IN THE HIGH COURT FOR ZAMBIA **2011/HPC/0161**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

FINANCE BANK **PLAINTIFF**

AND

MICHAEL KAHULA **DEFENDANT**

Before the Honourable Mr. Justice W. S. Mweemba at Lusaka.

For the Plaintiff : *Mr R. Ngulube- Messrs Tembo Ngulube & Associates.*

For the Defendant: *Mr K. Khanda- Messrs Central Chambers.*

JUDGMENT

LEGISLATION & WORKS REFERRED TO:

1. ***Halsbury's Laws of England 4th Edition, Volume 16.***

CASES REFERRED TO:

1. ***Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda SCZ Judgment No.10 of 2003.***
2. ***Michael Kahula v Finance Bank Zambia Limited Appeal No. 96/2012.***
3. ***Societe National Des Chemis De Pur Du Congo (SNCC) V Joseph N. Kasonde SCZ No. 19 of 2013***

By Writ of Summons taken out on 17th March, 2011, the Plaintiff is claiming the following:-

(i) The sum of K63,007,813.67;

(ii) Interest

(iii) Further or other relief the Court may deem fit

(iv) Costs

According to the Statement of Claim, on or about 23rd January, 2008 the Defendant applied and was advanced a Car Loan Facility in the sum of K55,000,000.00.

The Plaintiff further advanced the sum of K22,000,000.00 to the Defendant on or about 12th October, 2009 by way of a Personal Loan. That despite numerous reminders by the Plaintiff to the Defendant to settle the loan amounts outstanding the Defendant remains adamant to settle the same and was now indebted to the Plaintiff in the sum of K63,007,813.67 as at 24th January, 2011.

The Defendant filed a Defence on 28th March, 2011 and averred that the Plaintiff had been paid in full and it was the one that had not paid his terminal benefits for the period he served with it.

It was also stated that the Plaintiff was not entitled to any of its claims as it had not come to Court with clean hands and this matter should be dissolved with costs as the claim herein was within the Defendant's claims against the Plaintiff at the Industrial Relations Court under Cause No. Comp 87/2010 and should therefore be dismissed as it amounted to abuse of Court process.

The Defendant also filed a Counterclaim where he averred that he had not been paid his terminal benefits for the period that he served with the Plaintiff amounting to a total sum of K300,000,000.00 despite numerous demands.

The Defendant was now claiming the following:

1. Immediate payment of his terminal benefits.

2. Damages for the inconvenience caused due to non-payment of the benefits.
3. Interest
4. Any other relief the Court may deem fit.
5. Costs.

The Plaintiff filed its Reply and Defence to Counterclaim on 3rd June, 2011 and averred in the Reply that the Defendant had admitted having been advanced loan facilities in the sum of K77,000.00.

It reiterated that the Defendant owed it K63,007,813.67 arising from the loan facilities and denied that it had been paid this amount and further averred that it was not indebted to the Defendant in any way whatsoever.

It was lastly stated that the Defence is misleading because the Plaintiff had no claim against the Defendant in Complaint/87/2010 which was purely a labour matter.

In the Defence to Counterclaim it was averred that the Defendant was paid all its dues in accordance with the Pension Scheme that was established by the Plaintiff in 1999 of which the Defendant was a member. That in any event, the Counterclaim was before the Industrial Relations Court under Complaint Number 87/2010 and had reached an advanced stage with the Defendant having closed his case.

That the Counterclaim was an abuse of Court process and must accordingly be dismissed for multiplicity of actions.

The Plaintiff filed one Witness Statement dated 7th December, 2016 from **Mr Hendrix Chiyengi (PW1)**, the Recoveries Manager in the Credit Department of the Plaintiff.

He testified that on 23rd January, 2008 the Defendant was advanced a Car Loan of K55,000,000.00 and was further advanced a sum of K22,000,000.00 on about 12th October, 2009 by way of a Personal Loan.

That despite several reminders by the Plaintiff to the Defendant to settle the loan amounts outstanding, the Defendant remained adamant to settle it and remained indebted to the Plaintiff in the sum of K63,007,813.67 as at 24th January, 2011.

In Cross examination the Witness told the Court that he was aware that there were terminal benefits due to the Defendant and that they arrived at Separation dues after taking into account leave days due at the time of leaving and days worked but not paid.

That the number of years worked for was not part of the calculation done on the Statement of Account on page 7 because the payment of leave days as well as the terminal benefits of 3 months for each year served was also based on the exit salary.

According to **PW1** he would not dispute if he was told that the exit monthly salary was K12,120.00 and that the Defendant served for 23 years which was 69 months of service. He also stated that he would not know if the terminal benefits regarding loss of office were deducted and that pension payments were dealt with outside the Bank.

Moreover, that the Pension payment of the Defendant was made on 17th February, 2015 into his Account and he was informed and that this payment had not been factored into the claim before Court and that the interest that had been charged on the loan was compounded.

That what was due to the Plaintiff was deducted from the Pension but that he did not know the amount involved as this was currently being done by

Professional Life Insurance Company Limited. He further stated that the separation letter mentioned that benefits and pension payments were part of benefits. Moreover, that the Bank was claiming compound interest because all staff loans were compounded and there was no signed document where the Defendant agreed to pay compound interest.

The Witness also stated that the basis of the claim was on the loan and not on the current account or overdraft and the basis of the loan did not provide for compound interest and the claim ought not to have included it.

That there was need to calculate the effect of money paid to the Defendant in February, 2015 as part of benefits and the computation on page 7 should not have included compound interest and it should have taken into account pension benefits paid in February, 2015.

According to the Witness the calculation of the payments was made in February, 2015 and was done by someone else and it was currently being handled by the Legal Department and Finance Division.

That he did not deal with acturials on money and it was not possible that the loan amount could have been extinguished once a proper calculation of what was due to the Defendant was done.

In Re- examination PW1 told the Court that where benefits were not adequate to cover staff loans the balance was converted into a commercial loan. Moreover, that the payment was made following an order of the Supreme Court in a matter instituted by the Defendant in the Industrial Relations Court.

That the payment of February, 2015 was not factored in the claim by the Bank as it was made long before the Defendant's claim in the IRC and the Plaintiff did not consider that it owed the Defendant any money.

That the tabulation at page 7 of the Plaintiff's Bundle of Documents was not useful regarding pension payment because the parties had gone to Court relating to another matter.

The Defendant filed two Witness Statements. The First one came from Mr Michael Kahula on 13th May, 2015.

He stated that the Plaintiff was not owed any money as everything that was owed to it was deducted from the terminal benefits that were still due to him and the Plaintiff wrote him a letter that stated that whatever was owed by him would be deducted from the terminal benefits.

Moreover, that interest could not be paid on sums that were deducted or should have been deducted from his dues which had not been paid and according to **DW2** the Assistant Actuary, his detailed analysis and calculation of his pension due as at December, 2014 was ZMW701,824.4.

That pension payable was ZMW53, 188.5 (Salary ZMW 1,772.95 x 3 months x 10 years) as at 1999 and given this scenario, this amount was supposed to be paid in 2010, to determine the future value of this sum in 2010 using 1999 as the base year required that they considered the prevailing interest rates.

He also added that interest rates fluctuated over the 1year period between 1999 and 2010 hence the requirement to determine the future value of ZMW53,188.50 as at 2010.

He also showed this Court the same calculations as DW2 in arriving at the sum of K701,824.4 which was his pension due as at December, 2014

In cross examination **DW1** stated that he was a Banker and that he got a car loan from the Plaintiff on 23rd January, 2008 of K55,000,000.00. He also agreed that the Bank had the discretion to recover the loan from his salary and that at the time of leaving the Bank it had the right to recover it from the

terminal benefits or directly from him as an individual. Therefore he agreed that where the Bank had not recovered the loan from the terminal benefits they had the right to sue him to do so.

He also stated that he also obtained a Personal Loan from the Bank of K22,000,000.00 and that at the time he was leaving the Bank a letter was written to the Finance Division, salary section that his loans should be deducted from his full and final benefits since he had not settled both loans.

According to **DW1** he owed the Bank about K40, 759.54 as shown in the Bank Statements and he did not agree that the Bank had the contractual right to convert his loans into commercial loans and he was unaware of the clause which stated that the loan should be converted to a commercial loan.

That line two of the last segment of the contract allowed the Bank to convert the loan into a commercial one upon his separation from them and his evidence was that he did not pay the loan as it was supposed to be recovered from his terminal benefits. Moreover that the Bank had the right to pursue him to recover the loan if it did not do so from the terminal benefits.

DW1 also agreed that he had filed a Counterclaim and the basis for the figure he was seeking was that the Bank did not pay him his full terminal benefits after working there for 23 years. That the Defence of the Plaintiff on the Counterclaim was that at the time it originated these summons against him he was already before the IRC before Justice J. Chinyama under Complaint No. 87 of 2010 on the issue of his terminal benefits which matter arose out of a dispute between the Plaintiff and the Defendant on the amount of terminal benefits and had not been finalised.

In Re- examination **DW1** stated that the Bank in a letter dated 23rd September, 2010 and addressed to him elected to recover the loans in question immediately he left them by debiting his personal account with the two loans by K40, 759.54 and even overdrew it.

Moreover, that the Bank did not discharge their obligation to pay him his benefits which is why he took them to Court.

DW2 was **Mphatso Magai Tembo** an Acturial Analyst of Sanlam Life Insurance Zambia. He stated that an Acturial Analyst was a Professional Statistician and Mathematician employed predominantly by Life Insurance Companies, Pension Funds and Investment Banks to calculate the risk of transactions. His Witness Statement was filed into Court on 13th May, 2015.

He stated that he had made a detailed analysis and calculations of PW1's pension and below was his professional tabulation according to the scenario presented.

That Pension payable as at 1999 was ZMW53, 188.5 based on a salary of K1,772.95 x 3 months x 10 years. Given that the amount payable in 1999 was ZMW53,188.5 and that this amount was supposed to be paid in 2010 the methodology to determine the future value of this sum in 2010 using 1999 as the base year was determined by the then prevailing interest rates. Interest rates fluctuated over the 1year period between 1999 and 2010 and hence the requirement to determine the future value of ZMW53, 188.50 as at 2010.

He went on to state that the lending rates from 2011 to 2014 were obtained from the Trading economies website which used World Bank indicators to calculate Country's rates. By definition, Lending rate was the Bank Rate that usually met the short and medium term financing needs of the private sector and this rate was normally differentiated according to credit worthiness of borrowers and objectives of financing.

Further that the consumer price index (CPI) was used to calculate the 'interest rates' over the 1year period and it was defined as; changes in the cost to the average consumer of acquiring a basket of goods and services that may be fixed or changed at specified intervals, such as yearly.

That the consumer price indices used in this calculation were obtained from the IMF's Financial Sector Indicators report on Zambia and were shown in Appendix A. These CPIs were used to calculate the annual interest rates over the period shown below.

Interest rate for 2000.

1999 CPI = 31.56,2000 CPI – 39.77

I = 39.77- 31.56 = 0.214 (21%)

31.56

Future value of ZMW 53, 188.5 in 2000 using 1999 as base year and an interest rate of 21% is:

FV = ZMW 53,188.5x (1+ 21%)

FV= ZMW 64, 358.1

This procedure was repeated until 2010 where the FV is equal to ZMW287,465.3. From 2011 to 2014 the interest rate was fixed at 25% bringing the FV to ZMW701, 824.4 as at 2014.

Pension Calculation Table

Year	CIP value	Interest rate	Monetary value
1999	31.56		64,358.1
2000	39.77	0.21	78,129.5
2001	48.28	0.22	95,493.4
2002	59.01	0.21	115,932.0
2003	71.64	0.18	136,758.9

2004	84.51	0.18	161,825.7
2005	100	0.09	176,422.4
2006	109.02	0.11	195,226.6
2007	120.64	0.12	219,516.6
2008	135.65	0.13	248.920.4
2009	153.82	0.09	270,087.2
2010	166.9	0.06	287,467.3
2011	177.64	0.25	359.334.1
2012		0.25	449,167.6
2013		0.25	561,459.5
2014		0.25	701.824.4

According to these calculations **DW2** stated that the pension due to **DW1** as at December, 2014 was ZMW 701,824.4.

In Cross Examination he stated that his evidence was based on the terminal benefits that the Defendant wanted the Bank to pay him and the Defendant did not inform him that he had another claim besides this one.

There was no Re-examination.

Counsel for the Plaintiff filed Written Submissions into Court on 26th July, 2017. He submitted that the determination of the Plaintiff's case was based on the resolution of two issues.

The first issue being whether the Defendant was still owing the Plaintiff an outstanding loan debt comprising of the car loan in the sum of K55,000.00 and

the Personal Loan of K22,000.00. and as stated in the Statement of Claim the Plaintiff was seeking to recover the total loan sum remaining of K63,007,813.67.

To support its case the Plaintiff called one witness the Recoveries Manager in the Credit Department who relied on the Statement of Account on page 7 of the Plaintiff's Bundle of Documents.

That a cursory perusal of this Statement clearly demonstrated that the Defendant was indebted to the Plaintiff in the total sum of K63,067,813.67 and to counter this claim, the Defendant filed a Defence on 25th March, 2011. That these clearly showed that the Defendant actually contracted both the car loan facility and the personal loan but merely asserted, by a bare denial that he did not owe the moneys without furnishing detailed reasons.

Furthermore, at trial the Defendant admitted having availed a car loan facility and a personal loan and his defence seemed to suggest that he did not owe such monies on account of having not being paid his pension benefits.

Moreover, that an issue that required further clarification related to compound interest that was charged on the Defendant's current account. In cross examination, PW1 told the Court that although there was no signed document allowing the Plaintiff to charge compound interest, the account opening forms did provide for charging of compound interest where the account was overdrawn and liquidated into a current account.

PW1 further testified that the Plaintiff was entitled to charge compound interest because all staff loans were administered on compound basis. Counsel pointed out that this testimony was not disputed in cross examination and should therefore stand as the legitimate truth.

Counsel went on to rely on the case of **CREDIT AFRICA BANK LIMITED (IN LIQUIDATION) V JOHN DINGANI MUDENDA (1)**, where the Supreme Court of Zambia stated that the basis of charging interest can only be sustained if there

was an agreement between the parties to the charging of compound interest or if there is evidence of consent to the same.

He also added that applying this law to this case, it was quite clear that although the car loan facility may not have had an express provision for charging of compound interest, the Defendant should however be deemed to have acquiesced to this. Counsel based this conclusion on the evidence of PW1 who said that it was the Bank's practice to administer compound interest on staff loans.

He also added that other facts like the Defendant having been a Senior Employee of the Plaintiff Bank knew or ought to have known this practice by the Bank. That his knowledge of the Plaintiff's right to charge compound interest on his current account could also be deduced from his statement of Defence and Witness Statement where he did not challenge or protest to the charging of compound interest which was only raised by his Lawyer.

Counsel further stated that the second question for determination by this Court, was whether the Plaintiff could not commence and sustain a claim for recovery of the loan debt in view of the Defendant's assertion that any such outstanding amounts could only be deducted from terminal benefits.

According to Counsel such an argument was contractually invalid as the Car Loan Facility dated 23rd January, 2008 was self- explanatory. That the facility agreement clearly stated that where the loan remained unpaid for whatever reason upon release from the Bank, the Plaintiff could either repossess the car and sell it to offset the loan or alternatively it could convert the loan balance into a commercial loan at market rate.

Further that during the trial evidence was adduced which showed that the Plaintiff converted this loan to a commercial loan by transferring it to the current account in accordance with the express terms of the loan facility Agreement alluded to. That the Defendant could not contend that the Plaintiff's

cause of action could only arise when terminal benefits were due and payable to the employee.

Counsel also submitted that it was common cause that a Loan Agreement between an employer and an employee would have a provision on how an employee would settle a loan when they separate from the Company. In this case it was understandable that the Plaintiffs were not able to recover the entire loan because the terminal benefits were still under litigation before another court.

Thus the argument should therefore be dismissed as it lacked legal merit and Counsel urged this Court to find that the Plaintiff had proved its case on a balance of probability against the Defendant and was entitled to Judgment as prayed.

On the issue of the Defendant's Counterclaim Counsel for the Plaintiff submitted that the Plaintiff also filed its Defence to counterclaim on 3rd June, 2011 contending *inter alia* that the subject matter of the Counterclaim was yet to be determined by the Industrial Relations Court under complaint number 87/2010 and it was therefore an abuse of Court process for the issue to be raised herein.

That in the course of Cross Examination, the Defendant admitted that the subject matter of his counterclaim being terminal benefits was yet to be finalised and following this admission, it could not be doubted that the Defendant's counterclaim fell within the legal caveat of Res Judicata.

Counsel went on to cite the **Halsbury's Laws of England 4th Edition, Volume 16 in paragraph 1528** where the essentials of *Res Judicata* were stated thus;

> **"In order that a defence of *res judicata* may succeed, it is necessary to show that not only was the cause of action the same, but also that the Plaintiff has had an opportunity of recovering and but for huis own fault might have recovered in the first action that which**

he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties......"

Based on this authority Counsel argued that the Defendant's cause of action in the IRC being a claim for terminal benefits was the same as under this Cause and due to this, the Defendant's Counterclaim was not only an abuse of Court process but was incompetently before this Court since it was debarred by the doctrine of *Res Judicata*.

Thus he prayed that it be dismissed with costs.

The Defendant's Counsel also filed written submissions into Court on 21st July, 2017 as well as on the 10th of August, 2017 when he filed further submissions. In the former submissions he stated that the Court had to determine firstly whether the Defendant owed the Plaintiff the claimed K63,007,813.67.

Secondly, whether the Defendant was owed any money as his benefits post leaving employment.

He also admitted having gotten a loan whilst still in the employ of the Plaintiff and at the time of his departure it was about K40,759.34. this amount was clearly expressed on the Bank Statement on page 12 of the Defendant's Bundle of Documents.

He stated that the Bank had the right to recover the loan from his salary, which was his source of loan repayment, from his terminal benefits and to recover from his terminal or personal benefits.

That at the point of his exit the Plaintiff wrote to the Finance Division that all loans must be deducted from his full and final benefits. DW1also refused that the Bank had the contractual right to convert loans into commercial rates although he read the Car Loan Facility which stated thus.

According to the witness the loan was to be recovered from his terminal benefits because at departure from employment, he was not paid his full benefits as entitled to and as per direction contained on a letter authored jointly by one Lutato K. Nyendwa the Director of Human Resource at the time and Rex Ellis the Executive Director of Retail Banking and Operations of the Plaintiff Bank.

Further that the Letter of Demand dated 25th January, 2011 showed that by the Plaintiff's calculations the Defendant was supposed to have been paid K53,184,470 at the time. This amount was one that was due as at December, 1999, thereby showing that this figure was calculated without applying the time money value principle.

Be that as it may, the loan of the Defendant as at departure was K40,759.34 which should have been deducted from the terminal benefits by the Plaintiff at the time.

In Re-examination, **DW1** stated that the Bank elected to drop the K40,000.00 on his account and then overdrew it by K40,000.00.

Further that **DW2** an actuarial scientist testified that his evidence was based on the claim for terminal benefits of the Defendant and that the Defendant did not inform him of any other claim regarding terminal benefits.

By a letter dated 23rd September, 2010 the Director of Human Resource and the Executive Director Retail Banking stated;

> **"By copy of this letter, the Director of Finance (Salaries Section) is advised to pay you your full and final terminal benefits less any amount that you may owe the Bank..."**

By this letter the Bank elected and undertook to recover its loans from the Defendant's Terminal benefits. Moreover, that at the time of his exit he had

enough terminal benefits to offset the amount owing as at 1999 his terminal benefits were K53, 188,470.00 which amount could have offset the loan amount.

In the Further Submissions the Defendant's Counsel stated that it was not in dispute that the issue that required clarification before this Court related to compound interest that had been charged on the Defendant's account.

That according to the Plaintiff they were entitled to charge compound interest although the loan facility did not have an express provision showing consent to this effect. Further that in the absence of this the Defendant should have been deemed to have acquiesced to the charging of compound interest on account of the fact that he was a senior employee of the Plaintiff Bank.

It is submitted that although the Plaintiff cited the case of **Credit Africa Bank Limited** above they purposefully omitted a relevant part of the same where the Court held that:

> **"the charging of compound interest could only be sustained if there was an express agreement between the parties to the charging of compound interest or if there was evidence of consent or acquiescence to the same."**

According to Counsel there was no evidence led to prove the acquiescence of the Defendant to this. He also added that the word acquiesced was defined by the Halsbury's Laws of England as:

> **"in its proper sense it implies that the person abstains from interfering while a violation of his legal right is in process: in another sense it implies that he refrains from seeking redress when a violation of his rights which he did not know at the time it was brought to his notice."**

That this test was used in **the Credit Africa Bank Limited case** cited above.

Counsel then applied this to the case in *casu* and argued that from its definition it could be seen that acquiescence was merely abstaining from interfering or seeking redress from the violation of a right, which he didn't know.

That although the Plaintiff submitted that the Defendant did not challenge or protest to the charging of compound interest, this was raised by his Counsel and considered to be an afterthought. Counsel maintained that using the above test, the Defendant could not be said to have acquiesced to the charging of compound interest as he was unaware of this.

The Second issue Counsel responded to was on whether or not the Plaintiff could commence or sustain a claim for recovery of the loan in view of the Defendant's assertion that any such amounts could be deducted from terminal benefits.

Counsel submitted that he was guided by the Supreme Court in the case of **MICHAEL KAHULA V FINANCE BANK ZAMBIA LIMITED (2)** which held that:

> **"We hold that the Industrial Relations Court properly directed itself when it held that the Appellant must be paid in a similar way to Mrs Mundia and Mr Njolomba."**

He also stated that the Appellant being referred to above was the Defendant herein and the similar way that Mrs Mundia and Mr Njolomba were paid was that the amounts owing to the Plaintiff Bank were deducted off their terminal benefits. That the Defendant's Bundle of Documents had produced documents to aid the Court regarding how Mr Njolomba was paid.

The emphasis of Counsel was that the Plaintiff calculated the right dues owed to the Defendant and then deducted its purported outstanding loan, if at all therefrom.

That is a well settled principle at law that, **'he who comes to equity must come with clean hands.'** That the Plaintiff could not insist on a purported outstanding loan owed to them when in fact they had not settled the rightful amount owed to the Defendant as terminal benefits. That Justice required that he who sought equity must do equity.

On the issue of the Counter-claim, Counsel for the Defendant stated that the Plaintiff contended that the Defendant's claim fell within the legal caveat of Res Judicata and should therefore fail.

He stated in response that the Plaintiff's contention was clearly aimed at misleading this Court in alleging that the Defendant's Counter-claim was within the legal caveat of res judicata.

According to the Defendant's Counsel the two claims were distinct and terminal benefits had not yet been decided and the claim under Complaint No. 87/2010 was a claim for the payment of terminal benefits. That the counterclaim in this matter being immediate payment of terminal benefits, damages for the inconvenience caused due to non- payment of the said benefits among others.

Further that the Counter-claim herein was premised on the directive by the Supreme Court in the case of **MICHAEL KAHULA V FINANCE BANK ZAMBIA LIMITED (2)**. Therefore following this directive he submitted that the Plaintiffs claim regarding the outstanding loan debt be set off from the Defendants terminal benefits due to him.

Counsel therefore prayed that this Court disregard the Plaintiff's submissions having been filed out of time and so improperly before Court and that they lacked the merit to entitle the Plaintiff its claims.

I am grateful to both Counsel for their written submissions which I have considered together with the evidence on record.

It is not in dispute that the Defendant on 23rd January, 2008 received a Car Loan Facility of K55,000.00 and on or about 12th October 2009 received a further K22,000.00 by way of a Personal Loan from the Plaintiff.

It is also not in dispute that the Bank had the right to convert the Car Loan Facility into a Commercial loan once the Defendant left employment.

It is also not in dispute that the Plaintiff only paid the Defendant his terminal benefits in 2010 and that these had not been factored into this claim.

What is in dispute is whether or not the Defendant owed the Plaintiff any balance of the said loans and whether interest on the same should be compounded and thirdly whether the Plaintiff could commence or sustain a claim for such recovery of the loan in view of the Defendant's assertion that any such amounts could only be deducted from terminal benefits.

I will resolve the three issues outlined above at the same time as I set out the evidence before Court.

The record will show that the Defendant had been in the employ of the Plaintiff for 21 years before he left in September 2010 and that before he left he took out two loans from the Plaintiff in 2008 and 2009. The first loan he took was a Car Loan Facility which had an express clause stating that:

> **"In the event of termination of employment by either party while the loan is still outstanding, you will be required to settle the balance from benefits due to you or from your own resources before your release from the bank. If for any reason the loan is still outstanding after your release from the Bank, the Bank reserves the right to any or all of the following:-**
>
> **i) Repossess the car and sell it off to off- set the loan**

ii) Convert balance of loan into a commercial loan at market rate payable by you."

Based on this provision I find that the Bank had the right to convert the Car Loan Facility into a Commercial loan.

The second loan the Defendant got was a Personal loan. Although this one had no clause expressly stating that it would be converted into a Commercial loan upon termination of employment, I take judicial notice of the fact that it is common banking practice for Bank employees to be charged using the commercial interest rate once they cease to be employed by the Bank.

Counsel for the Plaintiff also raised an issue to do with the Bank's right to charge compound interest which the Defendant denied. It is the Plaintiff's contention that compound interest is chargeable on the outstanding loan amounts for two reasons. Firstly that although there was no signed document allowing the Plaintiff to charge compound interest, the account opening forms did provide for charging of compound interest where the account was overdrawn and liquidated into a current account. Secondly that all staff loans are administered on compound basis. It is contended that in the absence of an express agreement, the Defendant having been a senior employee of the Plaintiff Bank should be deemed to have acquiesced to the charging of compound interest.

The Plaintiff has not filed or produced the Account Opening forms which provide for charging of compound interest nor the staff terms and conditions stating that staff loans are administered on compound basis. I therefore find that there was no express agreement by the Defendant that the Plaintiff was to charge compound interest on the car loan and personal loan granted to him.

As regards whether or not the Defendant acquiesced to the charging of compound interest I take the definition of acquiescence given to us by the learned authors of **HALSBURY'S LAWS OF ENGLAND** cited above and the

guidance or test provided by the Supreme Court in the case of **CREDIT AFRICA BANK LIMITED (IN LIQUIDATION) V JOHN DINGANI MUDENDA (1)** cited above. The questions that must be answered are:

(a) whether the Defendant was not interested in challenging the Plaintiff when the violation as borrower was being perpetrated by the Plaintiff?

(b) whether it would be correct to say the Defendant never took any action when a violation of his legal right was made to him in the course of his relationship as an employee and borrower with the Plaintiff.

The answers to both questions are in my view in the negative for lack of clear evidence to show that the Defendant was aware of the illegal charging of compound interest but did nothing to redress the situation. This is more so that as a member of the Plaintiff Bank's staff the Defendant was enjoying concessionary interest rates on both his car loan and personal loan whilst in the Plaintiff's employment.

In the circumstances, I cannot positively conclude that the Defendant ought to have known about the charging of compound interest, but took no measure to stop the illegal practice. I find therefore that the Defendant did not acquiesce in the consent to the charging of compound interest on his staff loans which converted to commercial loans when his employment with the Plaintiff Bank terminated.

The Defendant claimed that at the point of his departure the outstanding loan sum he had with the Plaintiff was K40, 759.54 a figure he identified from the Bank Statement on page 7 of the Plaintiff's Bundle of Documents.

He also told the Court that at the point of his exit he was told in a letter dated 23rd September, 2010 that the balance of his loans would be deducted from his terminal benefits. The letter stated:

> **"By copy of this letter, the Director, Finance (salaries section) is advised to pay you your full and final terminal benefits less any**

amount that you may owe the Bank. You are advised to handover any official documents and property that may be in your possession."

In my view this simply mirrors what was outlined in the quote from the Car Loan Facility and based on this it is my considered view that the Bank told the Plaintiff that they would recover the loans from his terminal benefits. The matter does not however end there. It is dealt with below.

As regards the question of whether or not the Plaintiff can commence and sustain a claim for recovery of the loan debt from the Defendant, I do not accept the Defendant's contention that the outstanding loan amounts can only be deducted from terminal benefits. The Defendant's contention that the loan debt can only be paid from or recovered from terminal benefits is based on a misinterpretation by the Defendant's Counsel of the holding of the Supreme Court of Zambia in the case of **MICHAEAL KAHULA V FINANCE BANK ZAMBIA LIMITED (2)** when it stated that:

> **"...we hold that the Industrial Relations Court Properly directed itself when it held that the Appellant must be paid in a manner similar to the way Ms Mundia and Mr. Njolomba were paid".**

I have perused the Supreme Court Judgment relied on by the Defendant and come to the conclusion that when the Industrial Relations Court directed that the Appellant (the Defendant herein) must be paid in a manner similar to the way Ms Mundia and Mr. Njolomba were paid, the direction was that the Defendant must be paid benefits, for the period 1988 to 1999. (i.e. the period prior to the Pension Scheme) by using the formula that was applicable prior to the introduction of the Pension Scheme. The formula was based on **the Minimum Wages and Conditions of Employment Order** – and the separation benefits were calculated at 3 months' salary for each year of service.

This is very clear as at page J27 the Supreme Court stated the following:

"RW2's evidence establishes that those who separated from the Respondent prior to the introduction of the Pension Scheme were paid some benefits albeit on the basis of the Minimum Wages and Conditions of Employment Order. We do not think that it is tenable at law to argue that the introduction of the Pension Scheme wiped away all benefits that had accrued to the Appellant for the period he worked for the Respondent from 1988 to 1999... In the absence of the said criteria, we are of the considered view that the most equitable way of computing the appellant's benefits, for the period from 1988 to 1999, was by using the formula that was applicable prior to the introduction of the Pension Scheme".

The issue of how the Defendant would pay his indebtedness to the Plaintiff Bank was not raised in the appeal to the Supreme Court, and the Supreme Court never directed that amounts owing to the Plaintiff must be deducted from his terminal benefits. The Supreme Court's direction was that the Defendant was to be paid terminal benefits for the period 1988 to 1999 by using the Minimum Wages and Conditions of Employment Order as was the case with Ms Mundia and Mr. Njolomba.

I am of the considered view that the contention that the Plaintiff's cause of action for recovery of a loan from an ex-employee can only arise when terminal benefits are due and payable to the employee is untenable at law.

On the balance of probabilities the Plaintiff has proved its claim that the Defendant owes it money arising from the car loan of K55,000.00 (then K55,000,000.00) it advanced to the Defendant on 23rd January, 2008 and a personal loan of K22,000.00 (then K22,000,000.00) it advanced to him on 24th January, 2011.

The Plaintiff exhibited at page 7 of its Bundle of Documents a Statement of Account showing that the Defendant was indebted to the Plaintiff in the total sum of K63,067.81 (K63,067,813.67 un-rebased) as at 1st January, 2011.

I am of the considered view that the said exhibit does not prove the balance of the outstanding loan because it includes compound interest which as stated above was illegally charged. The Plaintiff must therefore recalculate the interest payable so that simple interest is charged. Judgment is hereby entered in favour of the Plaintiff against the Defendant. The amount of the outstanding debt shall be assessed before the Registrar.

COUNTER-CLAIM

The Defendant herein counter-claimed for the sum of K300,000.00 (K300,000,000.00 un-rebased) being unpaid terminal benefits. The Plaintiff contends that the subject matter of the Counter-Claim was yet to be determined by Hon. Justice Chinyama (as he then was) at the Industrial Relations Court under Complaint Number 87/2010 and it was therefore an abuse of Court Process. The Plaintiff raised the defence of *res judicata* and cited the learned authors of **HALSBURY'S LAWS OF ENGLAND 4TH EDITION, VOLUME 16** at paragraph 1528 already referred to above.

The Defendant contends that its claims are two distinct claims. That the claim under Complaint Number 87/2010 is a claim for the payment of terminal benefits while the Counter-Claim in this matter is for immediate payment of terminal benefits and damages for the inconvenience caused due to non-payment of the benefits. It is submitted that the Counter-Claim is premised on the directive by the Supreme Court in the cited case of **MICHAEL KAHULA V FINANCE BANK ZAMBIA LIMITED (2)**.

The Dispute in Complaint Number 87/2010 concerns the termination of the Defendant's employment contract by the Plaintiff and the terminal benefits payable. The current matter however relates to loans granted by the Plaintiff to the Defendant while in its employment. However the Defendant's Counter-

Claim is for terminal benefits. That the Defendant is also claiming damages for the inconvenience caused due to non-payment of the benefits does not change the fact that the Counter-Claim is for terminal benefits. The damages sought are already covered as interest is payable on the terminal benefits awarded to the Defendant for the period 1988 to 1999 under Complaint Number 87/2010. As the Counter-Claim is for payment of terminal benefits, I accept the Plaintiff's contention that it is not only an abuse of Court process but is incompetently before this Court as is therefore debarred by the legal doctrine of *res judicata.*

I agree with the submission by the Defendant's Counsel that a plea for *res judicata* must show either an actual merge or that the same point had been actually decided between the same parties. He cited the case of **SOCIETE NATIONALE DES CHEMIS DE PUR DU CONGO (SNCC) V JOSEPH NONDE KASONDE (3)** in which the Court stated that:

> **"the rationale for res judicata is that there must be an end to litigation ... res judicata is not only confined to similarity or otherwise of the claim in the first and the second case, it extends to the opportunity to claim matters which existed at the time of instituting the first action and giving the Judgment".**

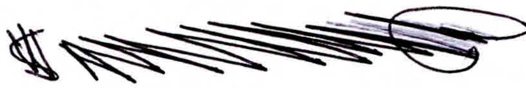
The above submission and the cited case are on point but they do not aid the Defendant. They instead confirm the Plaintiff's contention that the Defendant's Counter-Claim falls within the legal caveat of *res judicata.* The issue of the Defendant's terminal benefits was before the Industrial Relations Court in a Complaint filed on 20th December, 2010 and determined by the Court's Judgment delivered on 30th November, 2011 and cannot therefore be subject of the proceedings herein. It is the Industrial relations Court's Judgment of 30th November, 2011 which was the subject of the Supreme Court's holding in the case of **MICHAEL KAHULA V FINANCE BANK LIMITED (2)**. The Counter-Claim is an abuse of Court process.

For the foregoing reasons, the Defendant's Counter-Claim is dismissed.

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

Leave to Appeal is hereby granted.

Dated the 7th day of February, 2018.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE