

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/0605



BETWEEN:

SINGI MUKOBOTO

1st PLAINTIFF

EDWARD NYAMBE

2nd PLAINTIFF

AND

CHOLA MWEWA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7th DAY OF
FEBRUARY, 2018**

For the Plaintiffs : Ms I. Kapotwe with Mr B.J Abwino, Simeza Samgwa and Associates

For the Defendant : No appearance

J U D G M E N T

CASES REFERRED TO:

1. *Printing and Numerical Registering Company V Simpson 1875 L.R 19E.Q. 62*
2. *Khalid Mohammed V Attorney General 1982 ZR 49*
3. *Christopher Mundia Lubasi V Sentor Motors Limited 1982 ZR 66*
4. *Union Bank (Zambia) Limited V Southern Province Co-operative Marketing Union Limited 1995-1996 ZR 207*
5. *Credit Africa Bank Limited (In liquidation) V John Dingani Mudenda 2003 ZR 66*
6. *Febian Musialela V Evans Chipman 2011 VOL 2 ZR 471*
7. *Ringford Habwanda V Zambian Breweries 2012 VOL 3 ZR 75*
8. *Damales Mwansa V Ndola Lime Company Limited 2012 VOL 3 ZR 268*
9. *Intermarket Banking Corporation (Z) Limited V Strategic Services Limited and Evans Chicheleko Mweemba 2015/HPC/0172*

LEGISLATION REFERRED TO:

1. ***The Law Reform Miscellaneous Provisions Act, Chapter 74 of the Laws of Zambia***
2. ***The Money Lenders Act, Chapter 398 of the Laws of Zambia***

OTHER WORKS REFERRED TO:

1. ***Phipson and Elliot's Manual of the Law of Evidence, 11th Edition***
2. ***Chitty on Contracts Vol 1, General Principles, 29th edition***
3. ***Black's Law Dictionary by Bryan A. Garner, 8th Edition***

The Plaintiff suing by way of writ of summons on 11th April, 2017 commenced this action claiming;

1. *Payment of ZMW50, 000.00 being the money loaned to the Defendant by the Plaintiffs pursuant to an agreement.*
2. *Interest on the amount found due at the contractual rate of 30% per annum from 15th April, 2015 to the date of actual payment.*
3. *Any other relief the court may deem fit.*
4. *Costs*

The statement of claim shows that the 1st and 2nd Plaintiffs run a small scale business, and that by an oral agreement dated on or about 15th April, 2015, the 2nd Plaintiff agreed with the Defendant that the Plaintiffs would loan the Defendant the sum of ZMW50, 000.00. That the terms of the agreement were that;

1. *The ZMW50, 000.00 would be payable to the Plaintiffs within thirty (30) days of the date of the agreement.*
2. *That interest at a rate of 30% of the said ZMW50, 000.00 was payable from 15th April, 2015 until the date of final payment.*

The statement of claim further shows that after the elapse of thirty (30) days, the amount due was not paid, and it accumulated to ZMW286, 000.00. That the Plaintiffs demanded payment of the amount together with interest thereon.

That on or about November, 2015, the parties entered into an oral agreement reducing the amount of ZMW286, 000.00 to ZMW125, 000.00 on the condition that the Defendant liquidates the outstanding amount within three (3) months.

However despite these attempts to help the Defendant liquidate the outstanding amount, the Defendant did not pay as agreed, and he only paid ZMW90, 000.00 on 25th November, 2015, broken down as ZMW35, 900.00 to the 1st Plaintiff and K54, 100.00 to the 2nd Plaintiff. That he also paid ZMW42, 000.00 to the first Plaintiff and ZMW6, 300.00 to the 2nd Plaintiff on 20th January, 2016. Then he paid ZMW4000.00 to the 1st Plaintiff and ZMW6, 000.00 to the 2nd Plaintiff on 28th April, 2016. The last payment of ZMW12, 600.00 was made to the 1st Plaintiff and ZMW18, 900.00 to the 2nd Plaintiff on 31st July, 2016.

It is stated that the Defendant has not made any further payments from that date, and the Plaintiffs claim ZMW50, 000.00 with interest thereon at 30% per month, which comes to ZMW409, 943.93, as at December, 2016, and continues to accrue at a rate of ZMW1, 098.50 per day.

The Defendant in the defence filed on 16th May, 2016 agrees that the parties entered into a verbal agreement under which he borrowed ZMW50, 000.00 with interest at 30% per annum, but his position is that such an agreement is not tenable at law. He agrees that the thirty (30) days within which he was supposed to repay the loan elapsed, but denies that the interest accrued to ZMW286, 000.00 as alleged.

That going by the agreement, he should have paid ZMW65, 000.00 as the principal and interest after thirty (30) days, and the claim for the payment of ZMW286, 000.00 is illegal. Whilst agreeing that the parties entered into an oral agreement in November 2015, reducing the amount due from ZMW286, 000.00 to ZMW125, 000.00, the reduced amount has continued accruing interest which is not chargeable at law. That he repaid ZMW90, 000.00 and ZMW142, 000.00 between 25th November, 2015 and 31st July, 2016, which the Plaintiffs admit having received in their statement of claim totaling ZMW232, 000.00.

He denies that he still owes the Plaintiffs any more money as he has paid them in full, and that what they claim stems from the unlawful interest of 30% on a monthly basis. It is the Defendants contention that the Plaintiffs are not money lenders who are entitled to charge interest at thirty (30) percent, as it is harsh and unconscionable, and that the interest charged should not exceed forty eight (48) percent per annum.

At the trial only the 2nd Plaintiff was before court, and he testified as the only witness for the Plaintiffs. The Defendant did not testify or call any witnesses. PW1 who is the 2nd Plaintiff testified that the Defendant in 2015 asked to borrow ZMW50, 000.00, and as he only had ZMW30, 000.00, he asked the 1st Plaintiff for ZMW20, 000.00. That it was agreed that the amount of ZMW50, 000.00 loaned was to be repaid within 30 days with interest at thirty (30) percent, and in default of payment, interest would continue accruing at the said thirty (30) percent. However the Defendant only made the first payment in November, 2015 when the amount had accumulated to ZMW286, 000.00, which was seven months later.

PW1 stated that they had sat down to chart the way forward, and the amount due of ZMW286, 000.00 was reduced to ZMW125, 000.00, paid as ZMW90, 000.00 upfront, and the balance in three instalments. He identified the document at page 2 of the Plaintiffs bundle of documents as the cheque deposit of ZMW90, 000.00 in the name of Tunta Enterprises, the Defendant's company. The 2nd Defendant identified the document at page 1 of the Plaintiff's bundle of documents dated 23rd November, 2015, as the letter that the two Plaintiffs had written to the Defendant reducing the amount due, but the same being payable on the agreed terms.

That the amount of ZMW35, 000.00 remained unpaid on the terms, and by December 2016 the amount outstanding to be paid was ZMW410, 000.00, as interest still applied on the balance.

Both parties filed submissions, and the Plaintiffs in the said submissions stated that it was not in dispute that the Defendant borrowed ZMW50, 000.00

which was to be repaid within 30 days, and which amount would attract interest at thirty (30) percent per month if not repaid. That the dispute was on the legality of the interest charged, with the Defendant contending that the Plaintiffs are not money lenders, and are therefore prohibited from charging interest at a monthly rate of 30%.

Reference was made to the Learned authors *Black's Law Dictionary* by Bryan A. Garner, 8th Edition, which defines compound interest as **"interest paid on both principal and interest previously accumulated"**. That in this matter the parties had agreed that compound interest would be chargeable, as the parties agreed that the interest would be rolled over, meaning that interest would be charged on the principal sum and interest previously accumulated. The Plaintiffs referred to the case of ***INTERMARKET BANKING CORPORATION (Z) LIMITED V STRATEGIC SERVICES LIMITED AND EVANS CHICHELEKO MWEEMBA 2015/HPC/0172*** where the court stated that the charging of compound interest flew in the teeth of the provisions of Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia which prohibits the award of interest on interest.

However that this position is not applicable where the parties have expressly agreed to the charging of compound interest, and the cases of ***UNION BANK (ZAMBIA) LIMITED V SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED 1995-1996 ZR 207*** and ***CREDIT AFRICA BANK LIMITED (In liquidation) V JOHN DINGANI MUDENDA 2003 ZR 66*** were relied on as authority for this position. Further reliance was placed on *Chitty on Contracts Vol 1, General Principles, 29th Edition*, which states that **"it is however always been open to the parties to make express provision in their contract for the payment of interest, which courts would enforce (except in situations covered by specific statutory provision)."**

That in this case the parties agreed that the ZMW50, 000.00 would attract interest at thirty (30) percent, and that the principal would be changing monthly. Further that the parties agreed that compound interest would be

charged on the principal amount. That in any event by the Defendant agreeing that he paid a total sum of ZMW232, 000.00 to the Plaintiffs, shows that he acquiesced to the payment of compound interest in line with the agreement. It was also submitted that the Defendant entered into the agreement freely and voluntarily, and the court should therefore enforce the agreement.

To this effect, the definition of a contract as defined by the learned authors, *Chitty on Contracts Volume 1 General Principles at paragraph 1-001* as **“an agreement giving rise to obligations which are enforced or recognized by law”** was referred to, and it was submitted that the definition was endorsed in the case of **RINGFORD HABWANDA V ZAMBIAN BREWERIES 2012 VOL 3 ZR 75**. Further reference was made to the case of **FEBIAN MUSIALELA V EVANS CHIPMAN 2011 VOL 2 ZR 471** where it was stated that **“the two parties having freely and voluntarily entered into the purchase agreement, I am, as a court obliged to enforce it, as counsel for the defendant has urged me to do.”**

That the court held so in view of the case of **PRINTING AND NUMERICAL REGISTERING COMPANY V SIMPSON 1875 L.R 19 E.Q.62** where it was stated that **“if there is one thing more than another which public policy requires is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contract when entered into freely and voluntarily shall be enforced by the courts of justice.”**

That based on this, the Defendant should not be allowed to state that the interest charged was illegal, when he competently contracted with the Plaintiffs that interest would be charged at that rate. As regards the Defendant's argument that the Plaintiffs are not money lenders, and are therefore not entitled to charge such high interest rates, and that the interest charged should be less than forty eight (48%) per annum, Section 2 of the Money Lenders Act, Chapter 398 of the Laws of Zambia was referred to. The section defines a money lender as;

"money-lender" includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, but shall not include-

- (a) any pawnbroker in respect of business carried on by him in accordance with the provisions of any law for the time being in force in relation to pawnbrokers; or**
- (b) any body corporate in so far as it is empowered to lend money by any Act or by any British Act; or**
- (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or**
- (d) any building society registered under the Building Societies Act; or Cap. 412**
- (e) any body corporate for the time being exempted under section two A;"**

That going by the above definition, the Plaintiffs are not money lenders as they do not advertise or hold themselves out as such. Rather, they fall under paragraph (c), as persons bona fide carrying on a business whose primary objective is not to lend money, but in the course of that business lend out money. That the evidence in this matter shows that the Defendant approached the 1st Plaintiff to lend him money from his carwash business, and the money was lent. Therefore the limitations placed under the Money Lenders Act do not apply to the Plaintiffs, as they are not money lenders.

The Defendant in the submissions filed submitted that because he did not attend the trial, the Plaintiffs should not automatically succeed on their claims. He relied on the case of **KHALID MOHAMMED V ATTORNEY GENERAL 1982**

ZR 49, as authority. Reference was made to ***Phipson and Elliot's Manual of the Law of Evidence, 11th Edition*** at page 73 which states that the standard of proof of a civil matter is on a preponderance of probability. That the issue for determination is what interest was applicable in the agreement that the parties entered into. That the statement of claim shows that the Defendant was lent ZMW50, 000.00 to be paid within 30 days. Further that interest would be payable on the said amount from 15th April, 2015 at a rate of thirty (30) percent.

That going by the said agreement, the said rate of interest would only be charged on the principal sum of ZMW50, 000.00, when there was default, and nothing else, and as such those were the sole terms of the agreement. That the court would note from the Plaintiffs' pleadings that there is nothing that was expressly agreed by the parties that compound interest would be charged, apart from interest on the principal sum.

It was also submitted that paragraph 12 of the Plaintiffs submissions raises fresh issues that were not part of the agreement as pleaded in the statement of claim, to the extent that compound interest would be charged on the principal amount in the event of default, and therefore there was agreement to that effect. The Defendant submitted that parties are bound by their pleadings, and relied on the case of ***CHRISTOPHER MUNDIA LUBASI V SENTOR MOTORS LIMITED 1982 ZR 66***, as well as the case of ***DAMALES MWANSA V NDOLA LIME COMPANY LIMITED 2012 VOL 3 ZR 268***, as authority.

The Defendant's submission was that only the agreement as pleaded in the statement of claim should be considered. That the charging of compound interest was void and illegal, based on the case of ***INTERMARKET BANKING CORPORATION (Z) LIMITED V STRATEGIC SERVICES LIMITED AND EVANS CHICHELEKO MWEEMBA 2015/HPC/0172***, relied on by Counsel for the Plaintiffs. The case of ***UNION BANK LIMITED V SOUTHERN PROVINCE COOPERATIVE UNION MARKETING UNION LIMITED 1997 SJ 30***, was also referred to, submitting that in that case it was stated that the law frowned

upon penalties, including those for non- payment of money, and that even where there was a specific agreement that upon failure to pay a sum of money, a larger sum shall become payable, as this would be a classic example of penalty provision, which could not generally be entertained.

Therefore, as the Defendant had paid the principal sum of ZMW50, 000.00, as well as interest in the amount of ZMW180, 000.00 bringing the total to ZMW232, 000.00, this was a classic example of penalty provision which could not generally be entertained by the courts. The Defendant asked that the Plaintiffs claims be dismissed with costs.

I have considered the matter. It is not in contention that the Plaintiffs lent the Defendant the sum of ZMW50, 000.00 on or about the 15th April, 2015, which was to be repaid within thirty (30) days, at an interest rate of thirty percent. The issue in dispute is whether the parties agreed that in the event of default of payment as agreed, compound interest would be charged on the amount.

The statement of claim states that the agreement was that the ZMW50, 000.00 was payable after thirty (30) days of the agreement, and that interest of thirty (30) percent was payable monthly on the amount from 15th April, 2015 until the date of final payment. The evidence of PW1, the 2nd Plaintiff was that the Defendant had approached him asking him to lend him ZMW50, 000.00. That it was agreed that the amount would be repaid within thirty (30) days at an interest rate of thirty (30) percent. Further that interest at same rate would accrue until the amount was paid in full.

The evidence as led by PW1 as regards the terms of the agreement was in tandem with the pleadings as contained in paragraph 4 of the statement of claim. The contention however relates to paragraph 6 of the statement of claim which states that the Defendant defaulted on payment, and the amount accumulated to ZMW286, 000.00. The Defendant's submission was that the amount claimed as owing was arrived at after interest was compounded on the ZMW50, 000.00, and that this was not the agreement of the parties.

The Plaintiffs in justifying the amount owed relied on the evidence of PW1 who testified that if the amount owing was not paid within thirty (30) days as agreed, the principal would change, and interest at thirty (30) percent would be added, hence the amount accumulating to ZMW268, 000 by November, 2015.

In the submissions, the Plaintiffs argued that while the case of ***INTERMARKET BANKING CORPORATION (Z) LIMITED V STRATEGIC SERVICES LIMITED AND EVANS CHICHELEKO MWEEMBA 2015/HPC/0172*** held that the charging of compound interest flew in the teeth of Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia, the cases of ***UNION BANK LIMITED V SOUTHERN PROVINCE COOPERATIVE UNION MARKETING UNION LIMITED 1997 SJ 30*** and ***CREDIT AFRICA BANK LIMITED (In liquidation) V JOHN DINGANI MUDENDA 2003 ZR 66*** held that compound interest can be charged where there is agreement, consent or acquiescence.

On the argument by the Defendant that the Plaintiffs are not money lenders and are therefore not entitled to charge interest, it was submitted that the Plaintiffs indeed are not money lenders, and therefore any restrictions imposed on money lenders under the Money Lenders Act, Chapter 398 of the Laws of Zambia do not apply to them. However that they are entitled to charge interest on money lent as business persons.

Going by the definition of a money lender in Section 2 of the Money Lenders Act, there is nothing in the evidence to suggest that the Plaintiffs are registered money lenders in line with that Act, and therefore that Act applies to them. It therefore does not, and the Defendant's arguments that the Act applies to the Plaintiffs cannot stand. Section 2 of the said Money Lenders Act is explicit that the definition of a money lender does not encompass persons who are carrying on a business in the course of which they lend out money. This is what the Plaintiffs argue that they are.

However the question for determination is whether the Plaintiffs as business persons are entitled to charge compound interest on any monies that they

lend? In the submissions, they argued that the parties entered into a contract freely and voluntarily in which the Defendant agreed to pay compound interest on the ZMW50, 000.00, if he did not repay it within the thirty (30) days of being advanced.

The case of ***FEBIAN MUSIALELA V EVANS CHIPMAN 2011 VOL 2 ZR 471*** which held that ***“the two parties having freely and voluntarily entered into the purchase agreement, I am, as a court, obliged to enforce it”*** was relied on to this effect.

It can be seen from the above authorities that compound interest can be charged on monies lent where there is express agreement to that effect, or where there is consent or acquiescence to the charging of the same. Counsel for the Plaintiffs in the submissions referred to Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia. That section empowers the court to award interest on amounts found due as debts or damages, but that such awards should not include the award of interest on interest, and that the section shall not apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise. Further that the section shall not affect the damages recoverable for the dishonor of a bill of exchange.

In my view, the section while prohibiting the charging of interest on interest generally, does not prohibit the court from enforcing the payment of interest on interest where the same has been agreed, consented to or acquiesced. Thus the question is whether this was the agreement in the matter at hand? PW1, as already seen, told the court that the parties entered into an oral agreement that the Plaintiffs would lend the Defendant ZMW50, 000.00, repayable after 30 days with interest at thirty (30) percent thereon.

This oral agreement does not make reference to compound interest being charged. The claim as pleaded by the Plaintiffs in paragraph 4 of the statement of claim does not show that there was agreement to charge compound interest on the amount lent in the event of default, but interest, which in my view is

simple interest. PW1 in his testimony stated that once the principal and interest were not paid, the principal would change. The Defendant argued that this was not the agreement, as in his understanding, interest would only be charged on the ZMW50, 000.00, meaning that only simple interest would be charged.

It is on record that in November 2015, the Defendant was informed by the Plaintiffs that the amount had accumulated to ZMW268, 000.00, and it was negotiated to ZMW125, 000.00, if the Defendant cleared the same within three months. This fresh agreement entailed that if the Defendant paid the ZMW125, 000.00 by 25th February, 2016, the debt would have been extinguished. Paragraph 9 of the statement of claim shows that the Defendant paid ZMW90, 000.00 on 25th November, 2015, leaving a balance of ZMW35, 000.00 in pursuance of the fresh agreement.

He paid ZMW 48, 300.00 on 20th January, 2016, which was almost two months after he had paid the ZMW90, 000.00. The Defendant had therefore extinguished the renegotiated debt of ZMW125, 000.00 by 20th February, 2016, and had paid an excess amount of ZMW13, 300.00. Going by the evidence on record, there was no express agreement to charge compound interest on the amount of ZMW125, 000.00, which was renegotiated as when one goes to the document at page 1 of the Plaintiff's bundle of documents which is the letter to the Defendant from the Plaintiffs, they will note that the letter states that the Plaintiffs had agreed that the amount due be reduced to ZMW125, 000.00, and that to clear that amount the Defendant needed to issue two cheques of ZMW62, 500.00 each.

The letter does not make reference to any interest accruing on the ZMW125, 000.00. Even paragraph 7 of the statement of claim does not make reference to any interest being charged on the ZMW125, 000.00. Parties are bound by their pleadings as rightly submitted by the Defendant.

However it could be said that the Defendant acquiesced to the charging of compound interest as despite the parties agreeing that the amount owing of

ZMW268, 000.00 as at November, 2015 was reduced to ZMW125, 000.00 if the said amount was repaid within three months, he continued paying the Plaintiffs even after he had paid off the ZMW125, 000.00 on 20th February, 2016. It must be noted that while the Plaintiffs claim that the Defendant did not pay ZMW125, 000.00 within three months of 25th November, 2015, he did do so, as that was renegotiated as the amount owing.

Therefore there is no basis upon which the Plaintiffs can claim that the Defendant failed to repay the ZMW125, 000.00 by February, 2016, and would thus be entitled to continue charging him interest. The Defendant had settled the debt owing by then, and the fact that he continued making payments thereafter does not legitimize the Plaintiffs claims, going by the renegotiated terms of the agreement. On that basis the Plaintiffs claim fails, and it is dismissed. Each party shall bear their own costs of the proceedings. Leave to appeal is granted.

DATED THE 7th DAY OF FEBRUARY, 2018

 Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE