IN THE HIGH COURT FOR ZAMBIA **2020/HPC/712**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**ORDER XXX, RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA AND ORDER 88 RULE 1 OF THE RULES OF THE SUPREME COURT OF ENGLAND 1965 (WHITE BOOK), 1999 EDITION**
IN THE MATTER OF:	**A LOAN AGREEMENT DATED 28TH NOVEMBER, 2019**
IN THE MATTER OF:	**SUBDIVISION NO. 2 OF SUBDIVISION 'C' OF FARM NO. 1938, SITUATE IN LUSAKA IN THE REPUBLIC OF ZAMBIA**

BETWEEN:

BONANZA CASH EXPRESS LIMITED **APPLICANT**

AND

WILLAH JOSEPH MUDOLO **RESPONDENT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 26th day of August, 2021.

For the Applicant:	*Ms. N. Adam of D. Findlay and Associates*
For the Respondent:	*Mr. S. Mbewe of Keith Mweemba Advocates*

JUDGMENT

Cases referred to:

1. *Printing and Numerical Registering Company v. Simpson (1875) LR 19 EQ 465.*
2. *Colgate Palmolive (Z) Inc. v. Abel Shemu Chika and 110 Others, SCZ Appeal No. 81 of 2005.*

3. *Kalusha Bwalya v. Chardore Properties and Another, SCZ Judgment No. 20 of 2015.*
4. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership) v. Hyper Foods Products Limited and 2 Others (1999) Z.R. 124.*
5. *Exhilda Mtonga, Halive Mtonga v. Money Matters Limited (2010) 1 Z.R. 382.*
6. *Samuel v. Jarrah Timber and Wood Paving Corp. Ltd (1904) A.C. 323.*
7. *Mwanza v. Simpasa and Another (2011) 1 Z.R. 436.*
8. *Freeman v. Cook* (1848) 2 Exch. 654 at 663.
9. *Pickard v. Sears (1837) 6 Ad & E 469.*
10. *Mundanda v. Mulwani and Others (1997) Z.R. 29.*
11. *Hoare v. Adam Smith (London) Ltd (1938) 4 All E.R. 283.*
12. *Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] 1 All ER 300.*
13. *Jones v. Morgan [2001] EWCA Civ 995.*
14. *Noakes & Co Ltd v. Rice [1902] AC 24.*
15. *Magic Carpet Travel and Tours v. Zambia National Commercial Bank Limited (1999) Z.R. 61.*
16. *Mukumbwa v. Musatwe and Northern Breweries Limited and Another, SCZ Judgment No. 47 of 2014.*
17. *Reeves Malambo v. PATCO Agro Industries Limited, SCZ Judgment No. 7 of 2007.*

Legislation referred to:

1. *Order 30, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia (High Court Rules).*
2. *Order 88, rule 1 of the Rules of the Supreme Court of England, 1999 Edition (White Book).*
3. *Sections 9 (2), 10, 14 and 15 of the Money-Lenders Act, Chapter 398 of the Laws of Zambia.*
4. *Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia.*

Publications referred to:

1. *Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson West, 2004].*
2. *Halsbury's Laws of England, 5th Edition, [London: Butterworths LexisNexis, 2010], Volume 77.*

1. INTRODUCTION AND BACKGROUND

1.1 This action was commenced on 11th September, 2020, by way of Originating Summons, pursuant to Order 30, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as the "High Court Rules") and Order 88, rule 1 of the Rules of the Supreme Court of England, 1999 Edition (hereinafter referred to as the "White Book"). By the said Originating Summons, the Applicant seeks:

(i) The immediate settlement of the sum of K1,673,600.00, being the principal sum borrowed by the Respondent from the Applicant, pursuant to a Loan Agreement dated 28th November, 2019, with interest thereon up to the date of Originating Summons, which is due and payable to the Applicant under the aforesaid Loan Agreement entered into between the Applicant and the Respondent;

(ii) Interest on the amount due from the date of Originating summons to date of payment thereof;

(iii) An order for foreclosure of Subdivision No. 2 of Subdivision 'C' of Farm No. 1938, Lusaka (the

"Mortgaged Property"), offered as security for the repayment of the Loan Agreement dated 28th November, 2019;

(iv) An order for delivery of possession of the Mortgaged Property; and/or in the alternative,

(v) A declaration that the Applicant do register the transfer of the Mortgaged Property and register the Deed of Assignment executed by the parties in respect of the Mortgaged Property;

(vi) Further or other relief that the Court may deem fit; and

(vii) Costs and incidents of this action.

1.2 The Originating Summons is supported by an affidavit (hereinafter referred to as the "Affidavit in Support"), sworn by one Zhuang Bai Yu, the General Manager in the employ the Applicant. The Affidavit in Support is augmented by Skeleton Arguments and both documents are of even date with the Originating Summons.

1.3 In opposition, the Respondent filed an affidavit (hereinafter referred to as the "Affidavit in Opposition"), sworn by the Respondent himself. The Affidavit in Opposition is augmented

by Skeleton Arguments and both documents were filed in court on 24th September, 2020.

1.4 The Applicant, further, replied to the Respondent's opposition and, to this end, filed an affidavit (hereinafter referred to as the "Affidavit in Reply"), on 2nd October, 2020 and also sworn by Zhuang Bai Yu, as well as augmenting Skeleton Arguments of even date.

2 APPLICANT'S EVIDENCE AND ARGUMENTS IN SUPPORT

2.1 Zhuang Bai Yu deposed in the Affidavit in Support that the Applicant is a money lending company, while the Respondent is believed to be the owner of the Mortgaged Property.

2.2 That, on or about 28th November, 2019, the Applicant and Respondent entered into a Loan Agreement, pursuant to which the Applicant advanced the sum of K800,000.00 to the Respondent at an agreed interest rate of 36%, to be repaid in four monthly instalments, each in the sum of K272,000.00, commencing on 28th December, 2019, with completion on 28th March, 2020. As proof of said Loan Agreement, the deponent produced exhibit "ZBY3".

2.3 Zhuang Bai Yu deposed, further, that it was agreed that the Respondent would pledge the Mortgaged Property as security for the repayment of the loan and deposit the original Certificate of Title, with the Applicant. As proof of said Certificate of Title, the deponent produced exhibit "ZBY4".

2.4 It was the deponent's further testimony that it was agreed that should the Respondent fail to meet his obligation to pay the Applicant the sum of K1,088,000.00, being the principal amount plus interest, the transaction would immediately be deemed to be a Sale Agreement and the Mortgaged Property would be conveyed to the Applicant. To lend support to this assertion, the deponent produced exhibits "ZBY5" and "ZBY6", being copies of a Contract of Sale and Deed of Assignment.

2.5 The deponent deposed that the Respondent failed to settle the amount due and payable on 28th March, 2020, and the Applicant demanded settlement of the same. That, the Respondent requested for an extension of the loan on several occasions, which the Applicant agreed to, at the same interest rate to which the Respondent had agreed in writing and, that, the parties agreed that the amount payable was

K1,673,600.00. As proof thereof, the deponent produced exhibits "ZBY7", "ZBY8" and "ZBY9", being the correspondence exchanged between the Respondent and the Applicant. That, to date, the Respondent has not paid the said amount of K1,673,600.00, despite the Applicant's demand.

2.6 In the Skeleton Arguments augmenting the Originating Summons and Affidavit in Support, Counsel for the Applicant submitted that this is a case befitting for the Applicant to pursue all its remedies concurrently, upon the property pledged, following the Respondent's default in repaying the loan advanced to him.

2.7 Citing the cases of *Printing and Numerical Registering Company v. Simpsom*[1], *Colgate Palmolive (Z) Inc. v. Abel Shemu Chika and 110 Others*[2] and *Kalusha Bwalya v. Chardore Properties and Another*[3], Counsel for the Applicant contended that parties are at liberty to enter into agreements on such terms and conditions as they deem fit, and that the general attitude of the courts towards such agreements is to deem them valid and enforceable. Further, that where parties enter an agreement expressly stating the terms thereof, reduced to writing,

extrinsic evidence is generally not admissible to add or vary the terms of the contract between the parties. In this regard, therefore, Counsel for the Applicant submitted that it is evident from the documents before this Court that the Applicant and Respondent entered into a Loan Agreement on 28th November, 2019, in which the parties expressly agreed on the terms and amounts to be repaid to the Applicant. That, the sanctity of the agreement should be upheld as the terms therein are sacred and enforceable.

2.8 Counsel for the Applicant, further, argued that in pursuance of the Loan Agreement, the parties agreed that in the event of default on the part of the Respondent to repay the loan amount as expressly agreed, the security pledged by the Respondent would be transferred into the name of the Applicant to liquidate the loan amounts. That, further, the parties executed a Contract of Sale on 6th December, 2019 and a Deed of Assignment to effect the transfer of the Mortgaged Property, in the event that the Respondent defaulted on the Loan Agreement.

2.9 Citing Order 30, rule 14 of the High Court Rules and Order 88, rule 1 of the Rules of the White Book, and in respect of the reliefs sought by the Applicant herein, Counsel for the Applicant submitted that the Affidavit in Support discloses that:

(i) The Applicant and Respondent entered into a Loan Agreement for the advancement of the sum of K800,000.00 to be repaid to the tune of K1,088,000.00 (with interest added) by 28th March, 2020;

(ii) The Respondent pledged, as security for the repayment, the Mortgaged Property, by depositing the original Certificate of Title relating to the same with the Applicant;

(iii) The parties agreed that in the event that the Respondent failed to honour his obligation, the Applicant would immediately be at liberty to take possession of and/or sell the Mortgaged Property; and

(iv) The Respondent wholly failed to honour his obligation to repay the loan as agreed, leaving the amount due and payable standing at the sum of K1,673,600.00.

2.10 Counsel for the Applicant, citing Black's Law Dictionary, defined a Mortgage as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to stipulated terms. Against this backdrop, Counsel thus, submitted that it is evident that the Applicant has an equitable mortgage over the Mortgaged Property as the salient features of a mortgage, being 'assignment of a property as security for payment, which assignment is rendered void upon payment of money', have been satisfied.

2.11 Counsel for the Applicant submitted, finally, that it is the right of a mortgagee to seek the remedies primarily for the recovery of capital, being foreclosure and sale. Further, citing the case of *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership) v. Hyper Foods Products Limited and 2 Others*[4], Counsel for the Applicant submitted that the mortgagee's remedies are cumulative.

3 RESPONDENT'S EVIDENCE AND ARGUMENTS IN OPPOSITION

3.1 The Respondent deposed that it is true that the amount he borrowed was K800,000.00. However, he disputed the interest rate of 36% per month and claimed that the same was excessive and unconscionable.

3.2 The Respondent denied having failed to settle the amount due, as alleged by the Applicant, or that he made any requests to extend the loan facility with the view to settling the sum of K1,673,600.00. That, he did not make any assurances or agree to pay the sum of K1,673,600.00 after the alleged extension of the loan facility.

3.3 The Respondent also denied the allegation that the Applicant demanded from him the payment of the amount due and payable in accordance with the Loan Agreement.

3.4 It was the Respondent's testimony that it is not true that the he is indebted to the Applicant in the sum of K1,673,600.00 or that he failed to honour repayment of said amount.

3.5 In the Skeleton Arguments augmenting the Affidavit in Opposition, Counsel for the Respondent contended that the Applicant is not entitled to the reliefs sought because:

(i) The Respondent did not borrow K1,673,600.00, but the sum of K800,000.00;

(ii) The 36% rate of interest as charged is excessive, harsh and unconscionable and against the provisions of Sections 9 (2), 10 and 15 of the Money-Lenders Act, Chapter 398 of the Laws of Zambia; and

(iii) Clause D, under the terms of the Loan Agreement is illegal, null and void.

3.6 In support of the contention that the interest charged under the Loan Agreement is illegal, Counsel for the Respondent referred the Court to Sections 10 and 9 (1) and (2) of the Money-Lenders Act. It was contended by Counsel that, in *casu*, a perusal of the Loan Agreement reveals that the rate of interest is not expressed per annum, but merely states '36%', and thus, contravenes Section 9 of the Money-Lenders Act, as the said interest rate appears to have been applied monthly.

3.7 Counsel, further, submitted that the courts frown upon unconscionable interest payment agreements and in this

regard, called into aid the case of *Exhilda Mtonga, Halive Mtonga v. Money Matters Limited*[5].

3.8 Counsel for the Respondent contended, further, that Clause D of the Loan Agreement is illegal as security for a loan cannot be converted into a sale. That, it is an established principle of law that once a mortgage always a mortgage, and a mortgagee cannot impose any clog or fetter on the equity of redemption. Counsel submitted that such conversion would be rendered void and, in this respect, he placed reliance on the case of *Samuel v. Jarrah Timber and Wood Paving Corp. Ltd*[6]. That, although the Applicant made the Respondent execute a Contract of Sale and a Deed of Assignment, it is trite law that the terms of an agreement cannot act as a fetter or clog on the borrower's right of equity of redemption. Further, that the mortgagee is specifically precluded from purchasing the mortgaged property at the sale unless the purchase by the mortgagee or its nominee was approved by the Court.

3.9 With the foregoing, Counsel for the Respondent prayed that the Court finds that the Applicant is neither entitled to compound interest charged on the default of the Respondent

nor to register the purported assignment, and to declare Clause D of the Loan Agreement illegal.

4 APPLICANT'S EVIDENCE AND ARGUMENTS IN REPLY

4.1 Zhuang Bai Yu deposed that the Respondent has not denied having been advanced the sum of K800,000.00 upon the terms of the Loan Agreement or indeed, having deposited the Certificate of Title of the Mortgaged Property with the Applicant.

4.2 That, the Respondent freely and voluntarily agreed to repay the sum of K800,000.00, by way of monthly instalments, each in the sum of K272,000.00, commencing on 28th December, 2019 and ending on 28th March, 2020, bringing the total amount repayable to K1,088,000.00.

4.3 It was further deposed that the Respondent freely and voluntarily offered to sell the Mortgaged Property, in the event that he failed to settle the loan, and as such, freely executed all the necessary transfer documents.

4.4 With respect to the Respondent's dispute of interest rate charged on the loan the deponent stated that the Respondent continued to communicate with the Applicant, through his

Advocates, representing to the Applicant that there was no issue with the agreed interest rate and continued seeking an extension to repay the loan, together with the agreed interest.

4.5 In the Skeleton Arguments augmenting the Affidavit in Reply, Counsel for the Applicant reiterated her earlier argument that the circumstances of this case reveal that the parties entered into a contractual agreement, pursuant to which the Respondent agreed to borrow and the Applicant agreed to lend, on terms specified in the Loan Agreement. That, as this was done freely and voluntarily, the Court should enforce the said contract.

4.6 With respect to the Respondent's contention that the Applicant is in contravention of Sections 9 and 10 of the Money-Lenders Act, Counsel for the Applicant submitted that Section 9 of the Act makes reference to the requirement that the interest applied shall be charged per annum and/or applied at a rate representing the interest charged, as calculated per annum. In this regard, Counsel contended that the Loan Agreement does stipulate the interest rate applied and agreed between the parties, and thus, the Applicant has complied with the Act.

4.7 With regard to the Respondent's contention that Clause D of the Loan Agreement seeks to fetter or clog the Respondent's right of redemption, Counsel for the Applicant submitted that the Loan Agreement specifically provides that the property shall revert to the Respondent upon the Respondent making the full payment to the Applicant. She further submitted that there is no evidence adduced by the Respondent that the Applicant intends to sell the property or that any attempts have been by the Applicant to sell the Mortgaged Property. That, instead, the evidence before this Court is that the Applicant seeks to enforce the payment of the agreed amount stipulated in the Loan Agreement, and in the alternative foreclosure.

4.8 Citing the case of *Mwanza v. Simpasa and Another*[7], Counsel for the Applicant submitted that an equitable mortgage was created over the Mortgaged Property when the Respondent deposited the Certificate of Title of the Mortgaged Property, with the Applicant. That, the legal implication of the creation of an equitable mortgage is the right of the mortgagee to foreclose and/or appoint a Receiver.

4.9 It was submitted that the Respondent agreed to settle the loan amount as expressed in the Loan Agreement as he repeatedly requested for an extension, and prompting the Applicant to put its intention to commence legal proceedings for recovery of the amount due, on hold. Citing the cases of *Freeman v. Cook*[8] and *Pickard v. Sears*[9], Counsel for the Applicant submitted that if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believes that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded or estopped from contesting its truth. That, the Respondent's challenge to the effect that the amount claimed by the Applicant is contrary to what was agreed upon and/or challenge with respect to the amount claimed by the Applicant, is not permitted by law as it contravenes the principle of estoppel by representation.

4.10 It was further submitted, in response to the Respondent's dispute of the computation of interest, that as regards the same, the principle of estoppel by representation also applies and the Respondent is precluded from asserting that the

amount claimed by the Applicant was not agreed upon by the parties.

4.11 As regards the issue of illegality, Counsel for the Applicant submitted that the Loan Agreement is not illegal or contrary to any provisions of the law. That, the applied interest rate was agreed by the parties. Calling in aid the case of *Mundanda v. Mulwani and Others*[10], Counsel for the Applicant submitted that as to the question of possible illegality of a contract, the courts agree with the principle that the parties to a contract should be presumed to contemplate a legal rather than an illegal course of proceedings. That, the courts will never condone the flaunting of the law but must approach the matter by considering whether it was possible for the parties to comply with their contractual obligations legally.

4.12 It was contended, further, that it is an afterthought by the Respondent to allege that the interest rate applied by the Applicant is contrary to the provisions of the law, following the Respondent's failure to remit the agreed sum of money to the Applicant. That, the Respondent should be estopped from deviating from the representation made to the Applicant that

he had agreed to the amount payable, in pursuance of the extensions sought by the Respondent.

4.13 With this, Counsel for the Applicant submitted in conclusion, that the Applicant has an equitable right over the Mortgaged Property and prayed that the Applicant be granted all the reliefs as claimed.

5 ANALYSIS AND FINDINGS

5.1 I have carefully perused and considered the affidavits filed on behalf of the parties herein as well as the arguments advanced by both parties. It has not been disputed by the Respondent that he was availed a loan of K800,000.00, by the Applicant and that he stands indebted to the Applicant. Further, the Respondent has not disputed the fact that he is the owner of the Mortgaged Property and that he had deposited the Certificate of Title of the Mortgaged Property with the Applicant as security for the loan.

5.2 The dispute, however, arises from Respondent's challenge of the interest rate of 36% as excessive and unconscionable. That, the same is contrary to the Money-Lenders Act and should have been expressed per annum and not per month.

5.3 The Respondent has also alleged that Clause D of the Loan Agreement is illegal and unconscionable, as one cannot convert a security for a loan into a purchase.

5.4 In response to the Respondent's dispute, the Applicant has contended that the Applicant and Respondent intended to enter into the Loan Agreement dated 28th November, 2019, which was reduced in writing and executed freely and voluntarily by both parties. That, both parties intended to be bound by the terms of the agreement and that it is an afterthought by the Respondent to allege that the interest rate applied by the Applicant is contrary to the provisions of the law, following the Respondent's failure to repay the loan.

5.5 Counsel for the Applicant argued that the Respondent, in acknowledging what he owed to the Applicant requested for several extensions of the loan repayment period, and as such, should be estopped from deviating from the representations he made to the Applicant.

5.6 From the above, the issues in dispute that call for determination in this matter, in my view, are the following:

(1) Whether the interest rate of 36% was excessive and unconscionable and ought to have been applied annually and not monthly;

(2) Whether estoppel by representation can successfully be raised against the Respondent in respect of his communications specifically requesting for extensions of the period within which to settle the loan;

(3) Whether Clause D of the Loan Agreement is illegal and unconscionable; and

(4) Whether the Applicant is entitled to the reliefs sought in its Originating Summons.

5.7 Regarding the first issue, it was contended by Counsel for the Respondent that a perusal of the Loan Agreement reveals that the rate of interest is not expressed per annum, but merely states '36%', and thus, contravenes Section 9 of the Money-Lenders Act, as the said interest rate appears to have been applied monthly.

5.8 I have perused exhibit "ZBY3", which is a copy of the Loan Agreement in question herein, and indeed, it merely states

that the interest rate is 36%, without stating whether the same is annual or monthly. The Loan Agreement, while not expressly stating whether the rate of interest at 36% is to apply monthly or annually, has an indication of how the said interest was to be applied and this can be deduced from a reading together of the clauses highlighted below. The relevant clauses in the Loan Agreement, which, in my view, speak to the subject of interest are the following:

(i) Clause 14 (Loan Amount Offered), being K800,000.00;

(ii) Clause 17 (Interest Rate), being 36%;

(iii) Clause 15 (Loan Period), being 4 months; and

(iv) Clause 18 (Instalment Amount and Total Repayment), being K272,000.00 and K1,088,000.00, respectively.

5.9 In this regard, therefore, I find as a matter of fact that the loan amount disbursed was K800,000.00, to be liquidated in four (4) monthly instalments of K272,000.00, the first falling due on 28th December, 2019 and the last on 28th March, 2020, bringing the total amount repayable to K1,088,000.00.

5.10 The above, notwithstanding, and as earlier stated, it has been alleged that the Loan Agreement is in contravention of Section

9 of the Money-Lenders Act, which prescribes the form which Money-Lenders' contracts should take. The said Section 9 of the Act provides as follows:

> *"9. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money-lender after the commencement of this Act, or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.*
>
> *(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per centum per annum, or the rate per centum per annum represented by the interest charged as calculated in accordance with the provisions of the Schedule."* (Emphasis the Court's)

5.11 The Schedule referred to in Section 9, in turn, provides as follows, in respect of calculations relating to interest:

> *"1. The amount of principal outstanding at any time shall be taken to be the balance remaining after deducting from the principal the total of the portions of any*

payments appropriated to principal in accordance with the provisions of this Act.

2. The several amounts taken to be outstanding by way of principal during the several periods ending on the dates on which payments are made shall be multiplied in each case by the number of calendar months during which those amounts are taken to be respectively outstanding, and there shall be ascertained the aggregate amount of the sum so produced.

3. The total amount of the interest shall be divided by one-twelfth part of the aggregate amount mentioned in paragraph 2, and the quotient, multiplied by one hundred, shall be taken to be the rate of interest per centum per annum."

5.12 The construction of the provisions above clearly points to the fact that a Money-Lenders' contract ought to expressly indicate the loan interest rate per annum, and in the event that it does not expressly state that the interest rate is per annum, the contract should state an interest rate charged as calculated in the Schedule and representing the interest rate per annum. A working of the latter, in my view, using the figures as they appear in the Loan Agreement in question herein, would appear as follows:

Outstanding principal instalments × number of months outstanding
K200,000.00 × 4 (months)
= K800,000.00 (Aggregate amount)

Total interest (K72,000 × 4) ÷ 1/ 12 of K800,000.00
K288,000.00 ÷ 66,666.67
= 4.319999784 (being the quotient)

The final step to multiply the quotient by 100 to arrive at the rate of interest per centum per annum will be:

4.319999784 × 100
= 431.9999784 %

5.13 Going by the calculations above, the interest per annum in the Loan Agreement works out to 431.9999784 %. When this figure is divided by 12 (being the number of months in a year), the result is 36% per month. I, accordingly make a finding as a matter of fact, that the expressions of the figures in the Loan Agreement work out to an annual interest rate of approximately 432%. At this juncture, it is imperative for me to introduce onto the scene, Section 15 of the Money-Lenders Act, which provides as follows:

> *"15. (1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per centum per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of section fourteen, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without*

> *prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per centum per annum, is excessive."* (Emphasis the Court's)

5.14 It goes without saying, in my view, that the interest rate of 36%, which works out to 432% per annum, is indeed, excessive and the transaction is harsh and unconscionable as far as the interest charged is concerned. I am also persuaded, in my decision, by the reasoning advanced by Lisimba J in the case of *Exhilda Mtonga, Halive Mtonga v. Money Matters Limited*[5], (which was cited by Counsel for the Respondent) and which I adopt in toto. The Court in that case had the following to say:

> *"A Court may allow recovery of money which it considers to be fairly due in respect of such principal amount, interest and charges, as the Court may adjudge to be reasonable. In so doing the Court may in terms of Section 14 (1) of the Money-Lenders Act apply the rules of equity.*
>
> *Even assuming there was an agreement by the parties to pay the overdue amount at that rate of 720% per annum, the Court would still find the rate of interest is excessive and the terms and conditions of the loan agreement extravagant and unconscionable."*

5.15 Section 14 of the Money-Lenders Act, which is cross referenced in Section 15, in turn, provides as follows:

> *"14. (1) Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the*

commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable,

notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) ...

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

(5) ...

(6) ... "

5.16 In essence, therefore, the provisions above, allow the Court to deem as harsh and unconscionable, any interest rate exceeding forty-eight per centum per annum and further, to reopen the loan transaction and tamper with it. From the evidence on record, it is evident that the interest rate expressed in the Loan Agreement in question is excessive in light of Section 15 of the Money-Lenders Act and Schedule thereto. This, in my view, would still be the case whether the 36% interest rate in the Loan Agreement were to be construed as applying monthly or annually, for the reasons below.

5.17 A simple arithmetical calculation of 36% of the sum of K800,000.00 gives us K288,000.00. When this sum of K288,000.00 is divided by 4, the figure arrived at is K72,000.00. Further, it is only logical to proceed on the

assumption that the principal loan sum of K800,000.00 was divided into four equal parts of K200,000.00, so that the principal instalment per month was K200,000.00, and when the interest of K72,000.00 was added, the figure came to K272,000.00, as the monthly instalment payable under the loan. This, in my view, explains how and why the instalment amount in Clause 18 of the Loan Agreement was expressed as K272,000.00. With this reasoning, the working out of the interest can be tabulated as follows:

Table A

Month	Month Interest	Total Interest	Balance
Nov 2019	--	--	K800,000.00
Dec 2019	K72,000.00	K72,000.00	K872,000.00
Jan 2020	K72,000.00	K144,000.00	K944,000.00
Feb 2020	K72,000.00	K216,000.00	K1,016,000.00
Mar 2020	**K72,000.00**	**K288,000.00**	**K1,088,000.00**

5.18 Logical as it may appear, however, the K72,000.00 interest instalment amounts indicated in the Loan Agreement do not work out to 36%, but instead, to 9% for each amount of K72,000.00. In other words, the figures indicated in the Clauses highlighted above seem to suggest that for the sum of

K800,000.00 to be repaid as K1,088,000.00, with K72,000.00 being added to each principal instalment of K200,000.00 per month for a duration of 4 months, the interest rate ought to have been 9% per month and not 36%. Whatever the case, 9% interest rate per month would still be excessive, in terms of Section 15 and the interest workings prescribed in the Schedule of the Money-Lenders Act.

5.19 To further demonstrate why the indicated interest rate of 36% as per the Loan Agreement seems to have no place in the agreement, a calculation applying an interest rate of 36% on the sum of K800,000.00, for a duration of 4 months would look like this (assuming that the interest is charged per month):

Table B

Month	Month Interest	Total Interest	Balance
Nov 2019	--	--	K800,000.00
Dec 2019	K288,000.00	K288,000.00	K1,088,000.00
Jan 2020	K288,000.00	K576,000.00	K1,376,000.00
Feb 2020	K288,000.00	K864,000.00	K1,664,000.00
Mar 2020	**K288,000.00**	**K1,152,000.00**	**K1,952,000.00**

5.20 Assuming, on the other hand, that the 36% interest rate in the Loan Agreement was intended to be applied annually, and prorated across 4 months (being the loan period), the result would appear as follows:

Table C

Month	Month Interest	Total Interest	Balance
Nov 2019	--	--	K800,000.00
Dec 2019	K24,000.00	K24,000.00	K824,000.00
Jan 2020	K24,000.00	K48,000.00	K848,000.00
Feb 2020	K24,000.00	K72,000.00	K872,000.00
Mar 2020	**K24,000.00**	**K96,000.00**	**K896,000.00**

5.21 From the workings in Tables B and C above, using the rate of interest at 36%, whether annually or monthly, it is clear that the balances in each do not match the sum of K1,088,000.00, which the Loan Agreement is seemingly suggesting is the loan amount plus interest at 36%. Table B reveals an amount so exorbitant that it blatantly contravenes Section 15 of the Money-Lenders Act, while Table C also reveals a balance that is lower, but nowhere near the sum of K1,088,000.00, which is allegedly computed on the basis of 36%. In fact, the sum of

K1,088,000.00 would only come about if a mere 36% of the sum of K800,000.00 (neither monthly nor annually) were to be added to the K800,000.00. However, as the provisions of the Loan Agreement currently stand, they do not reveal an interest rate of 36%, whether monthly or annually. Instead, what the instalment amount seems to suggest is that the calculations may have been intended as presented in Table A, with a monthly interest rate of 9%.

5.22 In a nutshell, as already intimated above, the interest rate applied to the loan is excessive and unconscionable. Further, the same ought to have been expressed as an annual rate or as a rate ascertainable as an annual rate as per the calculations stipulated in the Money-Lenders Act. It follows, therefore, that the circumstances in *casu*, are such that they warrant the setting aside and revision of the interest clause, as guided by Section 14 of the Money-Lenders Act.

5.23 This brings me to the second issue, namely, whether estoppel can be raised against the Respondent. It was contended by the Applicant that there arises, in *casu*, estoppel by representation and that the Respondent should be estopped from deviating

from the representation made to the Applicant that the Respondent had agreed to the amount payable, in pursuance of the extensions sought by the Respondent.

5.24 Estoppel by representation has been defined, by Black's Law Dictionary as:

> *"An estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person's reasonable and detrimental reliance on the belief."*

5.25 From the definition above, it is clear that estoppel by representation operates to preclude a party whose words/representations or conduct have made the other party conduct themselves in reliance on that party's words/representations or conduct, from denying the truth of such words/representations or conduct; or that the situation was otherwise than the words/representations or conduct entail.

5.26 Indeed, on the face of things, it appears that the Respondent did in fact make representations that the Applicant relied on and on the basis of which it agreed to extend the time within

which the Respondent could settle the loan. Ideally, therefore, estoppel should have applied as against the Respondent. However, in light of the finding above, that the interest rate stated in the Loan Agreement is in blatant contravention of Section 15 of the Money-Lenders Act, the simple answer to the issue of estoppel is that the same cannot be raised against the Respondent, in the circumstances. I call into aid the case of *Hoare v. Adam Smith (London) Ltd*[11], to fortify my position in this regard. The said case was an action against registered moneylenders claiming that certain transactions were unenforceable by reason of the non-compliance with the Moneylenders Act 1927, s 6, in respect of the memorandum of loan, and for other relief. Du Parcq LJ., delivering the judgment, had the following to say:

> *"The first question which I have to consider is whether the plaintiff is entitled to a declaration that the contract of 28 July 1937 and the bill of sale of the same date, are illegal, void, and unenforceable, by reason of non-compliance with the provisions of the Bills of Sale Act and the Moneylenders Acts 1900 to 1927, and to delivery up of the bill of sale, and to an injunction to restrain the defendants from taking any steps to enforce the bill of sale... The consideration is not truly stated. I think that, under the Bills of Sale Act 1882, s 8, the plaintiff acquires a right to have the bill of sale treated as void in respect of the chattels comprised therein. I think also that the*

> *memorandum must be said to be bad because the moneylenders have not complied with the statutory requirements of stating the actual amount of the loan.*
>
> *This case has been very clearly argued for the defendants by Mr. Blagden, and his answer to this point is that the plaintiff is estopped from raising it. I think that Mr. Samuels is right when he says that it is impossible for the defendants to rely on any plea of estoppel... it is no answer to a contention that the terms of the contract are inaccurately stated to set up a supposed estoppel arising out of the bill of sale. That would be to prevent the court from carrying out the intention of the legislature, and would make legal that which is illegal."*

5.27 It was also stated, in the case of *Kok Hoong v. Leong Cheong Kweng Mines Ltd*[12], that a party could not set up an estoppel in the face of a statute. Similarly, I will also dismiss the contention by Counsel for the Applicant that the Respondent voluntarily agreed to repay the loan sum at the interest rate stated in the Loan Agreement. In my view, estoppel may not be used to circumvent a statutory provision, especially in the circumstances at hand, where public policy such as the need to protect vulnerable persons dealing with Money-Lenders, clearly underlies the Money-Lenders Act. In view of the aforesaid, the answer to the second issue, namely, whether

estoppel can be raised against the Respondent, is in the negative.

5.28 The third issue needing determination is that of whether Clause D of the Loan Agreement is illegal and unconscionable. Said Clause D provides as follows:

> *"The lender and the borrower will sign a Contract of Sale according to the pledged collateral, to assign the pledged collateral to the lender, giving the lender the right to sell the collateral in order to recover the loan in the event of default."*

5.29 It was contended on behalf of the Respondent that Clause D, above, is illegal and unconscionable as it is seeking to convert a security for a loan into a purchase. That, it is an established principle of law that once a mortgage always a mortgage, and in this case the Applicant is seeking to impose a clog or fetter on the equity of redemption. In response, Counsel for the Applicant submitted the Loan Agreement specifically provides that the property shall revert to the Respondent, upon the Respondent making the full payment to the Applicant. She further submitted that there is no evidence adduced by the Respondent that the Applicant intends to sell the property or that any attempts have been by the Applicant to sell the

Mortgaged Property. That, instead, the evidence before this Court is that the Applicant seeks to enforce the payment of the agreed amount stipulated in the Loan Agreement, and in the alternative foreclosure.

5.30 The learned authors of Halsbury's Laws of England, 5th Edition, Volume 77, state as follows in paragraph 107, as regards the mortgagor's equity of redemption:

> *"Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemption, and which continues notwithstanding that he fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate. Any provision inserted in the mortgage to prevent redemption on payment of the debt or performance of the obligation for which the security was given is termed a clog or fetter on the equity of redemption, and is void. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons. This is especially illustrated in the case of mortgages by building societies where, although redemption is not contemplated for periods usually varying between 15 and 25 years, nevertheless the mortgage may expressly allow redemption at any time. The right continues unless and until, by judgment for foreclosure or, in the case of a mortgage of land where the mortgagee is in possession, by the running of time, the mortgagor's title is extinguished or his interest is*

> *destroyed by sale either under the process of the court or of a power in the mortgage incident to the security."*
> (Emphasis mine)

5.31 The learned authors go on to state in paragraph 317 as follows, on the clog on the equity of redemption:

> *"On the principle of once a mortgage always a mortgage, a clog or fetter on the equity of redemption is void. No agreement between mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable... No contract between a mortgagor and mortgagee made at the time of the mortgage, and as part of the mortgage transaction or, in other words, as one of the terms of the loan, can be valid if it provides that the mortgaged property is to become the absolute property of the mortgagee upon any event whatsoever or that the mortgagee is to have a share in the mortgaged property..."*

5.32 The sentiments above were well stated in the cases of *Samuel v. Jarrah Timber and Wood Paving Corp. Ltd*[6] (earlier cited by the Counsel for the Respondent) and the case of *Jones v. Morgan*[13]. It was, thus, stated in the case of *Noakes & Co. Ltd v. Rice*[14], that redemption is inherent to a mortgage, and therefore, once a debt has been repaid, the land is free and unfettered to all intents and purposes as if the land had never been made the subject of the security. That, once a mortgage,

always a mortgage and nothing, but a mortgage. Hence, no clog or fetter on the right to redeem is valid.

5.33 From the provisions above, it seems that for a mortgage to wind up as a sale of sorts, the same ought first to be summoned or authorised by an order of court. In this regard, in *casu*, it appears that Clause D of the Loan Agreement was intended to clog and/or fetter the Respondent's equity of redemption as it is purporting to compel the Respondent to sale the Mortgaged Property to the Applicant upon the event of default without first securing the necessary order of court following a mortgage action.

5.34 In light of the above, I dismiss the argument by Counsel for the Applicant that the Loan Agreement specifically provides that the property shall revert to the Respondent upon the Respondent making the full payment to the Applicant. I have perused said Loan Agreement and not come across any such alleged provision. Instead, what is specifically and expressly stated is what has been reproduced as Clause D and adjudged, herein, as a fetter and/or clog on the Respondent's equity of redemption.

5.35 Further, the fact that there is no evidence adduced by the Respondent that the Applicant intends to sell the property or that any attempts have been by the Applicant to sell the Mortgaged Property is no defence for the Applicant or a justification for what Clause D was intended to achieve. The fact of the matter is that Clause D as is, is problematic whether the Applicant has sought to enforce it or not and the same Clause has been challenged. In any event, I find this argument absurd because in one breath Counsel for the Applicant is contending that the Applicant does not intend to sell the Mortgaged Property and yet the fifth relief sought by the Applicant in the Originating Summons is a declaration that the Applicant do register the transfer of the Mortgaged Property and register the Deed of Assignment executed by the parties in respect of the Mortgaged Property. To what end would such a declaration be if the Applicant is not selling, since Clause D on which the fifth relief sought is premised, specifically suggests that the Applicant shall have the right to sell the Mortgaged Property? In light of this, I find that the

declaration sought by Counsel for the Applicant is unwarranted.

5.36 The final issue for determination is whether the Applicant is entitled to the reliefs sought in its Originating Summons. It has been contended by the Applicant that it is the right of a mortgagee to seek the remedies primarily for the recovery of capital, being foreclosure and sale.

5.37 With respect to the reliefs that can be sought in a mortgage action, Order 30, rule 14 of the High Court Rules provides as follows:

> *"14. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-*
>
> *Payment of moneys secured by the mortgage or charge;*
> *Sale;*
> *Foreclosure;*
> *Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;*
> *Redemption;*

Reconveyance;
Delivery of possession by the mortgagee."

5.38 The Applicant is seeking the immediate settlement of the sum of K1,673,600.00, being the principal sum borrowed by the Respondent, with interest thereon up to the date of Originating Summons. That, the same is due and payable to the Applicant under the Loan Agreement.

5.39 It appears that in arriving at the sum of K1,673,600.00, the Applicant applied the interest indicated in the Loan Agreement. As I have already made a finding that the interest rate in the Loan Agreement is excessive and unconscionable, it should follow that the same cannot be used in calculating what is supposedly owed to the Applicant.

5.40 Further, it also appears that in arriving at the same figure of K1,673,600.00, the excessive interest of 36% continued to be applied to the amount owing, way beyond the date on which the loan period expired. The learned authors of Halsbury's Laws of England, 5th Edition, Volume 77, in this regard, have settled such incidences in which the lender continues to apply the contractual interest rate even after repayment date has

since passed, and they have stated as follows, in paragraph 220:

> *"If the mortgage makes provision for payment of the principal on a day certain, with interest at a fixed rate down to that day, there is no implied contract for the continuance of interest at the same rate or at any rate at all after that day; but a stipulation in the mortgage that the mortgagor will not transfer the property until payment in full of principal and interest implies an agreement for the continuance of this original interest until payment. Interest is given in these cases, not as interest payable under the contract, but by way of damages for detention of the debt."*

5.41 The provision above needs no further illumination, except for this Court to emphasise that the Applicant is precluded from treating the loan payments and contractual interest as continuing beyond the loan repayment date to the date of the Originating Summons. In light of this, and in light of my finding that the interest rate under the Loan Agreement was excessive and unconscionable, the sum of K1,673,600.00 is not justifiable.

5.42 What is clear, however, is that the Respondent is owing the Applicant the sum of K800,000.00 which was evidently advanced to the Respondent as a principal loan, and none of which has been settled to date. Therefore, in the spirit of

avoiding unjust enrichment on the part of the Respondent, it is only fair that the Respondent pays back the sum of K800,000.00, to the Applicant.

5.43 The Applicant is also seeking interest on the amount due from the date of Originating summons to date of payment thereof. As money has been established to be owing to the Applicant, it only follows that the same should attract interest and I will make the appropriate order regarding interest, later in this Judgment. I am fortified, in this regard by Section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia, which provides as follows:

> *"4. In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> *Provided that nothing in the section-*
>
> *(i) shall authorise the giving of interest upon interest; or*
>
> *(ii) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or*
>
> *(iii) shall affect the damages recoverable for the dishonour of a bill of exchange."*

5.44 As regards the typical mortgage reliefs, namely, foreclosure and possession, there has been no dispute that money was lent to the Respondent by the Applicant and further, the Respondent deposited the Certificate of Title of the Mortgaged Property with the Applicant as security for the loan. The Supreme Court settled the effect of depositing title deeds as security for a loan. To this end, it held, in the case of *Magic Carpet Travel and Tours v. Zambia National Commercial Bank Limited*[15], as follows at page 64 on the question of an equitable mortgage:

> *"On the issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence. One of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land; the relationship between the lender and borrower is one that is based on mutual trust between the two."*

5.45 The Court also stated, as follows, in the case of *Mukumbwa v. Musatwe and Northern Breweries Limited and Another*[16]:

> *"It is trite law that an equitable mortgage is constituted merely by the deposit of title deeds as security. The nature of a lien created by the deposit of title deeds is described in Coote on Mortgages (9th edn, 1927) vol 1, p 86, in a passage cited by Templeman J in Re Wallis & Simmonds (Builders) Ltd at page 564, as follows:*
>
> *"A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the depositee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown and the delivery would be sufficient part performance of such agreement...."*"

5.46 From the above, it is clear that the deposit by the borrower or consenting third party, of title deeds with the lender as security for the borrowing, operates to create an equitable mortgage. In *casu*, this is precisely what happened and same has not been disputed. There was, therefore, an equitable mortgage created by the depositing of the Mortgaged Property's Certificate of Title, with the Applicant herein, and effectively making the Applicant a mortgagee over the Mortgaged

Property. This is notwithstanding Clause D and the Clause relating to interest in the Loan Agreement which have been found to be unconscionable.

5.47 As there is no dispute as to the mortgage, the loan acquired and the Respondent's indebtedness, it follows that the Applicant has proved its case, to this extent, on a balance of probabilities and should be entitled to the mortgage relief. It was also held by the Supreme Court, in the case of *Reeves Malambo v. PATCO Agro Industries Limited*[17], that the mortgagee was at liberty to exercise his right of foreclosure and sale as the mortgagor had failed and defaulted to redeem the mortgaged property, and same had not been disputed by the mortgagor. It is trite law, according to the case of *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership) v. Hyper Foods Products Limited and 2 Others*[4], that the reliefs or remedies claimed by a mortgagee are cumulative. Once the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies.

6 CONCLUSION AND ORDERS

6.1 It is clear from the record that the Respondent borrowed the sum of K800,000.00 from the Applicant, bringing the total sum repayable to K1,088,000.00 applying an interest rate 36%. As security for the loan, the Respondent deposited the Certificate of Title of the Mortgaged Property with the Applicant.

6.2 The sum of K1,088,000.00 was to be liquidated in monthly instalments of K272,000.00 (being a principal instalment sum of K200,000.00 plus K72,000.00 interest). The interest rate indicated in the Loan Agreement was not specified as applying monthly or annually and also seems not to be the correct representation of the interest sum of K72,000.00 added to the principal instalments.

6.3 The Respondent has, indeed, defaulted and there is evidence on the record that he had, on several occasions, requested for extensions of the loan repayment period. This is conduct which the Applicant has argued the Respondent should be

estopped from deviating from in his quest to challenge the sum due to the Applicant as excessive and unconscionable.

6.4 Further, the Respondent has challenged Clause D of the Loan Agreement, which is purporting to convert the mortgage into a sale of the Mortgaged Property to the Applicant and in respect of which the Respondent executed a Contract of Sale and Deed of Assignment. The Respondent has contended that this is a fetter and/or clog on his equity of redemption.

6.5 The Applicant has, in turn, dispelled the Respondent's arguments and maintained that the Respondent voluntarily entered into the agreements with the Applicant and as such, should be awarded the reliefs sought in the Originating Summons.

6.6 The Applicant is, thus, seeking the immediate settlement of the sum of K1,673,600.00, being the principal sum borrowed by the Respondent from the Applicant, pursuant to a Loan Agreement dated 28th November, 2019, with interest thereon up to the date of Originating Summons, as the sum due and payable to the Applicant under the Loan Agreement.

6.7 It has been established, herein, that the purported interest rate stipulated in the Loan Agreement is excessive and unconscionable. It has also been established that Clause D of the same Loan Agreement is, in fact, a fetter and/or a clog on the Respondent's equity of redemption.

6.8 In light of the foregoing, I make the following orders:

(1) Clause D of the Loan Agreement is hereby struck out for being unconscionable, a fetter and/or clog on the Respondent's equity of redemption. The effect of this on the Contract of Sale and Deed of Assignment, purportedly executed by the Respondent, is that the said documents are of no legal effect as their foundation has been removed.

(2) Clause 17 of the Loan Agreement stating that the interest rate is 36%, is hereby revised to read "36% per annum", which shall work out to simple interest of 3% per month (or as the workings in Table C, above, show).

(3) The amount due to the Applicant (the Judgment Debt), as at the expiration of the loan period shall, therefore, be K896,000.00, being the principal sum plus interest at 36%

per annum, prorated into monthly instalments of K24,000.00 for four months.

(4) The said judgment debt shall attract interest at contractual rate (settled herein at 36% per annum or 3% per month) from the date of Originating Summons to the date of Judgment and thereafter, at current lending rate as determined by the Bank of Zambia, from the date of judgment until full payment.

(5)The Respondent shall liquidate the judgment debt (plus interest as herein adjudged) within ninety (90) days of this Judgment failing which, pursuant to the provisions of Order 30, rule 14 of the High Court Rules, the Respondent shall convey the property subject of the equitable mortgage, namely, Subdivision No. 2 of Subdivision 'C' of Farm No. 1938, Lusaka unto the Applicant unconditionally.

(6) Each party to bear own costs.

(7) Leave to appeal is denied

Dated at Lusaka the 26th day of August, 2021.

W. SITHOLE MWENDA (DR.)
HIGH COURT JUDGE