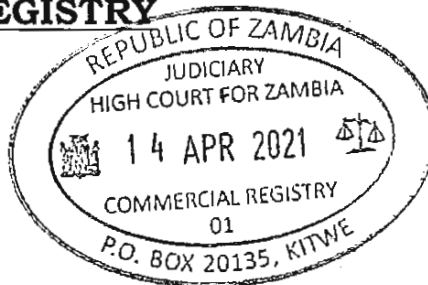


**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE COMMERCIAL REGISTRY**  
**HOLDEN AT KITWE**

**2020/HKC/058**

**(CIVIL JURISDICTION)**



**BETWEEN:**

**CONNECT MICRO FINANCE (Z) LIMITED**

**PLAINTIFF**

**AND**

**PALOMA MULENGA MANDA**

**DEFENDANT**

*Before Hon. Lady Justice Abha Patel, S.C.*

✓ **For the Plaintiff: Mr. F. Chalenga**

**Messrs. Freddie & Co.**

**For the Defendant: Mr. C. Tafeni**

**Messrs Suba Tafeni & Associates**

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**JUDGEMENT**

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**List of Authorities**

- 1. H.G. Beale Chitty on Contracts General Principles Vol 1 28<sup>th</sup> Edition  
(London Sweet and Maxwell, 1999)**

**2. Chitty on Contracts**

**3. Banking and Financial Services Act No. 7 of 2017 (BFSA)**

**Cases Referred to:**

- 1. Holmes Limited vs Buildwell Construction Company limited (1973) ZR 97**
- 2. Ponde and Others vs Zambia State Insurance Company (2204) ZR 151**
- 3. BOC Gases Pls vs Musonda (2005) Z.R 119**
- 4. Numerical Registering Company vs Simpson (1875) LR 19 EQ 462  
Colgate Palmolive (Z) Inc vs Abel Shemu Chuka and 110 others Appeal  
No. 181 of 2005**
- 5. National Milling Company Limited vs Grace Simataa and others (2000)  
ZR 91**
- 6. Zambia Export and Import Bank Ltd vs Mkuyu Farms Limited, Elias  
Andrew Spyron and Mary Ann Langley Spyron (married woman)  
(1993) S.J. 28 (SC)**
- 7. Shogun Finance Limited v Hudson (2004) 1.A.C at page 919**

**1. Introduction**

1.1 The Plaintiff commenced this action by way of a Writ of Summons and Statement of Claim filed in this Court on 4<sup>th</sup> September, 2020, claiming the following:

- i. an Order for the Defendant to pay the sum of Fifty Eight Thousand Six Hundred and Fifty United States Dollars (US\$58,650) being the principal amount borrowed (US\$17,000) plus agreed interest;
- ii. An Order to dispose off the collateral a motor vehicle Registration Number ABZ 1415 Nissan Patrol;
- iii. An Order for interest on the Judgment sum;
- iv. An order for legal costs incidental to these proceedings.

1.2 The Defendant filed her defence on 21<sup>st</sup> September 2020.

1.3 The matter was referred to mediation which was unsuccessful and the Court at a scheduling conference and in agreement with the Parties did direct that both Parties would file a statement of agreed issues together with their skeleton arguments by or before 21<sup>st</sup> December 2020 after which the Court would deliver a Judgment on the documents before the Court without the need for a trial.

1.4 By a consent order filed on 16 December 2020 for leave to file the statement of agreed facts and issues out of time the date was extended to 31<sup>st</sup> December 2020.

1.5 By a further consent order for leave to file statement of agreed facts and issues out of time (filed on 28<sup>th</sup> January 2021) the Parties sought leave to file by 29<sup>th</sup> January 2021.

1.6 The Court having consented to the Order in 1.5 above must express its disappointment that both consent orders for leave were filed after the time within which the directions issued at the scheduling conference were to have been complied with. However, in view of the covid-19 pandemic and in the interest of justice, the Court did consent to the Order and allow the Parties to file out of time.

1.7 I am grateful to Counsel for the parties for the industry employed in the documents presented and after a careful consideration thereof, alongside the submissions, my decision is as set out below.

## **2. The Plaintiffs contention**

2.1 The Plaintiffs contention is that this action arose from a contract entered into between the Plaintiff and the Defendant dated 24<sup>th</sup> September 2019 created by a loan facility agreement (hereinafter referred to as '*the Facility*') wherein the Plaintiff agreed to lend a sum of US\$17,000.00 to the defendant who agreed to pay back the said principal sum with interest at 20% per month

repayable by 31<sup>st</sup> October 2019 and also agreed to pay default interest at 25%.

2.2 The Plaintiff has pleaded that the defendant having failed to repay the borrowed monies borrowed has caused the debt to accrue to the sum of USD58,650 at the rate of 25% per month as at the time of the commencement of action.

2.3 The Plaintiff has therefore brought this action against the defendant claiming the reliefs set out in 1.1 above.

2.4 The Plaintiff has submitted in its skeleton arguments that the Defendant having received the principal monies should not now be allowed to deny the existence and terms of the facility.

### **3. The Defendants contention**

3.1 The Defendant relied on her defence filed into Court on 21 September 2020 and submissions filed on 31<sup>st</sup> December 2021. It is the defendants contention that she had entered into an agreement to borrow the sum of USD17,000 and avers that the facility being a US dollar denominated facility, the fact the Plaintiff paid her the sum of Kwacha Two Hundred and seventeen thousand

(K217,000.00) altered the nature and terms of the contract such that there is no agreement between the parties for the claim of interest.

3.2 The defendant further maintains that the interest claimed is illegal and denies that the Plaintiff is entitled to its claims for any loss and damage as a result of the actions of the defendant or at all.

4. **The Evidence of the Plaintiff and the Defendant**

4.1 The Court being of the considered opinion that this was a matter which did not need to be tried, directed that it proceed by way of documents alone, and further directed the Parties to file a list of agreed issues and issues in dispute and address the court on the law applicable on the transaction, the subject of this action.

4.2 The Court has noted that the Parties have filed their respective skeleton arguments and submissions and have filed a statement of agreed facts and issues in dispute on 29<sup>th</sup> January 2021. However, the Court has noted that Counsel have not addressed the Court on the law and permissible interest pertaining to loans such as the one in *casu*. The Court will speak to this later in its Judgment.

## 5. **The Issues for determination**

I have noted the issues for determination and as I see them these issues are as follows:

- 5.1 Did the payment of the sum of Kwacha two hundred and seventeen thousand (K217,000.00) instead of the sum of USD17,000.00 negotiated between the parties alter the basic conditions of the agreement and give rise to a new agreement altogether?
- 5.2 Is the computation of interest at 20% per month and default interest of 25% tenable in accordance with the Banking And Financial Services Act?

## 6. **The Plaintiffs Submissions**

- 6.1 Counsel for the Plaintiff has submitted and has argued that that the Plaintiff, a registered financial institution advanced a credit facility to the defendant repayable with interest at 20% per month and at 25% per month on any part of the facility that remained unpaid on the due date. The Plaintiff has submitted that the only evidence available in this matter is the terms of the

agreement namely, the credit facility agreement dated 24<sup>th</sup> September 2019.

6.2 The Plaintiff has submitted that to allow the defendant to plead that she is not liable for interest having received the amount in Kwacha is without merit. The plaintiff has also submitted that to allow the defendant to introduce extrinsic evidence to a written contract is not permissible at law. They rely on the decision of the Supreme Court in the case of **Holmes Limited vs Buildwell Construction Company Limited** wherein the Court held as follows:

*“where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”*

6.3 The above principle was later adopted in the case of **Ponde and Others vs Zambia State Insurance Company** where the Supreme Court held that:

*“parol or extrinsic evidence is inadmissible because it tends to add, vary, or contradict the terms of a written agreement validly concluded by the parties.”*

In support of the same principle the Plaintiff has relied on the case of **BOC Gases Pls vs Musonda**. Counsel for the Plaintiff has urged this Court to find that the terms of



the credit facility agreement are authentic, genuine and executed by both parties. Counsel has also submitted that the terms of the facility letter being clear and unequivocal requires no interpretation by way of extrinsic evidence and ought to be enforced by the Court. On this submission they have referred to the case of **Printing and Numerical Registering Company vs Simpson** quoted in the case of **Colgate Palmolive (Z) Inc vs Abel Shemu Chuka and 110 others.**

6.4 It is the Plaintiffs submission that the parties intended to create a legally binding agreement and having received the sum of USD 17,000.00 albeit in *Zambian Kwacha*, the defendant ought to be bound by the terms of the facility and cannot contradict the terms of the written agreement.

## 7. **The Defendants submissions**

7.1 The defendant has submitted that the fact that the loan advanced was in *Zambian Kwacha* gave rise to a new agreement altogether as it led to a change in the basic condition of the agreement. Counsel has referred this Court to the case of **National Milling Company Limited vs Grace Simataa and others.**

7.2 It is the defendants submission that the failure by the Plaintiff to pay the sum of USD 17,000.00 being a fundamental term of the contract, entitled the defendant to treat the contract as repudiated or rescinded. The defendant has further submitted that the fact of accepting the Kwacha payment, altered the basic condition and brought about a replacement contract in kwacha, different from the US dollar contract and submitted that the Plaintiff is estopped from trying to unilaterally revert to the terms of the original agreement. They have referred this Court to the case of **Zambia Export and Import Bank Ltd vs Mkuyu Farms Limited, Elias Andrew Spyron and Mary Ann Langley Spyron (married woman)**.

8. **Analysis and application of the facts to the law**

8.1 Having discoursed the law and having stated the issues for determination, I must now escalate my enquiry by applying the law to the facts in *casu*.

8.2 On the issue of a contract having been entered into between the parties the Court has also had occasion to consider a decision of the Supreme Court in the case of **National Drug Company Limited and**

**Zambia Privatization Agency v. Mary Katongo Appeal**

where the court held that:

*“It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contracts and that the role of the court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract.”*

- 8.3 Apart from the authorities cited by the Plaintiff on the sanctity of contract, the Court has relied on renowned authors on the Law of Contract and has quoted from **Evan Mckedrick’s Contract Law** as follows:

*“The Law of contract is perceived as a set of power conferring rules which enable individuals to enter into agreement of their own choice on their own terms. Freedom of contract and sanctity of contract are dominant ideologies. Parties should be as free as possible to make agreements on their own terms without interference of the courts or parliament and their agreement should be respected, upheld and enforced by the courts.”*

- 8.4 In support of Counsel’s submission on the issue of extrinsic evidence, the Court has had occasion to reflect on the case of **Shogun Finance Limited v Hudson** wherein the Court stated as follows:

*“The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to mercantile law of this country; the bargain is the document; the certainty of the contract depends on it....This rule is one of the greatest strengths of English commercial law, and is one of the main reasons for international success of English Law in preference to laxer systems which do not provide the same certainty.”*

8.5 On the issue of admissibility of extrinsic evidence, the Defendant has urged the Court to find that the agreed terms of the facility had been varied by the payment of the advance in Kwacha instead of in United States Dollars. The renowned authors **Chitty on Contracts** on the issue of extrinsic evidence have stated as follows:

*“Written documents- where the parties appear to have embodied their agreement in a written document, the question arises whether extrinsic evidence that is to say, evidence of matters outside the document is admissible so as to affect its content. Two issues are involved; first whether it is permissible to adduce extrinsic evidence of terms other than those included expressly or by reference in the document; secondly, whether extrinsic evidence may be admitted to explain or interpret the words used in the documents.”*

9. **Findings of the Court**

9.1 Having considered the pleadings of the Parties, and having considered the submissions of Counsel, the following facts are not in dispute:

i. The Plaintiff is a limited liability company registered as a financial lending institution in Zambia.

ii. The defendant is a business lady conducting business in Zambia.

iii. The Parties did enter into an agreement for the Plaintiff to lend and the defendant to borrow the sum of USD17,000.00 (*the principal sum*) on terms and conditions endorsed in the said facility letter.

9.2 An opportune place for the Court to start to unravel the competing contention of the Parties, is by reflecting on the issues identified above. The Plaintiff has invited the Court to accept the terms of the facility as being the governing agreement between the parties, while the Defendant has submitted that the payment of the facility in Zambian Kwacha, and not United States Dollars as agreed in the facility letter has altered the terms of the contract to the extent that the Plaintiff is not entitled to

the payment of any interest and the loan has converted to a Kwacha loan.

9.3 To the extent that this Court is familiar with the general principles of the law of contract as enshrined by the materials referred to, and the principles of admissibility of extrinsic evidence and when such should be applied, the Court concurs with the submissions of the Plaintiff. Further, it would be unconscionable and indeed untenable if the Defendant's arguments were maintained.

It would be akin to having her cake and eating it too. The Court has also noted that there is no denial of the monies received, nor any complaints made by the defendant at the time, who, as submitted by the defendant's counsel, had the opportunity to either repudiate or rescind the contract, but chose to do neither. There has been to date, no repayment of the monies or at all.

9.4 Having determined the first issue in favour of the Plaintiff, it follows that the defendant is indebted to the Plaintiff for the principal sum of United States Dollars Seventeen thousand. The Court has noted that although the plaintiff paid the sum of Kwacha two hundred and seventeen thousand (K217,000.00) to the defendant, the same was accepted by the defendant as being the

equivalent of the principal sum, although no submissions were made, nor proof laid before the Court, of the exchange rate prevailing at the time of the transaction.

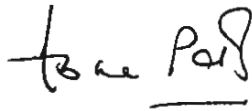
9.5 Accordingly, the Court will enter Judgment in favour of the Plaintiff for the principal sum of United States Dollars seventeen thousand (USD17,000.00)

9.6 On the claim for interest, and as noted earlier, Counsel not having submitted on the issue of interest in accordance with the BSFA, the Court does direct that the computation of interest on the said principal sum be referred to the Hon. District Registrar for assessment from the date of disbursement of the facility to the date of commencement of the action, and thereafter at the rate of 1% above LIBOR to the date of Judgment. *(unless sooner agreed between the parties)*.

9.7 Before I vacate this Judgment, I must state that it is cases such as the one in *casu*, that cry-out for a mediated settlement. The Court did refer the Parties to mediation which however failed, and in accordance with Statutory Instrument No. 72 of 2018, the Court is entitled to use its discretion on the issue of costs where suitably guided by the report of the mediator.

The report not revealing any such reasons, costs must fall where they lie and the Plaintiff is accordingly awarded the costs of this action.

Delivered in Court, the 14<sup>th</sup>, day of April, 2021.

A handwritten signature in black ink, appearing to read "Abha Patel". The signature is written in a cursive style with a horizontal line under the name "Patel".

**Lady Justice Abha Patel, S.C.**