

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Division)

2021/HPC/0406

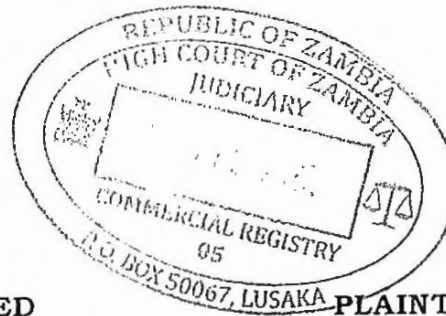
BETWEEN

WALIS FINANCIAL SERVICES LIMITED

AND

NAYOYA MWANANUKU

DEFENDANT



JUDGMENT

Cases Referred to:

1. *Nkongolo Farms Limited V. Zambia National Commercial Bank Limited and Others* (2007) Z.R. 149.
2. *Anderson Mazoka and Others V. Levy Mwanawasa and Others* (2005) Z.R. 138.

Legislation and Other Material Referred to:

1. *High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia* (HCR): O. LII, r. 6 (2) and r. 6 (4).
2. *Money-Lender's Act, Chapter 398 of the Laws of Zambia: s.10.*

Background

1. By writ of summons filed on 19th July, 2021, the plaintiff claimed, against the defendant, payment of the sum of K242,300.48 and an order for the sale of a Volvo motor vehicle registration no. BAJ 8872ZM. The plaintiff also requested for interest and costs.

The Case for the Plaintiff

2. By statement of claim filed together with the writ, the plaintiff pleaded that it is a limited company incorporated in Zambia and that it carries on the business of financial facility services.
3. Additionally, the plaintiff pleaded that it availed the defendant a loan of K20,000.00 at an interest rate of 25% payable within a month from the date of disbursement, in furtherance of a loan agreement dated 20th January, 2022. Furthermore, that the defendant has failed to service the loan, which it is alleged has accumulated to the sum of K242, 300.48, which it now claims

Defence

4. In his defence filed on 24th February, 2022, the defendant admits having borrowed K20,00.00, but denies having agreed to be charged 25% monthly compound interest.

The Evidence

5. At trial the plaintiff relied on the witness statement of Mr. Mumbwali Simuzingili, its managing director and only witness (PW1).
6. According to PW1, the plaintiff and defendant entered into a loan agreed in January, 2020, wherein the plaintiff agreed to extend a credit facility of K20,000.00 to the defendant. The loan, it was attested, was payable within a month from the date of disbursement of the funds. The witness avowed that the agreed contractual interest was cumulative at the rate of 25% per month on the outstanding balance.
7. PW1's evidence was that the money was disbursed in two phases: (i) K10,000.00 as transferred from the plaintiff company's Indo-Zambia bank account to the defendant's bank account on 6th February, 2020; (ii) K10,000.00 as transferred from the plaintiff company's Indo-Zambia bank account to the defendant's bank account on 7th February, 2020. Reference was made to copies of the electronic bank transfer reports exhibited on pages 4 and 5 of the plaintiff's bundle of documents.
8. PW1 also testified that notwithstanding several requests for settlement having been made, the defendant has failed to settle the loan in accordance with the agreement. That as a result the

defendant had accumulated an outstanding debt of K242,300.48 as of the date the writ was issued.

9. Additionally, PW1 stated that it was a term of the agreement that that the loan would be secured by motor vehicle registration no. BAJ 8872ZM.
10. When cross-examined, PW1 stated that he had a money lenders license, although it was not before Court.
11. He maintained that it was agreed that the loan would carry compound interest. For this, he referred the Court to what he termed the loan application form exhibited at page 3 of the plaintiff's bundle of documents.
12. The defendant did not file a witness statement and elected not to call any witnesses.

Analysis of Evidence and Findings of Fact

13. In his defence, the defendant admitted having received a loan of K20,000.00 from the plaintiff by agreement of January, 2020. Further, I observed that the defendant did not rebut the evidence of PW1 relating to the date the funds were transferred to him and the agreed repayment period. I, therefore, accept that the defendant borrowed the sum of K20,000.00 from the plaintiff by a loan agreement entered into in January, 2020.

Additionally, I find that the loan was to be repaid within one month of disbursement.

14. Having studied the copies of the electronic transfer of funds reports that are before me, I find that the last date of disbursement of the loan was 7th February, 2020. It follows, therefore, that the defendant was required to repay the loan within one month therefore, being no later than 6th February, 2020.

15. In his defence, the defendant did not traverse the plaintiff's pleadings that the defendant did not repay the loan on the due date.

16. According to *Order LIII, rule 6 (2) of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia*, a defence shall specifically traverse every allegation of fact made in the statement of claim. A defence that fails to meet the requirements of *O. LIII, r. 6 HCR* must be deemed to have admitted the allegations not specifically traversed as provided in *O. LIII, r. 6 (4) HCR*.

17. In applying *O. LIII, r. 6 HCR* to this case, I must deem that the defendant has admitted the fact that he failed to repay the loan on the due date on account of the failure to traverse the said pleading. I therefore determine that the defendant failed to repay the principal sum of K20,000.00 that he borrowed from the plaintiff by 7th March, 2020, when it became due.

18. Having perused through the statement of claim and reply, I note that the plaintiff did not plead that the plaintiff furnished security in the form of a pledge of a vehicle. However, this evidence was tendered through the testimony of PW1. The defendant did not object. The absence of an objection opens the door for me to consider this evidence. This is in line with the pronouncement of the Supreme Court in the case of ***Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others (1)*** that:

"... issues which were not pleaded but which were nevertheless raised in the Court below, without any objection from the other side, cannot be ignored and the Court has an obligation to consider such issues"

19. In the case of ***Anderson Mazoka and Others V. Levy Mwanawasa and Others (2)*** the Supreme Court put it like this:

"where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it."

20. Considering that the defendant has not challenged PW1's testimony that the defendant pledged motor vehicle, Volvo BAJ 8872ZM as security for the loan, I accept that the defendant pledged the said vehicle as security for the loan.

21. I now turn to consider the applicable interest. The plaintiff relying on a term contained in what PW1 is calling the loan application agreement that is exhibited at page 3 of the plaintiff's bundle of document.

22. I have examined the said loan application agreement. It refers to a loan amount of K12,000.00 where the defendant agrees to pay the plaintiff K15,000.00 only, at a monthly cumulative interest of K25% per month on the outstanding balance. The date of the document is 10th January, 2020 and expresses one schedule of instalment payment, being payment of K15.000 on 10th February, 2022. Additionally, the security is given is stated as a personal guarantee and a motor vehicle, Volvo BAJ 8872ZM. However, the document is not signed by either party.
23. Aside the loan application agreement not being signed, I observe that the principal loan amount stipulated therein, being K12,000.00 is different from the principal loan amount of K20,000.00 that PW1 stated, in his testimonial evidence, was advanced to the defendant. It is also inconsistent with the defendant's admission that he borrowed K20,000. The inconsistencies lead me to conclude that the exhibited loan application agreement is not the applicable agreement. I therefore disregard it.
24. With respect to the evidence before me, during cross-examination PW1 maintained that the parties agreed 25% compound interest. He avowed that this was permissible under the *Money-Lender's Act, Chapter 398 of the Laws of Zambia*.

(hereinafter referred to as the "Act"). I will make a finding on this issue when I consider the applicable law.

25. During further cross-examination PW1 stated that the plaintiff possessed a Money Lender's Licence. His testimony was not challenged, save to highlight that the licence in question was not before Court. Having studied the demeanour of the witness and considering that he unflinchingly told the Court that he was the managing director of the plaintiff, who carried on the business of money-lending, I see no reason to doubt his testimonial evidence.

26. I, therefore, accept and find that the plaintiff was a licenced money-lender at the time it lent money to the defendant.

The Law

27. Having acknowledged that the plaintiff was a licenced money lender, I accept that the loan agreement between the parties is governed by the Act. Consequently, I have considered section 10 of the Act which reads as follows:

"Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money by a money-lender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract"

28. Additionally, section 10 of the Act contains a proviso which reads as follows:

"Provided that provision may be made in writing by any such contract that, if default is made in the payment upon the due date of any sum payable to the money-lender under the contract, whether in respect of principal or interest, the money-lender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan."

29. My understanding of section 10 of the Act in relation to compound interest is that the charging of compound interest to a loan granted by a money-lender is expressly prohibited. Further, that where such a contract provides directly or indirectly for the payment of compound interest, the contract shall be illegal to the extent that it provides for the application of interest to be compounded. Essentially, section 10 requires the illegal part of the contract to be severed.

30. Upon reflecting on section 10 of the Act, I take the view that an agreement governed by the Money Lenders Act which purports to charge compound interest is null and void to the extent of the illegality. Thus, where parties agree to the charge of compound interest in a loan agreement governed by the Act, that term would be illegal and unenforceable.

31. In this case, the plaintiff does not take issue with the charge of interest at the rate of 25%. It is the compounding of

interest that is disputed. Since compound interest is not permissible under the Act, I determine that the plaintiff can only claim 25% simple interest on the unpaid principle of K20,000.00.

32. In view of the foregoing, judgment is entered in favour of the plaintiff as follows:

- i. The defendant shall pay the plaintiff the outstanding principal of K20, 000.00 together with interest at 7% per annum from 7th March, 2020, when the money became due, to the date of judgement (the Judgment debt), payable within sixty days of this Judgment.
- ii. The Judgment debt shall attract interest at the rate of 8% per annum from date of judgment until full and final settlement.
- iii. In the event that the defendant fails to settle the Judgment debt within sixty days as adjudged, the plaintiff shall be at liberty to enforce the pledge by sale of the Volvo motor vehicle registration no. BAJ 8872ZM.
- iv. Costs are awarded in favour of the plaintiff to be taxed in default of agreement.

Summary of Ratio Decidendi

Where contract for lending of money is governed by the Money Lenders Act provides directly or indirectly for the payment of

compound interest, the contract shall be illegal to the extent that it provides for the application of compound interest. Essentially, section 10 requires the illegal part of the contract to be severed.

Dated this 10th day of August, 2022.


B.G. SHONGA
JUDGE

