IN THE HIGH COURT FOR ZAMBIA **2017/HP/1318**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

ANDREW ANTHONY MITI **PLAINTIFF**

AND

HOWARD KATUBA LUNGU **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 24th day of July, 2018

For the Plaintiff : *In Person*
For the Defendant : *No Appearance*

J U D G M E N T

Cases Referred To:

1. *Edman Banda v Charles Lungu, Supreme Court Selected Judgment No. 22 of 2017*

Other Works Referred To:

1. *G. Monahan on Essential Contract Law, 2nd Edition, Cavindesh Publishing (Australia) Pty Limited 2001*
2. *P. Richards Law of Contract, 7th Edition, Pearson Longman Publishing 2006*

The Plaintiff commenced this action by way of Writ of Summons and Statement of claim seeking the following reliefs:

(i) *K332,731.28, being money owed by the Defendant as at 10th December, 2016.*

(ii) Interest at the current bank lending rate on all monies found due.
(iii) Any other relief the Court may deem fit.
(iv) Costs of and incidental to the proceedings.

The Defendant filed a Memorandum of Appearance and Defence on 28th September, 2017. The facts as they are revealed in the pleadings were that on 2nd February, 2016, the Plaintiff lent the Defendant K17,000 at an interest rate of 35%. He was required to pay back the money after a month and he pledged his motor vehicle as security. After agreeing on the terms, the parties executed a loan agreement. When the loan fell due, the Defendant failed to return the Plaintiff's money despite several reminders. The Plaintiff contended that the Defendant breached the loan agreement and commenced this action in Court to recover the sum of K332,731.28 with interest and costs.

According to his defence, the Defendant stated that he owed the Plaintiff K29,000 and he sued him in the Subordinate Court to recover the money. Out of that amount, he paid the Plaintiff K10,000 through his Bank account. The Defendant averred that he did not owe the Plaintiff K332,731.28.

The matter came up for trial on 14th June, 2018. Only the Plaintiff attended Court, while the Defendant did not appear even after he was served the notice of hearing on 1st June, 2018, which he refused to acknowledge. I was satisfied that the Defendant had been served the notice of trial according to the Affidavit of Service. I therefore, proceeded with trial in accordance with Order 35 Rule 3 of the High Court Rules, which says that a Court can hear a matter where a Defendant has been served with notice and there is Affidavit evidence to prove service.

The Plaintiff, **Andrew Anthony Miti** testified in his own right as **PW.** His evidence was that sometime in 2016, the Defendant went to his house in Salama Park, Lusaka to borrow K17,000 for his export business between Lusaka and Angola. They agreed on the terms of the loan and executed an agreement at page 6 of the Plaintiff's Bundle of Documents. The major terms of agreement were that the Defendant would repay the loan after a month at an interest rate of 35%.

In return, the Defendant pledged his Mazda Familia vehicle Registration No. ACP 85 as collateral and provided the Plaintiff a

copy of the White Book at page 7 of his Bundle of Documents. The vehicle was not registered in the Defendant's name, however, at page 9 of the Plaintiff's Bundle, a letter written by Ms. Sylvia Mulenga Mfula who sold the Defendant the vehicle confirmed him to be the owner.

According to PW, the vehicle was on hire in Solwezi when the loan agreement was executed and the Defendant promised to hand it over to him but never did. When the loan fell due, the Defendant failed to return PW's money and avoided him whenever he called him. He would claim to be out of Lusaka on Zambia Airforce (ZAF) on business.

PW went on to testify that he later met the Defendant sometime in 2017 and he promised to pay him his money. Eventually, the Defendant paid him K1,500 via ZOONA and several months later deposited K2,400 into his Bank account. After those two payments, the Defendant evaded PW until 12th March, 2017 when he followed him to his house at ZAF Twin Palm base. The Defendant told him that he deposited K25,000 into his Bank account and he insisted on confirmation from the Defendant's

Bank. They went to the Stanbic ATM at Crossroads Shopping Mall where the Defendant obtained a mini statement from his account and it showed that he did not transfer money to PW's account.

PW testified that the Defendant promised to pay him his money on 14th March, 2017 and the parties executed a further loan agreement, at page 11 of the Plaintiff's Bundle of Documents. On that date, the Defendant failed to return his money and completely avoided him whenever he followed him to his home or work place.

On the defence, PW testified that the Defendant only paid him K3,900 and not K10,000. He conceded that he commenced an action in the Subordinate Court but it was never cause-listed because he discontinued it after the Defendant promised to return his money. He concluded his testimony by praying for the reliefs set out in the Writ of Summons and Statement of Claim.

After trial on 14th June, 2018, I reserved the matter for judgment. On 17th July, 2018, the Defendant through his Advocates Messrs Iven Mulenga & Company issued Summons and a Supporting Affidavit for an order to discharge order adjourning or

fixing the matter for judgment and for an order for leave to defend the suit on merit pursuant to Order 35 Rule 2 of the Rules of the Supreme Court. Incidentally, the notice of appointment as Advocates was only filed into Court on 18th July, 2018. I have decided to ignore the application because it was filed way after the matter was reserved for judgment and it has been overtaken by events. In any event, before that application, the Defendant appeared to have been representing himself and should have attended trial.

In any event, the Defendant's remedy in the circumstances is not one, which circumvents the process of Court by reopening a case, because there must be finality to litigation. Instead, the remedy lies in Order 35 Rule 5 of the High Court Rules and can only be invoked after the Court has rendered judgment.

As I begin my determination, I wish to state that I have seriously considered the pleadings and the evidence adduced. It is common cause that on 2nd February, 2016, PW and the Defendant executed a loan agreement for the sum of K17,000 and agreed on interest at the rate of 35%. On 2nd March, 2016, he was supposed

to pay back a total of K22,950. He pledged his Mazda Familia vehicle Registration No. ACP 85 as collateral but never handed it over to PW. The Defendant did not fully settle the loan and PW sued him to recover his money.

Arising out of the facts, I find that the issues that fall for determination are the following:

(i) Whether there was a valid agreement between the parties upon which the Plaintiff is entitled to recover the money lent to the Defendant?

(ii) Whether the Defendant's debt has accumulated to K332,731.28?

(i) Whether there was a valid agreement between the parties upon which the Plaintiff is entitled to recover the money lent to the Defendant?

According to the Learned Author G. Monahan, on **Essential Contract Law, 2nd Edition,** at page 27:

> **"A valid contract is a contract that the law will enforce and creates legal rights and obligations.... and contains all the three essential elements of formation: agreement (offer and acceptance); intention (to be bound by the agreement); and consideration..."**

It is clear from the authority that for a contract to be valid, it must contain all the essential elements that is an offer and

acceptance, intention to be bound by the agreement and consideration.

The facts of this case and which have not been gainsaid show that the parties executed a loan agreement where PW offered the Defendant a loan of K17,000 at 35% interest. The Defendant accepted the offer and pledged his Mazda Familia motor vehicle Registration No. ACP 85 as collateral. The parties consequently executed a loan agreement, which in my considered view, confirmed the unequivocal act of offer and acceptance by the parties and their intention be bound by their agreement.

In consequence, I find that there was a valid agreement between the parties and the Defendant obtained a loan of K22,950 according to the agreement at page 6 of the Plaintiff's Bundle of Documents. From the evidence adduced by PW, I also find that the Defendant only returned K3,900 leaving a balance on the loan.

At paragraph 2 of the defence, the Defendant averred that the Plaintiff sued him in the Subordinate Court for K29,000 out of which he paid him K19,000 and remained with a balance of

K10,000. The Plaintiff conceded that he sued the Defendant but discontinued his action before the matter was ever cause listed. After considering the record, I find that the Defendant did not adduce any evidence in form of a Writ of Summons nor refer to an order or decision or judgment of the Subordinate Court, which could have aided his position. In the absence of such evidence, I further find that the Defendant's averment is unsatisfactory. I had the opportunity of observing the Plaintiff in Court and he was very composed and consistent. I therefore, preferred his evidence that the Defendant still owes him money as opposed to unsubstantiated averment in paragraph 2 of the defence.

The Learned Author P. Richards on **Law of Contract** states at page 113 that:

> **"Where a person fails to perform their side of the contract then subject to the mitigating factors, they will be in breach of contract. A breach of contract will always give rise to a claim in damages, no matter how minor or serious the nature of the breach. Whether an innocent party is entitled to treat the contract as at an end, so that they can treat the contract as discharged, depends on whether the breach is so serious that it goes to the root of the contract, that is there is a breach of a primary obligation."**

The authority states that when a breach of contract occurs, a party affected is entitled to damages and in a case of serious

breach, a party can terminate a contract. In this case, I find that the Defendant breached the agreement when he failed to pay PW his money. As a result, I hold that PW is entitled to recover the sum of K19,050 from the Defendant, which is outstanding on the loan agreement.

(ii) *Whether the Defendant's debt has accumulated to K332, 731.28?*

According to the pleadings PW claimed the sum of K332,73.28 from the Defendant. A careful review of the Writ of Summons, Statement of Claim shows that the sum of K332,731.28 arises from interest of 35% that PW charged the Defendant from the time that he defaulted on the loan obligation up to the time he filed this action into Court.

I also find that PW did not adduce evidence to show that he is a money lender or that he was entitled to charge 35% interest on the loan in default. In that instance, the loan between PW and the Defendant could only be considered as a simple one and the case of **Edman Banda v Charles Lungu**[1] is instructive. When faced with the question whether it is legally permissible for a person who is not

a licenced money lender under the Money Lenders Act to avail a loan for profit, the Supreme Court in reference to its decision in the case of *Neighbours City Estates Limited v Mark Mushili Appeal No. 47/2013* stated thus:

> **"The lending or borrowing in question between the Appellant and the Respondent in that case was caught by the provision of the Money Lenders Act and that as the Respondent had not been appropriately licenced, the transaction was illegal. Notwithstanding this conclusion, the question of losses or gains remaining where they had fallen did not arise because we upheld the alternative argument, which Counsel for the Respondent had advanced and which was to the effect that the agreement between the parties was of the nature of an ordinary contract which we accordingly upheld on the footing that the borrowed money (which had since been repaid) was to attract interest at the average short term rate from the date of the writ up to the date of the Judgment and thereafter at bank lending rate until full payment."**(underlining my own)

According to the Supreme Court decision, where a person is not appropriately licenced as a money lender, a borrowing becomes one which is to be considered as a simple contract. Thus, a person who is not a money lender can lend money and recover a profit or interest on it and there is no illegality in such an arrangement. However, such person cannot charge interest like a money lender. It therefore, accords that PW can recover his debt from the Defendant at a profit or interest. However, he is not entitled to charge interest at 35% for the period in default.

For the avoidance of doubt, I hold that the Defendant must pay the Plaintiff the sum of K19,050, which is outstanding on the loan agreement. I award the Plaintiff interest from the date of the Writ up to the date of judgment at the average short term deposit rate. Thereafter up to the date of settlement, interest is awarded at the current lending rate as determined by the Bank of Zambia. Costs are for the Plaintiff to be taxed in default of agreement.

Dated this 24th day of July, 2018

M. Mapani-Kawimbe

HIGH COURT JUDGE