IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0421**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHISANGA MUTANTIKA
(T/A MONAZ ENTERPRISES) **APPLICANT**

AND

LUAPULA ARTLAND LIMITED
(T/A KNOWLEDGE GATES) **RESPONDENT**

Delivered in chambers before Hon. Mr. Justice Sunday B. Nkonde, SC this 31st day of October, 2016

For the Applicant : Mr. A. Roberts of Messrs Alfred Roberts & Company
For the Respondent : Mr. M. Hamachila of Messrs Iven Mulenga & Company

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J U D G M E N T

CASES REFERRED TO:

1) *Exhilda Mtonga, Halive Mtonga vs. Money Matters Limited (2010) ZR 382 Volume 1*

LEGISLATION REFERRED TO:

1) *High Court Rules, Chapter 27 of the Laws of Zambia*
2) *Money Lenders Act, Chapter 398 of the Laws of Zambia*

This is an application commenced on 26th August, 2016 by way of Originating Summons and Supporting Affidavit pursuant to **Order 30 Rule 11 (b) & (c)** and **Order 30 Rule 14** of the **High Court Rules** claiming for

1. ***A declaration that in terms of Section 10 of the Money Lenders Act CAP 398 of the Laws of Zambia the Respondent as a money-lender is prohibited from charging compound interest on the loans obtained by the Applicant from the Respondent.***

2. ***A declaration that in terms of Section 9 (2) of the Money Lenders Act CAP 398 of the Laws of Zambia the interest charged by the Respondent on the Applicant's loan should be calculated on "per annum basis and not on "monthly basis."***

3. ***Refund of any monies overpaid by the Applicant to the Respondent as a result of the Respondent's charging of compound interest on the Applicant's loans with interest thereon at shorter deposit rate until settlement.***

4. ***Delivery of possession by the Respondent as mortgagee to the Applicant of the Applicant's Certificate of Title No. 47640 for Subdivision 916 of Farm No. 33a Meanwood Ndeke, Lusaka.***

5. ***Further or other relief.***

6. ***Costs.***

In the supporting affidavit, CHISANGA MUTANTIKA as deponent stated that he owned a small shop at Avondale Market in Lusaka and that on 11th June, 2014 and 21st July, 2014, he obtained loans of

K20, 000.00 and K12, 200.00 respectively from the Respondent who was and is a Money Lender regulated by the **Money Lenders Act**. The deponent further stated that paragraph 5.2 of the Facility Letter relating to the loan of 11th June, 2014 provided for 18% interest per month compounded monthly and paragraph 5.2 of the Facility Letter of 21st July, 2014 provided for 20% interest per month also compounded monthly. The two Facility Letters referred to were exhibited as "CM3" and "CM4" respectively in the supporting affidavit.

On 21st October, 2016, the Respondent filed the opposing affidavit. The deponent was JAMES KAPESA, the Managing Director of the Respondent. He denied that the Respondent charged the Applicant compound interest on the loans and further stated that there was an amount in the sum of K4, 752-86 on the loans due from the Applicant to the Respondent and only upon payment of this money will Certificate of Title No. 47640 for Subdivision 916 of Farm No. 33a, Meanwood, Ndeke, Lusaka be released to the Applicant.

At the hearing on 26th October, 2016, the parties sought an adjournment in order to attempt *ex-curia* settlement. I considered the request and declined the same as the matters raised by the substantive application were, in my view, also of public interest.

As it turned out, both parties by respective Learned Counsel were in fact very ready to argue the substantive application.

Learned Counsel for the Applicant forcefully re-stated the Skeleton Arguments and List of Authorities filed. The thrust of the argument

by Learned Counsel for the Applicant was first, that the charging of compound interest by the Respondent contravened **Section 10** of the **Money Lenders Act.** Secondly, that the charging of interest monthly by the Respondent contravened **Section 9 (2)** of the same **Act.**

In relation to the practice of the Courts to frown upon unconscionable interest payment agreements, Learned Counsel referred the Court to the case of **Exhilda Mtonga, Halive Mtonga vs. Money Matters Limited**[1] where the High Court before Lisimba J as he then was held as follows:

> ***"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."***

On his part, Learned Counsel for the Respondent equally forcefully contended that his instructions were to oppose the application; relying on the affidavit in opposition in its entirety.

Given the line of submission by Learned Counsel for the Respondent, I invited the Learned Counsel to address the Court on the law as raised by Learned Counsel for the Applicant.

Learned Counsel for the Respondent, in a manner that exemplifies the best of those indeed received a "call to the bar" rose to the challenge and said:

> ***"We raise no objections to those points of law and we concede"***

In terms of the applicable law, **Section 10** of the **Money Lenders Act** provides 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:***
>
> > ***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."

Section 9 (1) and (2) of the same **Act** also provides as follows:

"(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 represented by the interest charged as calculated in accordance with the provisions of the Schedule."

Now, I have perused the affidavit in support and carefully examined the Facility Letters dated 11th June, 2014 and 21st July, 2014 exhibited and marked 'CM3' and 'CM4' respectively. Paragraph 5 of the 11th June, 2014 Facility Letter stated as follows:

> ***"5. Repayment/Duration***
>
> ***The personal loan is repayable in six (6) monthly equal installments being 18% interest per month payable monthly in arrears on reducing balance method and compounded monthly..."***

Paragraph 5.2 of the 21st July, 2014 Facility Letter also stated as follows:

> ***"5.2. Interest Rate***
>
> ***The rate of interest to be charged on the account shall be at a rate of 20% per month to be charged and recovered monthly in arrears to be calculated on the daily balance outstanding on a compound basis to the debit of the borrower's loan account and will be payable to the Lender in arrears as per the instructions herein. Any interest that is not paid monthly will be compounded at the above rate."***

Both Facility Letters were signed by *Phostinah M. Sitali*, Credit and Loans Officer and *James Kapesa*, Chief Executive Officer for and on

behalf of Luapula Artland Limited and *Chisanga R. Mutantika* for and on behalf of Monaz Enterprises.

Exhibited and marked 'CM5' in the Applicant's supporting affidavit was also a copy of the letter dated 14th April, 2016 from the Respondent's advocates to the Applicant demanding payment within fourteen (14) days of K80, 560-00 outstanding in respect of the 11th June, 2014 loan of K20, 000-00.

On the glaring evidence before me, in particular the two Facility Letters as read together with the letter of demand dated 14th April, 2016, the 22nd June, 2015 letter on the restructuring of the loan ('CM6') and the computations in the supporting affidavit ('CM8', 'CM9' 'CM10' and 'CM11') and on the other hand the computations in the affidavit in opposition ('JK2' and 'JK3') all which I have carefully perused, I have no hesitation in finding that the Respondent charged the Applicant compound interest on the two loans and also calculated the loans on monthly basis in contravention of **Section 10** and **9 (2)** respectively of the **Money Lenders Act**. I also find that as a result, the Applicant overpaid the Respondent on the loans.

In short, what the Respondent embarked on to do, and in fact did, was illegal. Hence, this Court could not, at the hearing, have overlooked the obvious illegality and allowed the matter to go for *ex-curia* settlement and especially that there was prima facie evidence in the form of the two instances that such illegality may be the standard practice in the Respondent company.

For the avoidance of any doubt, even if the Applicant accepted the terms of the Facility Letters that provided for "compound interest" and on "monthly basis" as evidenced by the Applicant's proprietor, CHISANGA MUTANTIKA, signing the Letters, the Agreement contravened the provisions of **Section 10** and **9 (2)** of the **Money Lenders Act** and remained illegal.

"***Usury,***" meaning "***excessive or illegal charging of interest***" by a Money Lender, even if agreed between the Money Lender and the borrower is unenforceable under the **Money Lenders Act**. It is good that Learned Counsel for the Respondent conceded the points of law advanced by Learned Counsel for the Applicant.

In toto, I find that there is **de facto** and **de jure** substance in the Applicant's application and consequently make the following Orders:

1) **The declaratory reliefs sought by the Applicant are granted as prayed.**

2) **The Respondent do refund the Applicant the monies overpaid by the Applicant to the Respondent as a result of the Respondent charging of compound interest and on monthly basis on the Applicant's loans, such refund amount to be agreed and in default of agreement to be assessed by the Deputy Registrar.**

3) **The monies to be refunded by the Respondent to the Applicant to attract simple interest at the average of the short term deposit rate from the date of the action to the**

date of judgment and thereafter at the current Commercial Bank lending rates as determined by the Bank of Zambia from time to time until full payment.

4) **The Respondent as Mortgagee to the Applicant do forthwith deliver possession to the Applicant of the Applicant's Certificate of Title No. 47640 for Subdivision 916 of Farm No. 33a, Meanwood, Ndeke, Lusaka.**

5) **The Applicant shall have the costs of the application, the same to be taxed in default of agreement.**

Dated at Lusaka this 31st day of October, 2016.

Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE