IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA

2016/CRMP/1603

(Civil Jurisdiction)

BETWEEN:

DOCHIMA MONEY LENDERS **PLAINTIFF**

AND

DABSON MALASHA **1ST DEFENDANT**

BEAUTY SHAMILIMO MALASHA **2ND DEFENDANT**

Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu in open court at 09 00 hours this 5th day of October, 2017.

For the Plaintiff: In person

For the 1st and 2nd Defendants: In person

JUDGMENT

STATUTES REFERRED TO:

1. ***Money Lenders Act, Chapter 398 of the Laws of Zambia, s 15***

CASES REFERRED TO:

1. ***Evans (J) & Son (Portsmouth) Ltd v Andrea Merzario Ltd*** (1976) 1 WLR 1078
2. ***L'Estrange v Graucob*** (1934) 2 KB 394

3. Printing and Numerical Registering Co. v Sampson (1875) LR 19 Eq 462

The plaintiff commenced this action by way of a default writ of summons. The plaintiff claims a sum of K9, 600 being the debt loan accrued, plus costs and interest at current bank lending rate.

According to *viva voce* evidence and affidavit in support of default writ of summons sworn by one Dominic Chimanyika, the director in the plaintiff's firm, the 1st and 2nd defendants are husband and wife respectively.

That the plaintiff is a legal money lender in accordance with a copy of a money lenders certificate exhibited as DC1.

It was stated that on the 22nd October, 2016 the 2nd defendant borrowed K2, 500 and agreed with the plaintiff to pay back K3, 500 on the 22nd November, 2016. On the 27th October, 2016 the 1st defendant borrowed K2, 400 and agreed with the plaintiff to pay back K3, 360 on the 27th November, 2016. To that effect the 1st and 2nd defendants couple entered into separate written contracts with the purported plaintiff exhibited DC3 and DC2 respectively.

That the loans by the defendants were secured by collateral namely the couple's dwelling house number 38/03 situate in Chainda compound exhibited as DC4.

It was stated that despite several reminders the defendants have kept making promises which have not been fulfilled to date. That all efforts to compel the defendants to clear the outstanding debt have proved futile.

It was asserted that the defendants are justly indebted to the plaintiff and have no defence to the claim.

That in the premises the plaintiff seeks the indulgence of this court to compel the defendants to honour their obligations plus costs in the interest of justice.

The defendants adduced *viva voce* evidence and on the 6th January, 2017 filed an affidavit in opposition to default writ of summons jointly deposed to by Dabson Malasha and Beauty Shamilimo Malasha the 1st and 2nd defendants respectively.

According to *viva voce* evidence and affidavit in opposition, the defendants on the 27th September, 2016 borrowed a total sum of K3, 000 from the plaintiff at 40% monthly interest payable on the 27th October, 2016.

That when the payment was due it was further agreed between the plaintiff and the defendants that the defendants pay the interest due on and carry forward the principal amount to the next month.

It was submitted that the defendants then paid a sum of K1, 300 instead of K1, 200 interest leaving the principal amount of K2, 900 owed to the plaintiff which amount would be due for payment on 27th November, 2016.

That paragraph 6 of the plaintiff's affidavit in support is misleading as to the best of the defendants' knowledge the plaintiff is owed a sum of K4, 060 comprised of 40% of K2, 900 that is, K1, 160 plus K2, 900 principal amount the total comes to K4, 060.

It was submitted that to the best of the defendant's knowledge they do not owe the plaintiff a sum of K9, 600.

I have carefully considered the documentary, *viva voce* and affidavit evidence at my disposal. It is not in dispute that the 1st and 2nd defendants couple on 27th October, 2016 and 22nd October, 2016 signed separate contracts exhibited as DC3 and DC2 respectively. It is very clear from the said contracts that the 1st and 2nd defendants borrowed K2,400 and K2, 500 and were required to pay back K3,360 and K3 500 on the 27th and 22nd November, 2016 respectively. The money lenders certificate exhibited as DC1 clearly shows that the applicants for the certificate were individuals namely Dominic Chimanyika and Charity Banda trading as Dochima Money Lenders Limited. The defendants

contended that to their best knowledge as on the 22nd December, 2016 they owed the plaintiff a combined principal sum of K2, 900 plus 40% interest charged on the principal sum that is K1, 160 which comes to a total sum of K4, 060. These are the facts in brief.

The issues for determination posed by the above stated facts as I see them are as follows:

1. Whether *parole evidence* is admissible to vary or contradict the terms contained in the written instrument;
2. Whether the relationship between a money lender and borrower is exclusively regulated by the contract between the parties; and
3. Whether the entity called Dochima Money Lenders can sustain an action at law.

Having identified the issues for determination, I now apply the law to the facts.

Regarding the first issue, courts have insisted that where the parties have reduced to writing the substance of their agreement, parole evidence is not admissible to vary or contradict the terms contained in the written instrument. There is one exception to the said *parol evidence rule* if the defendant can prove by evidence that the written instrument did not represent the actual agreement. The case of ***Evans (J) & Son (Portsmouth) Ltd v Andrea Merzario Ltd*** (1976) 1 WLR 1078 is instructive in that regard. To resolve the matter at hand it is important to examine the terms contained in the contracts exhibited as DC3 and DC2 signed by the 1st and 2nd defendants respectively. It is very clear from exhibits DC3 and DC2 that on the 27th and 22nd November, 2016 the 1st and 2nd defendants borrowed from the plaintiff K2, 400 and K2, 500 respectively. In the absence of any evidence, fraud or misrepresentation to contradict the above clear contractual terms signed by the defendants, it is very difficult for me to believe the story of the defendants that they borrowed from the plaintiff a combined sum of K2, 900. In the case of ***L'Estrange v Graucob*** (1934) 2 KB 394, Scrutton LJ stated,

"When the document containing contractual terms is signed.... in the absence of fraud or misrepresentation the party signing it is bound and it is wholly immaterial whether he has read the document or not."

In considering the second issue of whether the relationship between a money lender and borrower is exclusively regulated by the contract between the parties, regard was had firstly to the case of ***Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq 462,** in words of Sir George Jessel:

"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

The above doctrine called "freedom and sanctity of contract" was formulated in the 19th Century originating in the work of Adam Smith (father of modern economics). However, the period also saw much statutory interference in private contracts.

In Zambia, the relationship between the money lender and borrower is strictly governed by statute. The money lenders contract must comply with the terms implied by the Money Lenders Act, Chapter 398 of the Laws of Zambia. In terms of the Act, interest at a rate exceeding 48 per centum per annum is deemed harsh and unconscionable, thus ***section 15(1) of the Money Lenders Act, Chapter 398 of the Laws of Zambia*** provides:

"S15. (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......"

From the clear wording of section 15(1), it is harsh and unconscionable for a money lender to charge interest above 48% per annum or 4% per month. The defendants couple on 22nd and 27th October, 2016 borrowed from the plaintiff a total principal sum of K4, 900. This action was filed into court on the 22nd December, 2016 on which date the defendants were liable to pay the plaintiff a sum of **K5, 292.00 only and not the K9, 600 claimed by the plaintiff**. It is very clear that the purported plaintiff money lender is in breach of the terms and conditions of the grant of the money lenders certificate (DC1) under the ***Money Lenders Act, Chapter 398 of the Laws of Zambia***. The money lender is charging 40% per month on the principal sum lent out to the defendants borrowers against the legal requirement of 48% per annum which in my view is very excessive, harsh and unconscionable.

Coming to the issue of whether the entity called Dochima Money Lenders can sustain an action at law. The entity Dochima Money Lenders is a mere business name and not a corporate body. In the case of ***Harry Mwanga Nkumbula & Simon Kapwepwe v UNIP* {1978} Z.R. 388,** it was held:

"An unincorporated body is not a legal entity and therefore not capable of suing or being sued in its name. It could only sue or be sued in a representative capacity, hence, UNIP, can only be sued in a representative capacity."

Dochima Money Lenders being an unincorporated body is not a legal entity at law and cannot therefore sue in its name. As such the action in the name of Dochima Money Lenders as Plaintiff in this matter is incompetent and it is accordingly dismissed for want of legal capacity to sue.

Delivered in open court this 5th day of October, 2017.

HON. HUMPHREY CHITALU

ACTING SENIOR RESIDENT MAGISTRATE