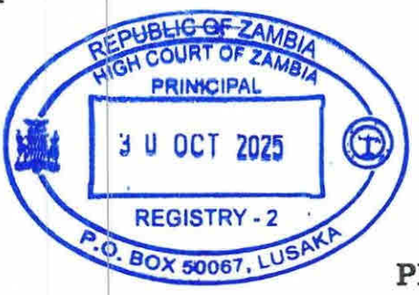
IN THE HIGH COURT FOR ZAMBIA **2016/HP/0415**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

BRAFUSS LIMITED **PLAINTIFF**

AND

DORAH NAMASIKU LIKUKELA **DEFENDANT**

Before Hon. Mr. Justice M.D. Bowa on 30th of October 2025

For the Plaintiff: Mr .W Muhanga of Willis. Clement & Partners.

For the Defendant: In person

JUDGMENT

Cases Referred to

1.Zambia Railways Limited vs Pauline S. Mwidza1, Brian Sialumba (2008) ZR

2.Miller vs Minister of Pensions (1974) ALL ER 372

3.Industrial Finance Company Limited vs Jacques and Partners (1981) ZR 25

4.Khalid Muhammed vs the Attorney General (1982) ZR 49

5.Jonas Aaron Banda vs Dickson Machiya Tembo (2008) ZR 204 vol 1

6.Union Bank Zambia Ltd Vs Southern province Cooperative Marketing Union Limited (1995 – 1997) ZR

7.Credit African Bank Limited in liquidation) Vs John Digani Mudenda (2003) ZR at page 71

8.Credit African Bank vs George K. Kalunga SCZ appeal No. 144/ 1997.

9.Colgate Palmolive (Z) Inc. vs Chuka and others SCZ 181 of 2005

10. Zulu vs Avondale Housing Project (1982) ZR 172 (SC)

11. Banda vs Lungu(Appeal no 73 of 2016) ZMSC160

12.Eva Chimbobi vs New future Finance Company HPC 776 of 2022 (unreported)

13.Diego Casilli vs Access Bank (Zambia) Limited & Ors (Appeal no 259 of 2022)

14.Neighbours City Estates Limited vs Mark Mushili SCZ Appeal no 47 of 2013

15.Sun Country Limited & 2 others vs Rodger Redin Siavory & Another SCZ Appeal no 122 of 2006

16.J Car Holdings vs Development Bank of Zambia (2013) 3 ZR 299

1.0 Background

1.1 This matter was commenced by writ of summons and statement of claim dated 2nd March 2016 by which the Plaintiff claims:

a) *The sum of K135,000.00 (Kwacha One Hundred and thirty-five Thousand) being money advanced to the Defendant;*

b) *Alternatively, enforcement of the contract of sale and an order for possession of the property known as Sub Q of Sub 50 of Farm No. 1441a, Roma, Lusaka being the property that the Defendant pledged as security for the advance and which she later agreed to sell at the price of K200,000.00 (Kwacha Two Hundred thousand);*

c) *An Interlocutory Order for the preservation of the said property until full determination of this action;*

d) *Interest on any sum awarded as agreed to in the contract or at the current Bank of Zambia lending rate;*

e) *Costs occasioned by or incidental hereto; and*

f) *Any other relief the Court shall deem fit.*

1.2 The Defendant did not file a defence. The matter then passed through a number of judges that included Mr Justice Sikazwe, Mr Justice Siavwapa, and Mr Justice M. Chitabo sitting as High Judges as they were then, before finally being assigned to this Court.

1.3 A status conference was called for on the 26th March, 2018, at which both parties were present to give the court an appreciation of what stage of the proceedings the matter was at. The status conference and a review of the record confirmed that the Defendant had made a number of applications before the Court that included:

- An appeal against the decision of the Deputy Registrar declining to join parties dated 30th November 2017.
- Summons to stay proceedings pending appeal dated 26th December 2017.
- A notice to raise preliminary issue dated 26th December 2017.
- An application for the review of the decision of the Deputy Registrar dated 24th of January 2018.
- Application for Judicial disqualification dated 13th February 2018.
- An application for an injunction before the Deputy Registrar dated 15th February 2018.

1.4 I gave directions on how the parties were to proceed with the pending applications at a status conference held on 23rd April, 2018. All the applications were dealt with and following my dismissal of a fresh application for joinder of parties, I proceeded to issue orders for directions to bring the matter to trial on the 20th December, 2021, in the following terms:

1. *The Defendant shall file a Defence and Counter-Claim if any within the next 30 days from the date of this Order.*
2. *The Plaintiff shall file a Reply and Defence to Counter-Claim if any within 14 days after receipt of the Defence.*
3. *There shall be discovery by list of documents within 10 days of delivery of the Reply.*
4. *There shall be inspection of documents no later than 14 days after discovery.*
5. *The parties should file and exchange their respective bundles off pleadings and documents no later than 14 days after inspection.*
6. *There shall be liberty to apply.*
7. *Trial will take place before a single judge of the High Court sitting at Lusaka.*

8. *A status conference to review compliance with the directions and to set trial dates will take place on the 8th February, 2022 at 08:30 hours.*

9. *Costs are in the cause.*

1.5 At the date eventually set down for trial on the 7th November, 2022, the Plaintiff's advocate confirmed having served the Defendant with the notice of hearing. By that date, the Defendant who was not in attendance had neither entered appearance and filed a defence nor complied with the directions at all. She further availed no reasons for her failed attendance. I therefore allowed the Plaintiff to proceed with its case in the absence of the Defendant in terms of order 35 rule 3 of the High Court rules which provides that:

"If the Plaintiff appears and the Defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may upon proof of service of notice of service of trial, proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the case and direct notice of such postponement to be given to the Defendant".

2.0 The Plaintiff's case

2.1 PW1 was Alfred Chisambi Chibwe. He testified that he is a Manager in the Plaintiff's company. He recalled that sometime in

February 2015, the Plaintiff was approached by a Mr Jason Makulu who stated that there was a person that wanted to borrow K100,000. from the Plaintiff. PW1 told Mr. Makula that the Plaintiff Company did not deal with third parties and had to transact with the proposed client directly.

2.2 Mr Makulu then drove him to a Miss Likukela's house in Lusaka's Roma residential area. She pledged her house as security for a loan that she wanted to obtain. He explained that Miss Likukela is the Defendant in the matter.

2.3 He inspected the property. He then went to the Ministry of Lands to see if it had any encumbrances and found that the property was unencumbered. On the 23rd of February, 2015, the Plaintiff executed an agreement with the Defendant to borrow K100,000 which included a facilitation fee of K35,000 that was to be considered a part of the loan amount.

2.4 The total loan obtained was thus K135,000 payable within a month. It was his evidence that the agreement clearly provided that if Defendant failed to pay within 30 days after the date of disbursement, the loan would accrue interest at 10% per week.

2.5 Further, that the agreement also stated that if the Defendant failed to pay within 1 month after the due date, the property

pledged as collateral would be sold to the Plaintiff. He added that the contract further stated that in the event of a sale to a third party, the client would pay the amount which would accrue at the time of conclusion of the sale of the property. He explained that this meant that the loan would continue to accrue interest up to the point of the sale of the security and the difference then paid to the owner or client.

2.6 He testified further that the Defendant proceeded to sign the letters of sale and an assignment in advance in terms agreed upon. She also executed the State's consent to assign. All these documents were witnessed by Mr Makulu.

2.7 He testified that the Plaintiff then disbursed the sum of K100,000 in cash to the Defendant on the same date being the 23rd February, 2015. He added that the Defendant gave the Plaintiff the title deeds of the property to keep until she had paid off the loan. It was his evidence that the title deeds are still in the Plaintiff's possession.

2.8 When the due date for settling the loan came, the Defendant did not make any payment. He spoke to her several times over the phone thereafter, reminding her about the payment. By date of

his testimony, the loan had not been settled. This was the reason Court intervention has been sought through this suit.

2.9 In running the Court through the documents relied upon by the Plaintiff, he testified that on page 1 of the Plaintiff's bundle filed on the 7th February, 2022, is a copy of the agreement between the Plaintiff and the Defendant. That the agreement shows that the Defendant surrendered the title for Sub Q of Sub 50 of farm 441a Roma, Lusaka as security for the loan. The agreement also sets out the terms he referred to.

2.10 He testified that on page 2 is the contract of sale between the Plaintiff and the Defendant which she signed whilst he signed on behalf of the Plaintiff company. The sale agreement was witnessed by Mr Jason Makulu. He added that on pages 5-8 is the assignment from the Defendant to the Plaintiff . PW1 signed on behalf of the Plaintiff. He testified further that the consent to assign was signed by the Defendant and a photocopy of the Defendant's NRC is at page 11.

2.11 He testified further that the amount indicated on page 1 as owing is K135,000. whereas the amount in the contract of sale is K200,000,. He explained that the K200,000 was arrived at taking

into account the amount which would have accrued at the time of a possible sale that included the interest component.

2.12 He testified that it was not the Plaintiff's practice to sell immediately after a default. The company typically gave a client a bit of time and would thus proceed with the sale and factor in the interest after a while. This would explain the seeming disparity between the amount in the initial agreement and the contract of sale.

2.13 It was his evidence that the Defendant signed all the documents and was very aware of the consequences of any default. That the Defendant was a Senior Police officer and had ascended to the rank of Assistant Commissioner of Police. She was eventually seconded to the United Nations. She was therefore very much aware of what she was signing for as far as the Plaintiff was concerned. He prayed that the Court grants an order for the sale of the property to enable it to recover its money.

2.14 He clarified that the Plaintiff's primary claim was for the payment of K135,000 or alternatively for the enforcement of the contract of sale as stated in the statement of claim. He also prayed for interest as agreed or at the Bank of Zambia lending rate. He stated that the Plaintiff would leave it to the Court to determine

what interest to follow. He also prayed for any other relief the Court may deem fit.

2.15 In answer to the Court's question in clarification, the witness testified that the company is a money lending business and applies simple interest. He stated that the statement of claim made reference to compounded interest but a decision had been made not to charge the Plaintiff this. That the K200,000 was therefore arrived at using simple interest.

2.16 PW2 was Jason Kasonde Makulu a businessman by calling. His evidence was that the Defendant needed some funds to borrow. He was approached by his young brother who was acquainted to the Defendant asking if he knew where money could be accessed. PW2 knowing about the Plaintiff company, took the Defendant to their offices to introduce the parties.

2.17 The Defendant stated what sum she was looking for and disclosed that she had a house which she could put up as security. The Plaintiff's representative, the Defendant and PW2 thus proceeded to see the house in Roma along Zambezi Road. They later drove back to the Plaintiff's offices where the Defendant signed some documents as the money she sought was given to her. PW2's role in this matter was therefore to simply introduce the

Defendant to the Plaintiff company. He also signed as witness for the transaction.

2.18 He recalled having sight of the title deed for the Defendant's property pledged as security and her National Registration Card. He witnessed the signing of the contract of sale and also signed it as a witness. He confirmed his signature when referred to the requisite documents in the Plaintiff's bundle of documents. Specifically, the contract of sale between the Defendant and the Plaintiff on page 2 and the assignment in favour of the Plaintiff on page 8 of the bundle.

3.0 Defendant's case

3.1 I adjourned the mater to avail the Defendant an opportunity to recall and cross-examine the Plaintiff's witnesses and to open her defence. I directed the Plaintiff's advocate to ensure that a notice of hearing was served on the Defendant and adjourned the matter to the 31st of January 2023.

3.12 On the date set for hearing, the Plaintiff's witnesses were present for cross-examination. The Defendant was not in attendance and counsel for the Plaintiff, Mr Muhanga, informed the Court that an affidavit confirming service by substituted service was filed into Court on the 30th January 2023. He further

informed the Court that the Plaintiff had exhibited evidence to show that the Defendant was also made aware of the sitting electronically.

3.13 That in her response, the Defendant categorically stated she would not attend Court. In fact, that the communication would further show that she was aware of previous dates of hearing but that she out of her own volition, chose to disregard the notices. Mr Muhanga prayed that the Defendant's case be closed and that the Court proceed to give directions for final submissions and reserve the matter for judgment.

3.14 I read through the affidavit of service and confirmed that the Defendant was not only aware of the proceedings but that she opted not to attend Court. Further, that in her usual manner on several turns evident on record, she proceeded to make unsubstantiated allegations against the Court, the Court marshal and the Plaintiff's lawyers in the matter.

3.15 I did not deem it fit to postpone the matter and in light of what I perceived to be the clear reluctance and disinterest by the Defendant to defend the matter, I granted the application to close the defence and issued directions for final submissions.

4.0 Submissions

4.1 The Plaintiff's submissions were filed into Court on the 1st March, 2023. Reference was made to the cases of **Zambia Railways Limited vs Pauline S. Mwidza1, Brian Sialumba**[1] and **Miller vs Minister of Pensions**[2] as authorities defining the burden and standard of proof in civil cases.

4.2 It was submitted that based on the evidence on record, the Plaintiff is entitled to the reliefs sought. Further, that the Plaintiff's evidence went unchallenged as the Defendant without justifiable reason failed to attend trial to defend the matter or to cross-examine the witnesses. That she further did not file any defence.

4.3 Reference was made to the case of **Industrial Finance Company Limited vs Jacques and Partners**[3] Ltd in which it was held:

"Where a party to the proceedings of this nature is given time and ample opportunity to oppose entry of Judgment, and does not do so, so as to disclose a defence whether that defence is acceptable by the Court or not, the other party is entitled to have the judgment entered in his favour".

4.4 In making this submission the Plaintiff however submitted that it was mindful of the guidance of the Court in **Khalid Muhammed vs the Attorney General**[4] that a Plaintiff cannot

automatically succeed whenever a defence has failed and that he must prove his case.

4.5 The Plaintiff submitted further that the duty of the Court is to enforce a contract in accordance with the terms the parties themselves have agreed to. That it is not its duty to impose or change the terms. Recourse was made to the case of **Jonas Amon Banda vs Dickson Machiya Tembo**[5] in which the Court held inter alia that:

"A Court will enforce a contract which, had all formalities been observed, would be binding at law and in which case it would be specifically enforced..."

4.6 As regards the issue of the 10% weekly compound interest contended to have been agreed upon by the parties, it was submitted that the Plaintiff was aware that it was trite law that compound interest pursuant to Section 11 of the Law Reforms (Miscellaneous Provisions Act) and the principle settled in **Union Bank Zambia Ltd vs Southern Province Cooperative Marketing Union Limited,**[6] is illegal.

4.7 However, that in the case of **Credit African Bank Limited in liquidation) vs John Digani Mudenda**[7] the Court held that:

"The charging of compound interest can only be sustained if there is an express agreement between the parties to the charging of compound interest or if there is evidence of consent or acquiescence to the same. Further that: a customer must be made aware of the intention of the Bank to charge an unusual rate of interest such as compound interest".

4.8 Based on the above, it was argued as clear that the law allows for the charging of compound interest provided that there is an express agreement or evidence of acquiesce to such practice by the parties themselves as evident in the present case. Further, that the client must be made aware of the intention to charge unusual interest rate. It was argued that this, as the evidence before the Court would show, was done. It was further argued that such interest is due and payable until the loan has been paid on the agreed terms as espoused in **Credit African Bank vs George K. Kalunga** [8].

4.9 Also called in aid was the case of **Colgate Palmolive (Z) Inc. vs Chuka and others**[9] in which the Supreme Court held:

"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 contract when entered into freely and voluntarily shall be enforced by the Courts of justice".

4.10 Based on the above, the Court was urged to be persuaded by the evidence on record to conclude that the Plaintiff had proved its

case on a balance of probabilities and therefore to grant the reliefs sought, costs and any other relief the Court may deem fit.

5.0 Court's consideration.

5.1 I have carefully considered the evidence on record and the only filed submissions on record by the Plaintiff. It is common cause that the Defendant did not enter appearance or file a defence in this matter. The Defendant also did not appear during trial to challenge the Plaintiff's claims.

5.2 The above notwithstanding, it is trite that the Plaintiff still bears the burden of proving his case. In *Khalid Muhammed vs Attorney General* (supra), Justice Ngulube CJ as he was then, summed up the settled principle of the law in the following terms:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence."

5.3 In **Zulu vs Avondale Housing Project**[10] Ngulube DCJ as he was then , stated the following:

"I think it is acceptable that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed as indeed in any other case where he makes any allegations, it is generally for him to prove these allegations. a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case."

5.4 The above settled, the uncontested evidence before me that I accept is that the Plaintiff and Defendant entered into an agreement by which the Plaintiff agreed to advance the Defendant the sum of K100,000. Pledged as security for the loan was the Defendant's property, stand No. Sub Q of Sub 50 of Farm No. 1441a, Roma.

5.5 The total amount disbursed to the Defendant was K100,000. that included K35,000. as a facilitation fee bringing the total loan sum to K135,000. The structure of the agreement was that in the event of default of payment, 10% interest would be charged for every week and after 30 days the Plaintiff would be at liberty to sell the property.

5.6 A contract of sale to the Plaintiff was drafted and signed by the parties in advance accompanied by an application for State's consent to assign and an assignment in the Plaintiff's favour with a view of facilitating the transfer to the Plaintiff and eventual sale of the property in the event of default by the Defendant.

5.7 I am satisfied that the documents in the Plaintiff's bundle speak to what was agreed to by the parties. I also find as not in dispute that the Defendant has defaulted in the payments. The inevitable conclusion that the Defendant is liable for payment of what she borrowed is therefore beyond dispute.

5.8 However, what I find to be the questions for my determination are firstly, whether the amount claimed as interest can attach in this case; and secondly, whether this court has the jurisdiction to order the possession and sale of property pledged as security which was a prayer in the alternative.

5.9 In considering the first of these questions hinging on the applicable interest, Counsel refers me to the requisite authorities that state that the charging of compound interest is illegal in the absence of agreement. There is no question that the weekly 10% interest charge past due date is a compounded interest. The Plaintiff's argument is that it met the requirements to fall within the acceptable exception spelt out in the cited authorities by demonstrating that the Defendant was made aware and duly consented to the charging of such interest as per evidence on record. I disagree.

5.10 The only evidence of the claimed consent was the signed agreement. There was no evidence led to show that the Defendant was engaged and made to understand that what the Plaintiff proposed to charge was an unusual interest and in fact compounded. Wording in the agreement suggesting such explanation would help confirm this or something pointing to acquiescence .

5.11 I further noted in the filed submissions, a departure from what the Plaintiff's own witness in PW1 told the Court. He told the Court that the Plaintiff had decided not to go the compounded route and would leave it to the Court's determination what the appropriate interest would be. There was not in his evidence, a sustained insistence on a prior agreement concluded with full understanding by the parties to allow compound interest.

5.12 Importantly, this was a transaction hinging on the lending of money by a company in the business of lending money as confirmed by the testimony of PW1 in answer to the court's questions in clarification.

5.13 In **Banda vs Lungu**[11] the Supreme court had occasion to comment on the application of the Money Lenders Act Cap 398 of the Laws of Zambia and observed as follows:

"The point should also perhaps be made that going by its preamble, the purpose of the Money Lenders Act is to make provision with respect to persons carrying on business as money lenders and to provide for matters incidental thereto...as regards the definition of a money lender, section 2 of the Act provides that a money lender..."includes every person whose business is that of money lending or who advertises or announces himself or holds himself out in any way as carrying out the business of money lending".

Although the use of use of the word, "includes" in the above quoted definition of a "money lender" would seem to render the definition of the term imprecise, a careful and patient examination of the section in relation to the general scheme of the Money Lenders Act, would reveal that a money lender can only be such if:

(a) His business is that of money lending or

(b) He advertises or announces or in any way holds himself out as carrying on the business or money lending".

5.14 In the matter before me, the Plaintiff by its own revelation through PW1 of being in the business of lending money, unquestionably gets caught up in the definition under (a) above. There was nothing presented by way of evidence that perhaps being a body corporate, the Plaintiff was exempt from the reach of the Act pursuant to the provisions of section 2A. The conclusion that I reach therefore, is that the Plaintiff was a money lender in terms of Section 2 of the Act. The Plaintiff's money lending

business was thus regulated by the Money Lenders Act Cap 398 of the Laws of Zambia .

5.15 Section 10 of the Act specifically states that:

"10. 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".

5.16 Section 15 goes to provide that:

"15. (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, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per centum per annum, is excessive. Interest at a rate exceeding 48 per centum to be deemed harsh and unconscionable"

5.17 Therefore. taking the above into consideration, the charging of 10% per week on the default was against section 10 and section 15 in particular that permits the charging of only up to 48% per annum. It was in that sense illegal and unenforceable. There is a presumption extended by law that charging beyond 48% is to be considered excessive and the associated transaction rendered "harsh and unconscionable".

5.18 Reference to section 14 then makes possible a court's intervention to reopen the transaction and reduce or cancel such high interest. My learned elder brother Judge Msoni J in the matter of **Eva Chimbobi vs New future Finance Company** [12] was able to make such intervention based on this provision.

5.19 In **Diego Casilli vs Access Bank (Zambia) Limited & Ors**[13] the Court of Appeal observed that:

"Unduly harsh interest terms may be unconscionable and unenforceable. The doctrine of unconscionability is one of the legal instruments used by the Courts to "police" agreements and protect against unfairness. In order to avoid the incorporation and legal enforcement of one sided oppressive or unfair contracts or clauses. A person from time to time may be in a desperate situation and therefore agree to a loan with an exorbitant interest rate. In such circumstances, the law forbids lenders from acting in a predatory fashion and restricts the rate of interest that may be charged".

5.20 The Court went on to conclude that:

"Generally, where an interest rate was negotiated with undue influence, such as where the lender prays upon the vulnerability of the borrower or where an interest rate is beyond the statutory limit and is explicitly unlawful or is so disproportionate as to afford a sense of reasonableness within the market place for similar lending rights, that interest may be set aside or substituted... From the afore stated, it is clear that Courts are open to considering a loan as unconscionable if the terms are so unfair that it would wrong to uphold them...".

5.21 In the case of **Neighbours City Estates Limited vs Mark Mushili**[14], The Supreme Court concluded on the facts of that case that the interest that was charged by the lender that was adjudged to be a money lender within the meaning placed by the Money lenders Act was higher than the 48% per annum permissible

under the Act and in fact even higher than what was being charged by financial lending institutions.

5.22 The Court went on to observe that:

"It seems obvious to us that the Respondent took advantage of the Appellants desperation to charge excessive interest which we cannot allow as this would be against public policy. It is our duty to protect desperate members of the public who end up being exploited by loan sharks. We must bear in mind in this case, that the lender was an individual and not a financial institution and certainly we agree that although he is entitled to interest, this must be reasonable".

5.23 Based on the above considerations therefore and having earlier found no dispute of the subsistence of a loan agreement, I enter judgment for the Plaintiff in the sum of K135,000.00 being the loan sum the parties on their own accord agreed to. Further, having found the applicable contract interest illegal and unconscionable and on the strength of section 15 of the Money Lenders Act, I award the Plaintiff interest at 48% per annum from the date the debt became due being the 23rd of March 2015 to the date of Judgment; and thereafter pursuant to section 2 the Judgment Act Cap 31 of the Laws of Zambia, at Commercial bank lending rate as determined by Bank of Zambia until full payment.

5.24 The final question for my determination is whether I can allow the enforcement of the security being the possession and sale of the house pledged as security that was presented as a prayer in the alternative.

5.25 As a general rule, a prayer in the alternative can only be considered if the main or primary prayer has failed. In **Sun Country Limited & 2 others vs Rodger Redin Siavory & Another**[15] the Supreme court stated:

"we wish to indicate that in cases such as this one where parties are seeking a main relief and some alternative reliefs, the court is not bound to consider the alternative reliefs. This is especially in cases where the court has granted the main relief. In such cases it ought to look no further. The rationale behind alternative reliefs is that if the main relief fails, the court can consider grating the alternative reliefs:

5.26 I however feel inclined to comment on this prayer as I believe a jurisdictional question nonetheless, arises.

5.27 It is common cause that a house was pledged as security and title deeds were deposited with the Plaintiff. This by definition qualified created an equitable mortgage, Order 30 rule 14 of the High court Rules Cap 27 of the Laws of Zambia prescribes the manner of commencement of a legal and or equitable mortgage action and enforcement of attendant rights and anticipated or for

possession and or sale in the event of breach. The rule is reproduced below for ease of reference.

"14. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee."

5.28 This action was commenced by writ of summons. The claim in the alternative relating to the enforcement of the security is therefore unattainable and ought to have been commenced by originating summons. Authorities abound that the mode of commencement is determined by the statute and not necessarily the relief sought and which in this case, the law specifically states should have been by originating summons.

5.29 In **J Car Holdings v Development Bank of Zambia**[16] the court held that:

"It is clear from the Chikuta and New Plast Industries Case that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter...."

5.30 I invariably conclude that this Court has no jurisdiction to make any pronouncement on the enforcement of the security. I proceeded to entertain this action solely on the premise that the main claim sought was payment of the money owed and not the enforcement of the security to satisfy the debt presented as a prayer in the alternative.

5.31 As the Plaintiff substantively succeeds in the main prayer I award it costs to be taxed in default of agreement.

5.32 Leave to appeal is granted.

Dated at Lusaka this.....30th.....day of .....October.....2025

HON. JUSTICE M.D BOWA