

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

2020/HP/0783

BETWEEN:



PHILLIP BANDA

PLAINTIFF

AND

ALFRED CHANDA

1ST DEFENDANT

ROAD TRANSPORT AND SAFETY AGENCY

2ND DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MESSRS MUYATWA LEGAL PRACTITIONERS

FOR THE 1ST DEFENDANT: MESSRS SOLLY PATEL HAMIR & LAWRENCE

RULING

Cases Referred To:

1. *R G Carter Ltd v Clarke* [1990] 2 All ER 209
2. *Philip Mutantika and Another v Kenneth Chipungu* SCZ Judgment No.13 of 2014
3. *African Banking Corporation Zambia v Mubende Country Lodge Limited* Appeal No. 116 of 2016
4. *Law Association of Zambia v The President of the Republic of Zambia and Others* 13/CCZ/2019
5. *Hakainde Hichilema and Others v The Government of the Republic of Zambia* Appeal No. 28 of 2017
6. *Zambia Revenue Authority v Hitech Trading Company Limited* (2000) Z.R.17
7. *Sylvester Musondo Shipolo v Shadreck Maipamber* Appeal No. 01 of 2016

8. *Saizi Adoni Makani v Bomach Finance Limited Appeal No. 92 of 2016*

This is the plaintiff's application to dispose matter on a point of law made pursuant to Order 14A of the Rules of the Supreme Court of England 1965 (White Book) 1999 edition. The questions for the Court's determination were drafted as follows:

- 1. Whether an unwritten contract between a borrower and a money lender for the repayment by a borrower of money lent to him by a money lender after the commencement of the Money Lenders Act can be enforced;**
 - a. Should the same question be answered that an unwritten contract between a borrower and a money lender for the repayment by a borrower of money lent to him by a money lender after the commencement of the Money Lenders Act cannot be enforced, then the Court should order that the oral contract alleged to have been entered into between the Plaintiff and the 1st Defendant was and is illegal and unenforceable for illegality and therefore that the purported consequential collateral contract for the motor vehicle was also illegal for being anchored on an illegal contract and dismiss the counter-claim; and**
 - b. That if the said question be answered that an unwritten contract between a borrower and a money lender for the repayment by a borrower of money lent to him by a money lender after the commencement of the Money Lenders Act can be enforced then the Court should proceed to determine the 2nd and 3rd question of construction and law herein below stated respectively.**
- 2. The following question of construction may be determined, namely, whether, the contract alleged to be for sale of the motor vehicle BMW X3 registration number BAP 6301 ZM (the motor vehicle) entered into between the Plaintiff and the Defendant as averred by the 1st Defendant in paragraphs 5 and 6 of his Defence in the manner pleaded and properly construed, was a contract**

of sale or it was a collateral contract for repayment of the loan alleged to have orally been contracted to be paid back on the 5th of July, 2020.

- a. Should the said questions be answered that the contract of sale of the motor vehicle between the Plaintiff and the Defendant as averred by the 1st Defendant in paragraphs 5 and 6 of his defence in the manner pleaded and properly construed, was a collateral contract for repayment of the loan orally contracted to be paid back on the 5th of July, 2020, then an order be made that the seizure of the subject motor vehicle was illegal at law and ought to be reversed.
 - b. Should the answer to the said question be that it was a contract of sale of the motor vehicle between the Plaintiff and the Defendant as averred by the 1st Defendant in paragraphs 5 and 6 of the 1st Defendant's defence in the manner pleaded and properly construed, was indeed the contract of sale which contract is independent and not collateral to the repayment of the loan orally contracted to be paid back on the 5th of July, 2020, then judgment be entered in favour of the 1st Defendant.
3. The following question of law may be determined, namely, whether a money lender is legally permitted to charge interest at 30% per month on the monies lent out to borrowers.
- a. Should the answer to the said question be in the negative then the Court should order that the 1st Defendant's charging interest at 30% on the money he lent to the Plaintiff was illegal and unenforceable at law.
 - b. Should the answer to the said question be in the affirmative then the Court should order that the 1st Defendant's charging of interest at 30% on the money he lent to the Plaintiff was illegal and enforceable at law.

The said application was supported by an affidavit and skeleton arguments dated 8th September, 2020. The affidavit was deposed

to by Phillip Banda, the Plaintiff herein. He deposed that the 1st defendant has been and is a duly registered money lender since 2013, under Cause number 2013/CRMP/ML/69 as shown by the Money Lender's Certificate exhibited herein.

It was also deposed that on 5th June, 2020, the 1st defendant availed the Plaintiff a loan in the sum of K50,000.00 at an interest of 30% per month pursuant to an oral contract which was to be repaid on 5th July, 2020. He went on to depose that as security for repayment of the loan, the Plaintiff pledged his white BMW X3 registration number BAP 6301 ZM.

The Plaintiff deposed that he was unable to settle the loan on 5th July, 2020, as agreed and that on 9th July, 2020, he managed to deposit a sum of K65,000.00 into the 1st defendant's FNB account which deposit the 1st defendant acknowledged in paragraph 18 of the 1st defendant's defence.

The Plaintiff deposed that premised on the foregoing, he has been advised by his advocates and believes it to be true that in the circumstances of this case, he can apply to Court to have the matter disposed of on a point of law.

On the other hand, the 1st defendant filed an affidavit in opposition dated 14th September, 2020, in which he deposed that he filed a defence and counter-claim to the Plaintiff's statement of claim and that the Plaintiff did not file a reply to the defence and a defence to the counter-claim. That the Plaintiff took out the application herein on 8th September, 2020.

It was deposed that the 1st defendant herein first obtained a Money Lenders Certificate under the name of Alfred Winstone Chanda T/A AWC Financial Consultancy in 2013. That the 1st defendant subsequently applied for renewal and renewed the Money Lenders Certificate for the years 2014, 2015, 2016, 2017, 2018 and 2019 respectively. The 1st defendant deposed that he did not apply for the renewal and did not renew his Money lender's Certificate for the year 2020, and that the Plaintiff has not exhibited any evidence to the contrary.

The 1st defendant also deposed that he availed the Plaintiff the sum of K50,000.00 at an interest of 30% pursuant to a verbal contract which was to be repaid on 5th July, 2020. That the 1st defendant entered into the verbal contract for the subject money with the Plaintiff on 5th June, 2020, in his personal name and not under

his business name Alfred Winstone Chanda T/A AWC FINANCIAL CONSULTANCY.

The 1st defendant deposed that the verbal contract for the money he availed to the Plaintiff was an ordinary contract which is valid and enforceable. Further that the Plaintiff had wilfully and voluntarily entered into the verbal contract, aforesaid, as evidenced by the Whatsapp correspondences marked "PB2 to PB5" exhibited in the Plaintiff's affidavit in support of his application for an interim injunction exhibited and marked "AWC1" herein.

The 1st defendant deposed further that on 5th June, 2020, the 1st defendant and Plaintiff executed a written agreement for the sale to the 1st defendant of the motor vehicle in question on the understanding that the said vehicle would automatically be owned by the 1st defendant upon the Plaintiff's refusal or failure to repay the repayment amount on 5th July, 2020, as shown by exhibit marked "AWC2" and that this agreement was also executed in the 1st defendant's personal name. That the agreements entered into under the 1st defendant's business pursuant to a validly subsisting Money Lender's certificate are evidenced in writing under the letter head of his business and are embossed with the stamp of the said business as shown by exhibit marked "AWC5". It was deposed that

the Plaintiff wilfully and voluntarily executed the written agreement as evidenced by the Whatsapp correspondences marked "PB6 to PB7" exhibited in the Plaintiff's affidavit in support of his application for an interim injunction exhibited and marked "AWC3" herein. That the Plaintiff also wilfully and voluntarily produced and delivered to the 1st defendant copy of his (the Plaintiff's) NRC, original white book and certificate of change of ownership relating to the motor vehicle in issue although the Plaintiff maintained possession of the same.

The 1st defendant deposed further that the Plaintiff expressly agreed in the written agreement marked "AWC2" that he would have absolutely no claim over the motor vehicle upon the sale of the said motor vehicle to him. The 1st defendant deposed that the Plaintiff only attempted to repay the money after the contractually agreed date of 5th July, 2020. That the whatsapp correspondence marked "AWC3" shows that the Plaintiff was willing to pay an additional amount of K20,000.00 on the amount of K65,000.00 just to have the car back. That the 1st defendant subsequently refunded the said monies on 9th July, 2020, to the Plaintiff. The 1st defendant deposed that the questions sought by the Plaintiff for

the determination of this Court are not suitable for determination without a full trial.

The parties herein proceeded by way of skeleton arguments which I have taken note of.

Counsel for the Plaintiff filed skeleton arguments on behalf of the Plaintiff on 17th September, 2020. Counsel for the Plaintiff submitted therein that the 1st defendant fortified the fact that he was a money lender by exhibiting various loan agreements that he has been signing with various clients in his capacity as a certified money lender. It was Counsel's contention that it was impossible to conclude that the 1st defendant, who by 4th January, 2019, had a money lending certificate could again file an affidavit in support of the application for renewal of the certificate barely 10 days from the date the same was renewed. Furthermore, that, that notwithstanding, the 1st defendant's business is that of money lending and that the 1st defendant announces himself or holds himself out in a way as carrying on that business within the meaning of Section 2 of the Money Lenders Act Chapter 398 of the Laws of Zambia. Counsel submitted that the 1st defendant is therefore an established money lender and is therefore governed by the Money Lender's Act.

Counsel also submitted that there are no triable issues in this case because all the facts that the Court would need to make its decision are before it and undisputed. Counsel for the Plaintiff relied on the case of **R G Carter Ltd v Clarke [1990] 2 All ER 209¹** and stated that the Court therein held that:

“As will be seen, I said: ‘It is quite different if you are dealing with a triable issue which arises as a matter of law.’ This aspect was considered, and the same conclusion reached by this court.... I would not resile from this view, even if I could, but it is as well to bear in mind the reason for this exception. It is this. If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far better if he then and there decides it himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision....”

Counsel submitted that premised on the foregoing, it was clear that where there are no issues of fact or indeed if the facts around the case before Court are not in dispute, then it is pointless to allow the matter to go to trial. Furthermore, that in this jurisdiction, trial is only designed to help the Court establish the facts in dispute. That it is their submission that this was an appropriate case for the Court to make its decision premised on the determination of the questions before it.

In relation to the question whether the 1st defendant's oral contract was executed under his money lenders business or in his personal capacity, Counsel contended that the 1st defendant is attempting to persuade the Court that he is two in one. That the 1st defendant is purporting to have two modes under which he lends money to his clients. Counsel made reference to the case of **Philip Mutantika and Another v Kenneth Chipungu SCZ Judgment No.13 of 2014²**. Counsel went on to submit that the 1st defendant should not be allowed to blow hot and cold with reference to his status as to whether he can be a money lender and not a money lender in the same breath. Counsel prayed that the Court finds that the 1st defendant is a money lender and that the Money Lenders Act fully applies to him. Counsel sought the indulgence of the Court to determine the questions of law and construction and upon such determination dispose of the whole matter before it with costs to the Plaintiff.

On the other hand, Counsel for the 1st defendant filed his skeleton arguments on 14th September, 2020. Counsel contended therein that with regards the first issue raised, the Plaintiff's application insofar as it sought to have the 1st defendant's counter-claim dismissed was not properly before Court for failing to meet a

cardinal requirement of Order 14A pursuant to which the Plaintiff's application was made. It was submitted that one who moves the Court under the provisions of Order 14A must fulfil the requirement of filing into Court a notice of intention to defend and Counsel relied on the case of **African Banking Corporation Zambia v Mubende Country Lodge Limited Appeal No. 116 of 2016**³.

Counsel contended that the 1st defendant is justified in having raised the first opposition in response to the Plaintiff's application and not having taken out a separate preliminary application challenging the propriety of the Plaintiff's application as guided by the Constitutional Court in the case of **Law Association of Zambia v The President of the Republic of Zambia and Others 13/CCZ/2019**⁴.

Counsel further contended that the Plaintiff did not file a reply to the 1st defendant's defence and counter-claim. Further that the Plaintiff cannot implore this Court to invoke the provisions of Order III Rule 2 of the HCR because this Court does not have discretion to grant an order under Order III Rule 2 which has, as sought in casu, the effect of finally determining the entire action

as per the case of **Hakainde Hichilema and Others v The Government of the Republic of Zambia Appeal No. 28 of 2017⁵**.

That the Plaintiff's application insofar as it is intended to have the 1st defendant's counter-claim dismissed, is incompetent for failing to comply with the provision of the law pursuant to which the application is made. Counsel urged the Court to decline to entertain and determine the Plaintiff's entire application.

In the alternative, Counsel submitted that the 1st defendant was not a money lender on 5th June, 2020, when he entered into the verbal contract with the Plaintiff by virtue of which the mandatory provisions of the Money Lenders Act did not apply to the said contract. It was Counsel's argument that the affidavit of the renewal of the Money Lenders Certificate purported in paragraph 5 of the Affidavit in Support to have been filed on 15th January, 2020, exhibited as "PB1C" in the Plaintiff's affidavit in support is the application that the 1st defendant made for the renewal of the Money Lenders Certificate for the year 2019, and not 2020. That a perusal of the jurat and the certificate of exhibits will reveal that the same was sworn or filed on 14th January, 2019 and that the stamps embossed on the said affidavit are suspiciously different.

It was contended that the contract between the 1st defendant and the Plaintiff was merely an ordinary contract by virtue of which the provisions of the Money Lenders Act do not apply.

In relation to the second issue raised, Counsel for the 1st defendant submitted that their understanding of the same is whether the contract of sale for the motor vehicle executed between the 1st defendant and the Plaintiff was a collateral contract for the repayment of the loan procured under the verbal contract. It was Counsel's contention that after perusing the arguments advanced by the Plaintiff's Counsel in their list of authorities and skeleton arguments, the same do not appear to assist this Court in determining the second issue raised. That as such, they should be discarded. Further that the said arguments introduce evidence that is not traceable to the Plaintiff's affidavit in support and that the matters not clearly pleaded in the statement of claim and defence. Counsel submitted that the said evidence thus constitutes evidence from the bar which is frowned upon by all courts. Counsel relied on the case of **Zambia Revenue Authority v Hitech Trading Company Limited (2000) Z.R.17⁶** where the Court held that:

“It is trite law that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence.”

Counsel went further to submit that a cursory reading of the contract marked “AWC2” unambiguously revealed that the contract was not a collateral contract and that extrinsic evidence should not be admitted to modify the state of the contract and bring it within the purview of a collateral contract. Counsel submitted that the contract for the sale of the motor vehicle was not a collateral contract which holding would be consistent with the guidance provided by the Supreme Court in the case of **Sylvester Musondo Shipolo v Shadreck Maipamber Appeal No. 01 of 2016⁷**.

Alternatively, that even if the Court found that the sale of the motor vehicle was collateral to the contract for the subject money, Counsel has proved under the first question that the latter contract was an ordinary contract which the Plaintiff wilfully and voluntarily executed and therefore enforceable.

With regards the third issue raised, Counsel for the 1st defendant submitted that the determination of the question in favour of the plaintiff is unlikely to topple the entire action herein as required under Order 14A. That the third question fails to meet the

condition precedent for inviting the Court to entertain it by virtue of which Counsel implored this Court to dismiss it.

Further that the Plaintiff wilfully and voluntarily entered into the contract for the subject money. Counsel relied on the case of **Saizi Adoni Makani v Bomach Finance Limited Appeal No. 92 of 2016**⁸ where the Court held that:

“There is no doubt, in this case, that the rate of 18% per month compounded was rather unusual. However, that unusual interest rate was contained in the finance contract which the appellant expressly signed to signify her acceptance of the terms therein. There was also evidence that the appellant had previously obtained loans from the respondent on the same unusual interest rates and had paid them back. Therefore, the appellant cannot now be heard to argue that the rate of interest was unconscionable.”

Counsel also argued that it has been established through the whatsapp correspondence marked “AWC3” that upon defaulting, the Plaintiff pleaded with the 1st defendant to have the motor vehicle returned and expressed his willingness to pay an additional amount of K20,000.00 on the amount of K65,000.00. That the Plaintiff cannot surely be heard to say that the 30% was illegal. Counsel submitted that the interest rate was not illegal to the extent that the Plaintiff agreed to the said interest and implored the Court to uphold the legality of the same.

Counsel concluded by contending that it was the attitude of the Court to ensure that a matter is heard on its merits during trial as opposed to determining the same based on evidence. Counsel prayed that the Plaintiff's application be dismissed with costs to be paid in favour of the 1st defendant.

I have carefully considered the affidavit evidence as well as the skeleton arguments and pleadings on record. This application has been made pursuant to Order 14A of the RSC 1999 edition White Book. Order 14A Rules 1 and 2 of the White Book provides as follows:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”

Order 14A allows a party, whether a Plaintiff or a Defendant, to make an application for the determination of any question of law or construction of a document. However, the Court can only determine such question where it appears to the Court that such

a question is suitable for determination without a full trial of the action and where the said determination will finally determine the entire cause or matter. In casu, the Plaintiff has brought this application.

I will first tackle Counsel for the 1st defendant's submission that with regards the first issue raised, the Plaintiff's application, in so far as it sought to have the 1st defendant's counter-claim dismissed, was not properly before Court for failing to meet a cardinal requirement of Order 14A. Counsel argued that one who moves the Court under Order 14A must fulfil the requirement of filing into court a notice of intention to defend. Counsel concluded this argument by urging the Court to decline to entertain and determine the Plaintiff's entire application or the first question raised.

In the Plaintiff's skeleton arguments dated 17th September, 2020, Counsel for the Plaintiff herein contended that the requirement to give notice to defend applies to a defendant as opposed to a plaintiff. Counsel stated that there is no requirement for a plaintiff to file a memorandum of appearance which in essence is a notice of intention to defend before filing a defence to counter-claim.

Counsel made reference to Order 1 Rule 4 of the RSC, White Book which defines notice of intention to defend as follows:

“Means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates.”

Counsel went on to state that paragraph 3 of the same Rule provides that:

“This definition describes an acknowledgment of service which does, as contrasted with one which does not, state an intention to contest the proceedings. Throughout the RSC frequent references are made to “notice of intention to defend” and under this definition, such a reference means that the defendant has lodged an acknowledgment of service and stated his intention to contest the proceedings.”

Counsel went further to rely on Section 2 of the High Court Act, Chapter 27 of the Laws of Zambia and defined defendant as follows:

“Defendant includes every person, other than a plaintiff, served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings in a civil cause, and also every person charged under any process of the Court with any crime or offence.”

It was Counsel’s submission that the pre-requisite of filing a notice of intention to defend in order to employ Order 14A proceedings only applies to a defendant. Counsel concluded that the proceedings are properly before the Court.

I note that the Constitutional Court gave guidance on the practice of raising preliminary issues on another preliminary issue in the case of Law Association of Zambia v The President of Zambia and Others 13/CCZ/2019. The Court guided as follows:

“Litigants are therefore encouraged to incorporate their preliminary issues in their opposing affidavit and skeleton arguments so as to minimise the possibility of multiple hearings.”

Instead of raising another preliminary issue herein, Counsel for the 1st defendant has instead incorporated this issue in their arguments.

Order 14A/2/3 provides the requirements for employing the procedure under Order 14A. It provides as follows:

“The requirements for employing the procedure under this Order are the following:

(a)the defendant must have given notice of intention to defend;

(b)the question of law or construction is suitable for determination without a full trial of the action;

(c)such determination will be final as to the entire cause or matter or any claim or issue therein; and

(d)the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.”

The authority above requires the defendant to give notice of intention to defend. In this case, the 1st defendant filed a defence as well as a counter-claim. From what I can decipher, Counsel for

the 1st defendant seems to imply that the Plaintiff is a defendant to the counter-claim and should have entered an intention to defend the said counter-claim for him to rely on Order 14A herein.

A perusal of the record shows that this application was filed on 8th September, 2020, while the Plaintiff's reply and defence to counter-claim was filed on 17th September, 2020. This means at the time the Plaintiff was making this application, he had not filed in a defence to the counter-claim. The question I should answer is therefore whether or not the Plaintiff herein can rely on Order 14A in the circumstances and I am of the considered view that he cannot for the reasons given by the learned Counsel for the plaintiff or Respondent herein.

The first issue raised by the Plaintiff is whether an unwritten contract between a borrower and a money lender for the repayment of money lent to him by a money lender after the commencement of the Money Lenders Act can be enforced and that if it cannot be enforced, then the Court should order that the oral contract alleged to have been entered into between the Plaintiff and the 1st Defendant was and is illegal and unenforceable for illegality and therefore that the purported consequential collateral contract for

the motor vehicle was also illegal for being anchored on an illegal contract and dismiss the counter-claim.

It is clear from the above that the relief sought by the Plaintiff in the first issue raised, includes the Court dismissing the 1st defendant's counter-claim. It is also clear that once the 1st defendant entered a counter-claim, the Plaintiff herein was to file a defence to the said counter-claim which he eventually did.

As cited by Counsel for the Plaintiff, "notice of intention to defend" means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates.

Furthermore, I am of the considered view that questions of law or construction raised are not suitable for determination without a full trial of the action, because the contract being relied upon is said to have been an oral contract by both parties. In addition, the plaintiff has argued that the motor vehicle in question was pledged as collateral for the loan while the 1st defendant has argued that the letter of sale of the motor vehicle was executed on the understanding that the said motor vehicle would automatically become the 1st defendant's upon the Plaintiff's refusal or failure to

repay the monies by 5th July, 2020. I am of the considered view that the issues raised are contentious and are suitable for determination at the trial of the action.

For the reasons stated, this application fails and the matter shall proceed to trial. I award costs to the plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the^{22nd} day of February, 2023

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ELITA PHIRI MWIKISA
JUDGE