WANG LI PING
versus
BARRY DEACON

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 19 September 2016, 5 October 2016 & 9 November 2016,
17 & 23 January 2017 & 1 March 2017

Civil Trial

J Ndomene, for the plaintiff
F Girach, for the defendant

DUBE J: Section 14 of the Money Lending and Interest Rates Act, accords protection to borrowers of money in instances where the interest rate agreed to by a lender and borrower exceeds the prescribed rate of interest. It prescribes criminal sanctions for lenders who fail to comply with its provisions. A lender who fails at the time of the loan, to take from the borrower a document signed by such borrower, setting out particulars of all the essential parts of the transaction, and to deliver to such borrower a duplicate or true copy of such document signed by the borrower, fails to comply with the mandatory provisions of the section. A lender who fails to comply with the provisions of s14 of the Money Lending and Interest Rates Act and shall be entitled to claim interest at no more than the prescribed rate of interest.

This matter proceeded as a stated case whose facts are not in dispute and are briefly outlined as follows. The applicant is a businessman and so is the defendant. The plaintiff is not a registered money lender in terms of the Money Lending and Rates of Interest Act [*Chapter 14:14*], [hereinafter referred to as the Act.] On various occasions during the period October 2010 to July 2011, the plaintiff loaned and advanced to the defendant various sums of money. The agreement of loan was not reduced to writing. It was a term of each advance of money that interest would accrue at the rate of 4% per month on the capital sum. Various repayments of the money advanced have been made. The plaintiff claims payment of a balance outstanding of $300 000-00 and maintains that he is entitled to interest the rate of 4% per month.

It is the defendant's case that the plaintiff is not entitled to such an interest rate and that his entitlement to interest is governed by the provisions of the Moneylending and Rates of Interest Act , [*Chapter 14:14*], hereinafter referred to as the Act and the Money Lending and Rates of Interest Regulations S.I 53 of 1985. The defendant submitted that the claim to interest at the rate of 4% per month is bad at law. The parties requested the court to determine whether the interest rate charged is legal. The court was asked to have regard to annexure "A'' to the amended stated case, a document signed by the defendant in which the defendant acknowledges borrowing money from the plaintiff. The parties were not in agreement regarding the status of the document. The plaintiff contends that the document constitutes an agreement between the parties whilst the defendant contends that it is a document forwarded by him to the plaintiff well after the monies were advanced and does not constitute the agreement of loan. The parties agreed that the question of the interest rate applicable is capable of being determined on the basis of the questioned document produced without the need to call oral evidence. The court has been asked to determine a *point in limine* related to the interest rate applicable to the loan advanced to the defendant .The parties agreed that the determination by the court of the issue regarding the interest rate applicable would have the effect of disposing of the matter. The parties will resolve the issue of quantum on their own.

The following issue has not been agreed on,

> "In circumstances where the lender is not a registered money lender for the purposes of the Act, and where he has entered into an oral agreement for the advance of money to a borrower, is the lender:
>
> a) Legally entitled to charge interest at the rate of 4%
> b) If not, what rate of interest is he entitled to claim?"

The plaintiff submitted as follows. He is entitled to charge interest at the rate agreed to. There is a document signed by the borrower governing the transaction. He contended that whether the document is described as an agreement, acknowledgement of debt [AOD] or concession is immaterial. What is important is that there is a document governing the transaction. Section 14 of the Act which requires a borrower to sign a document outlining the essential parts of the transaction does not state that the agreement or AOD ought to be entered into at the inception of the transaction. Reference to the borrower signing the document ''at the time of the loan'' in the provision, refers to him signing it at any time during the course of the loan. There is nothing wrong with parties to a contract having a document concluded

sometime after the money has already been advanced. The document and its contents remain binding and are not required to be entered into at the inception of the transaction.

The defendant submitted that the parties entered into an oral agreement and the agreement was not subsequently reduced to writing. The document presented was signed by the defendant well after the loan agreement was entered into. It is not an agreement. The defendant further submitted that the words 'at the time of the loan 'as used in the provision refers to the document being signed at the time the loan is advanced and not at any time during the currency of the loan. He contended that the document signed by the defendant is not the document envisaged by s14 of the Act.

The Act defines a "money lender" as,

> "any person who carries on business of money lending or who advertises or announces himself or holds himself out in any way as carrying on such business, ….."

A lender is defined as,

> "any person making a loan of money, the cessionary of any right arising under any contract of loan and the holder of any instrument of debt and includes a money lender''

The difference between a 'moneylender' and a 'lender' is that the moneylender is involved in moneylending as a business whilst the lender is just any individual who makes a loan of money, a cessionary arising under any contract of a loan of money and the holder of an instrument of debt. The word 'lender' includes a moneylender and any reference to a lender in the act includes a moneylender.

. The plaintiff is just an ordinary business person. He does not carry on business as a moneylender. The plaintiff does not have a history of moneylending and is not a moneylender as envisaged by the definition section of the Act. The facts of this case involve lending of money by a lender. This transaction amounts to a commercial transaction where monies were advanced and loaned to the defendant. This transaction is exempted from the purview of the Act by s 20 (3) of the Act. The section provides as follows,

> "20 Exempted transactions
> 1. …………
> 2. …………
> 3. Nothing in this Act contained, other than section 12, shall apply to or in respect of any commercial transaction to which a money lender is not a party."

Section 4 of the Prescribed Rates of Interest Act, [*Chapter 8:10*] provides for prescribed rates of interest and reads as follows:

> "If a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.''

Section 4 (2) of the Moneylending and Rates of Interest Regulations, S.I 53/85 sets the rate of interest at 10%. The prescribed rate of interest is applicable where the rate of interest applicable to a debt is not governed by an agreement, trade custom or in any other manner. Section 8 stipulates maximum rates of interest to be charged by lenders. It reads as follows

> "8. **Maximum rates of interest**
>
> (1) No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest.''

The section prohibits charging by lenders of interest exceeding the prescribed rate. There are exceptions to this rule which are provided for in section 14 of the Act. Section 14 (1). It stipulates as follows:

> "14 **Lender's obligations when interest over prescribed rate**
> (1) Whenever a loan of money is made at a rate of interest exceeding the prescribed rate of interest, and the obligation of the debtor is not evidenced by a bond or other instrument registered in the Deeds Registry, the lender shall at the time of the loan take from the borrower a document signed by such borrower, setting out particulars of all the essential parts of the transaction, and shall deliver to such borrower a duplicate or true copy of such document signed by the borrower.
> (2) A lender who contravenes subsection (1)
> (a) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment; and
> (b) shall not recover upon the contract interest at a rate that exceeds the prescribed rate of interest.
> [Subsection substituted by section 4 of Act 22 of 2001]"

Section 14 provides for commercial lending. The section allows a lender, who is not a moneylender, in a loan agreement to charge interest rates exceeding the prescribed rate. This is permissible in limited situations. Where money is loaned at a rate exceeding the prescribed rate of interest, and the obligation of the debtor is not evidenced by a bond or other instrument registered in the Deeds Registry, like a mortgage bond or a cession, the lender is required at the time of the loan to take from the borrower a document signed by the borrower setting out all the essential parts of the transaction and shall deliver to the borrower a duplicate copy of such document. The document must be signed by the borrower. The

document envisaged could be in the form of an agreement of loan or an acknowledgement of debt, setting out all the essential parts of the transactions. The document could be signed by the debtor alone as in an AOD. Where a written agreement of loan is entered into at the time of the loan, it would be expected to have signatures of both parties. In an a case where a loan of money is advanced at a rate of interest exceeding the prescribed rate of interest, the obligation of the borrower is required to be evidenced by a bond or other instrument registered in the Deeds Registry. Where no such arrangement exists, the borrower must sign a document setting out the particulars of all the essential parts of the transaction.

The document envisaged under section 14 must be made ''at the time of the loan'' The interpretation to be given to these words, is measured by the specific language of the statute. The words "at the time of the loan'' must be given their ordinary meaning. The meaning of the words is unambiguous. In its plain and clear meaning, the words, "at the time of the loan'' mean at the time that the loan was advanced or when the agreement of loan was entered into. The statutory provision does not provide that the document should be signed by the borrower during the currency of the loan or at any time after the loan. This language was chosen for a reason. The legislature intended that the document signed by the borrower be taken at the time of the loan to ensure that there is agreement over all aspects of the loan agreement. The legislature requires that the document be signed at the time of the loan for a purpose. The legislature intended that a person being charged interest exceeding the prescribed rate be aware of such fact at the time of the loan and should explicitly acquiesce to the high interest rate and the document envisaged serves as proof of such assent. The provision commands that document shall be signed at the time of the loan and specify the essentials of the agreement. The legislature unambiguously intended that the person borrowing money from a lender be aware of the interest rate charged where it exceeds the prescribed rate and assent to it. The mischief sought to be addressed by this provision is to control rates of interest charged by lenders and to accord protection to borrowers of money. The provision does not state that the document may be signed during the course of the loan. The borrower must acknowledge and confirm the interest rate agreed to at the time that the money is advanced, thus at the outset. I am unable to agree with the plaintiff's position that the words "at the time of the loan'' in the provision mean that the document may be completed and signed by the borrower at any time during the currency of the loan and any time after the advancement of the loan. A document confirming a loan, signed by a borrower three years after the agreement of sale has been entered into and well after the advancement of the loan is not signed ''at the time of

the loan.'' Any lender who wishes to lend money and agree with a borrower over an interest rate which is in excess of the prescribed rate is expected to comply with the procedural requirements of s14 (1). A borrower who agrees to a rate of interest higher than the prescribed rate of interest and signs a document envisaged by s14 at the time of the loan, cannot be protected by the law when he seeks to resile from an agreement to pay interest which is above the prescribed rate.

The document in issue is worded as follows;

"Declaration by B.A Deacon

"Debt owed to Mr Wang Li Ping by Barry Deacon.
Up to 28June 2011, US$ 150 000-00 was borrowed, and up and until that time interest was covered. From 28 June 2011 as stipulated, the capital was US$150 000- 00. No interest was paid until 9 march 2012 when the capital and interest had grown to us $234,500-00. On 9 March 2012, interest of us$44500 was paid, reducing the amount owed to us $190 000-00.

Summary
As of 9th March 2012, US$190 000-00 is owed to Mr Wang Li Ping .I would appreciate a serious review of the interest rate up to this point, it was 4% per month.

We are effectively 3 years down the line.

Signed xxxxxxx Witnesses: -------------------

B. A Deacon -------------------."

The stated case states that the agreement of loan is an oral agreement and was not reduced to writing. It is common cause that there is no bond or other instrument registered in the Deeds Registry. The only document which is available is the document which is subject of this dispute and was signed by the borrower alone. It was signed well after the loan was advanced. The monies which are subject of this dispute were advanced during the period running from October 2010 to July 2011.The document is not dated. The document does record that the parties are effectively 3 years down the line, from when it was drafted. This shows that it was compiled well after advancement of the monies. It constitutes a declaration by the defendant that it borrowed money from the plaintiff and outlines the terms of the loan agreement. It is not the agreement of loan. It clearly does not constitute an agreement which is the basis of this loan advancement. The document falls short of the requirements of s14 because it was not signed by the borrower at the time the monies were advanced. The

annexure does not serve the purpose which it is required to serve and as envisaged by s14(1), which is to confirm the loan advancement and the interest rate agreed to. In that document, the borrower actually takes issue with the interest rate instead of confirming it.

The effects of a failure to comply with a direct statutory prohibition were dealt with in *Funding Initiatives International (Pvt) Ltd* v *Mabaudi* HH 20/2007 where PATEL J stated as follows;

> "The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act, particularly where it is visited with a criminal sanction…no doubt that provisions cannot be waived by agreement and that any contractual stipulation to the contrary must be treated as being null and *void ab initio*. Moreover, as is made clear in section 9, any interest charged or agreed in excess of the prescribed maximum is unenforceable and irrecoverable, whether through civil proceedings or otherwise. Consequently usurious interest is charged in contravention of the Act, the borrower is entitled , in terms of section 11, to recover the excess amount paid within a period of two years after the date of payment''

The same position was reaffirmed in *Mavindidze* v *Mukonoweshuro* HH 20/2010.

Legislative intent is crucial in construing statutory provisions. The effect to be given to a statutory provision is governed generally by the language used in the statute. Where a statutory provision does not expressly state its intention, regard must be had to the statute as a whole. The court will consider the act required to be done, and the consequences of failure to comply with the provision. The effect of a failure to comply with statutory procedure as laid out in a statute is governed by whether the statutory provision is "mandatory'' or "directory''. Where the statute has mandatory effect, the consequence is invalidation of the action complained against. In a situation where a statute employs the use of the word 'shall' and the word is coupled both by a criminal sanction as a consequence of a failure to comply with the provision and has an invalidating effect, it is a mandatory provision. If the effect of a statutory provision is directory in its effect, the provision merely gives directions. Statutes that have no stated consequence for non-compliance with the statutory provision are merely directory .Evidently, where the failure to comply with a statutory provision has no criminal sanction or an invalidating effect, it is directory and non- compliance with a directory provision does not render the act complained against invalid.

The language of a command in a provision indicates the intention of the legislature. It is also pertinent for a court to evaluate the purpose of the procedural requirement. The legislature employs the use of the word 'shall' in s14 (1) of the Act .It makes it incumbent on a lender to take from the borrower a document signed by such borrower, setting out

particulars of all the essential parts of the transaction at the time of the loan. He shall deliver to such borrower a duplicate or true copy of such document signed by the borrower. Section 14(2) declares the consequence of a failure to comply with its provisions. Strict compliance with the command is required and hence a failure to comply with the statutory requirement is visited with a criminal sanction terms of s 14(2) of the Act and hence renders the act a nullity. Section 14 of the Act is mandatory because of the criminal sanctions provided for in s 14 (2) (a) and (b) which provides that the lender shall not recover upon the contract interest at a rate that exceeds the prescribed rate of interest. The legislative intention of such a statute is clearly to protect and benefit an affected borrower, non-compliance of which will result in injury to him. Section 14(1) makes it mandatory for an agreement to advance monies to be reduced to writing where the interest rate charged exceeds the prescribed rate of interest at the time of the loan. Failure to comply with the requirements of section 14(1) attracts a criminal sanction. The document presented does not meet the requirements of s 14 of the Act.

Regard being had to the foregoing; I must conclude that the plaintiff's contention that the document in issue constitutes an agreement and meets the requirements of s14 lacks merit. The failure by the lender to take from the borrower a document signed by him at the time of the loan renders the document filed lacking for purposes of section 14(1). The failure to comply with the mandatory requirements of s14 (1) has the effect of invalidating the document. For this reason, the provisions of s14 ought to be given mandatory effect. Any interest agreed to between the parties ,which surpasses the prescribed rate of interest is disregarded. The plaintiff's entitlement to interest is governed by s14 (2) (b) of the Act which bars a lender who fails to comply with the requirements of s14 (1) to recover upon the contract interest at a rate that exceeds the prescribed rate of interest. The plaintiff has not shown that he is entitled to charge interest at the rate of 4% per month. The circumstances surrounding this loan advancement do not justify such an interest rate. Consequently, it is my conclusion that the plaintiff can only charge interest at the prescribed rate.

In the result it is declared as follows,

1) The rate of interest applicable to the loan advanced to the defendant is the prescribed rate of interest.
2) The plaintiff is to pay the defendant's costs

Maposa Ndomene Maramba, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners
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