Mwalwanda v Sipedi [1990] 13 MLR 278

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	His Honourable Justice L Unyolo
Cause Number:	(Civil Cause Number 140 of 1989)
Date of Judgment:	April 06, 1990
Bar:	For the Applicant: Mzunda For the Respondent: Mhone

This is an application by originating motion for relief under the Loans Recovery Act, Cap. 6:04 of the Laws of Malawi.

The applicant avers in her affidavit in support of the application that she borrowed the sum of K200-00 from the respondent on 1 March 1988 to be paid back at the end of that month with interest in the sum of K140-00, making the total sum payable K340-00. The applicant avers further that she failed to pay on the due date and that the respondent charged further interest also in the sum of K140-00 thereby raising the aggregate amount to be paid to K480-00. She says that due to certain problems she again failed to pay the money due, the K480-

00, that is. She avers that in December 1988 the respondent told her that her total indebtedness cum interest then stood at K4 320-00, a further interest at the rate of K480-00 per month having been charged for the months of May through December. This meant interest in the sum of K4 120-00 within one year upon a loan of only K200-00. She avers that this is excessive, representing 2060% of the principal sum borrowed. The applicant goes on to say that the respondent, in addition, took her bottle cooler as security and that she has continually been harassed by the respondent. She asks the court to declare that the amount charged by the respondent herein as interest is excessive and the transaction unconscionable and that the court may reopen the said transaction so that in the end she can pay only what the court will consider fair and reasonable in all the circumstances.

The application is opposed. The respondent's case upon her affidavit is that she lent the applicant the sum of K3 160-00, not K200-00, to be repaid within three months. She admits having charged interest but says that the interest charged was K280-00 "per quarter year". She avers that this was in March, 1987, not 1988, and that it was only in October, 1988 when the applicant brought the sum of K480-00 which she refused to accept as the full amount borrowed was already overdue for payment. The respondent admits she is keeping the applicant's bottle cooler and says that this was brought to her by the applicant herself as security for the loan. She contends that the transaction herein does not come within the ambit of the Loans Recovery Act, hereinbefore mentioned.

Both parties were each cross-examined upon their respective affidavits, abovementioned. No other witnesses were called. I will have occasion, where

appropriate, to advert to the evidence so given as I proceed in this judgment.

The question which I think I must answer first is this: Who, as between the applicant and the respondent, is the court to believe? It is a difficult question due partly to paucity of evidence. As already indicated, apart from the parties themselves, no other witnesses were called. Two documents were exhibited and referred to by the parties but these simply made the case even more difficult. I will endeavour to offer some elaboration on this presently.

Pausing there, the first observation to be made is that the applicant was consistent in her story. Throughout her viva voce testimony she stood by what she averred in her affidavit and emerged firm in spite of the rigorous cross-examination she went through. The same is however not true of the respondent. Several times she contradicted herself. For example, in her affidavit, she averred that the applicant said she wanted the loan so she could start a “fish mongering business”. In her viva voce testimony, she said something different. There her story was that the applicant wanted the money to buy a car. Further, in her affidavit, she said that the applicant brought the bottle cooler to her house. However, in her viva voce testimony, she said that she collected the bottle cooler herself from the applicant’s house.

On yet another plane, the respondent’s case upon her affidavit was that the loan was to be paid within three months. But her own exhibit attached to the very affidavit tells a different story. It states that the loan was to be paid at the end of the very month of March the money was advanced. While on this aspect, it is to

be noted that the said exhibit was supposed to support the respondent that the amount of money loaned out to the applicant was K3 160-00. The document was in her possession all the long months that have passed. However, the document is conveniently torn so as to leave out the full amount earlier written thereon. What now remains is “K3” and the respondent’s explanation as to how the document came to be thus torn was far from cogent to my mind. Further, it is to be noted that the parties herein were total strangers before the occasion the loan was given. Looking at the matter all round, I doubt very much, woman to woman, the respondent would have loaned out so huge a sum as K3 160-00 to the applicant just like that.

In a word, I am inclined to believe the applicant and would prefer her evidence to that of the respondent. I find therefore that the principal amount the respondent loaned out to the applicant was, as stated by the latter, K200-00 only.

The next question for my determination is whether such a loan, as described by the applicant, fell within the purview of the provisions of the Loans Recovery Act. Mr Mhone, for the respondent, submitted that the Act is specifically concerned with money-lending transactions by persons whose business is to lend money – the katapila moneylenders to use local jargon. Learned counsel contended that the transaction in the present case was simply a bailment transaction.

Mr Mzunda for the applicant takes a contrary view. He submitted that it is significant the respondent herself does concede having loaned out money to the applicant and that the bottle cooler was taken only as a security. Learned

counsel submitted further that the Act herein is not limited to the moneylenders described by Mr Mhone but generally to money-lending transactions. He drew a distinction between the United Kingdom Moneylenders Act, 1900 and the Loans Recovery Act in this country. With respect, Mr Mzunda's submission is in my view made out. Reading the local Act through, I would agree with learned counsel that the same covers money-lending transactions generally and cannot be restricted to transactions by the so-called katapila moneylenders. Indeed, as I understand it, even the United Kingdom Moneylenders Act, 1900 does not restrict the term "moneylender" only to those whose business is that of money-lending. (See section 6 thereof). Indeed it was held in Samuel and another v Newbold [1906] AC 461 that the policy of the Act in question was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power. Actually, when answering questions put to her by the court, I thought that the respondent gave herself away as a regular moneylender. She said there that the applicant had originally wanted to sell the bottle cooler to her and then changed when she (the applicant) learnt that the respondent could lend her money directly.

Having said all this, it is my respectful view that interest at the rate of K140-00 on a loan of K200-00 payable within one month, as stated by the applicant, is excessive and the transaction clearly harsh and unconscionable. The same is true, a fortiori, of interest at the rate of K480-00 per month on such a loan as stated by the applicant in paragraph 4 of her affidavit.

All in all, I find that the transaction here was covered by the provisions of the Loans Recovery Act and that the interest charged was excessive and the transaction itself harsh and unconscionable. The court has power under the Act to reopen such a transaction and take an account between the parties. I have found that the amount loaned out was only K200-00 and that this was on 1 March 1988. I think that interest thereon at the bank rate applicable at the material time would meet with the justice of the case.

Indeed, it is significant that the respondent has in the interim been using the applicant’s bottle cooler thereby deriving a benefit therefrom. I hold therefore that the respondent is only entitled to repayment of the K200-00 and interest thereon at 19% per annum from 1 March 1988 to the date of payment.