

NOVUS HM LEGAL PRACTITIONERS NEWSLETTER

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MESSAGE FROM OUR MANAGING PARTNER



Misozi Hope Masengu

Dear esteemed reader,

We are excited to share with you the first edition of our Newsletter for 2024!

This edition is particularly exciting for us because in this month of April, we are celebrating the existence of our Firm for the last 5 years. It's been 5 years of providing our clients with outstanding and innovative legal solutions - we feel elated! As we journey into the next years, we are investing more in technology and strengthening our international alliances, so as to serve our clients better and realise our vision to be a premier legal service provider globally. Look out for our announcements later in the year.

The Newsletter starts off with a useful article on the effect of joint accounts in marriage and in business. It then moves on to a case review of a recent landmark Court of Appeal Judgment on the effect of judicial separation upon the death of a spouse. Employers in the habit of executing bonding agreements will be happy to read our case review of a recent Supreme Court Judgment which upholds the principle of freedom of contract. We've also included an article on the need for a money lender's license in order to get in the business of lending money. The Newsletter closes off with the latest legal and industry updates. See the final pages for exciting announcements and our gallery. On behalf of the Firm, I would like to thank you for taking the time to read our Newsletter. I hope you enjoy reading it as much as we enjoyed writing it. Happy reading!

Misozi Hope Masengu

Misozi Hope Masengu

Managing Partner

The Effect of Joint Accounts in Marriage vs. in Business

By Mundia Mukelabai

Joint bank accounts are frequently used by both business partners and married couples. A joint bank account is, an account opened by two or more people by which each party has a present right to withdraw all the funds in the account, and upon the death of one party, the survivors become the owners of the account, with no right of the deceased's beneficiaries to share in it (Black's Law Dictionary 8th Edition). In this article, we discuss the Zambian laws that guide the use of money held in a joint account.

In the recent case of **Finance Bank Zambia Ltd vs. Dimitros Monokandilos & Another (8-037-2019) SCZ 2023**, the Supreme Court extensively discussed how joint accounts are distinct from individual accounts. The Court further discussed how the courts will treat such accounts in commercial transactions and in divorce proceedings involving joint accounts held by a husband and wife.

Commercial Transactions

In commercial transactions, particularly in debt recovery by a bank, the Supreme Court guided that a joint account must be treated by the bank at which it is held as distinct for all purposes, from individual accounts held by the joint account holders. Consequently, a bank cannot blend a joint account and an individual account held by the same person to settle a debt, unless the account holder authorises a set-off against their joint account with the consent of the other joint account holder. Further, the Supreme Court stated that

since parties to a joint account are not automatically authorised to guarantee each other's debts, a banker should not lend money to joint account holders, either by means of a fixed loan, overdraft, or in any other way, without first obtaining consent from each of the other joint account holders; or an undertaking from them to be liable to repay the loan.

The Supreme Court further clarified that, money which is in a joint account belongs to the joint account holders. Therefore, if one of the joint account holders owes a debt to the bank, then the money in the joint account cannot be attached to settle the joint account holder's personal debt. The Supreme Court also emphasised that in commercial transactions, the legal principles prevent a bank from taking the action of debiting an account holders joint bank account, for the purpose of securing a partial satisfaction of its debt.

Divorce Proceedings

In the case of divorce proceedings, the Supreme Court cited the English case of *Jones vs. Maynard* (1951) CH 572. In that case a husband and wife had maintained a joint account fed by the husband's remuneration and investment income; the rent of a house which was jointly owned by a husband and his wife; and the wife's investment income of about 450 per annum. Periodically, the surplus on the account was invested in the husband's sole name. The parties were later divorced and the wife then sought a declaration that she was beneficially entitled to half the investments so made.

The husband contended that his former wife was only entitled to such proportion as represented by her own contributions to the joint account. In deciding in favour of the wife, the Court held that a husband's earnings or salary, when the spouses have a common purse and pool their resources, are earnings made on behalf of both, the money which goes into the pool becomes joint property.

Thus, the Supreme Court has taken the view that in divorce proceedings if the spouses hold a joint bank account, it is to be regarded as joint property and must be shared equally regardless of the individual contributions of either spouse. This is the case even though one spouse was contributing more money to the joint account than the other spouse. Therefore, while joint accounts may be useful in business partnerships to enable the parties to share profits and losses equally, in the context of a marriage, a joint account must only be used after careful consideration by both parties.



Mundia Mukelabai

What is the Effect of Judicial Separation upon the Death of a Spouse?

By Nchimunya Mwale

Judicial Separation is an arrangement whereby a husband and wife live apart from each other by a Court Order, but remain married. In Zambia, the effect of judicial separation is provided for in Section 35 and 36 of the **Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia (hereinafter "the Act")**. In the recent case of **Yammie Zimba and Magaret Zimba vs. Cynthia Zimba (Appeal No. 43 of 2022) CAZ 2024 the Court of Appeal (CA)**, considered the effect of judicial separation on the death of a spouse, particularly in terms of whether the surviving spouse would be entitled to benefit from the estate of the deceased spouse. The Court also highlighted the factors to consider when appointing an administrator of a deceased's estate. We consider the facts of the case below.

The Facts

The brief facts of the case are that the Respondent, Cynthia Zimba (hereinafter "the wife") was previously married to Kanyuka Zimba (hereinafter "the husband" or "the deceased"). After 20 years of marriage the couple went on judicial separation. While on judicial separation the husband died. The deceased's sisters, the 1st and 2nd Appellants, were then appointed as administrators of the deceased's estate by the High Court (hereinafter the "administrators"). Thereafter, the administrators distributed the estate excluding the wife. The wife, then sued seeking a declaration that she was a

surviving spouse and a beneficiary of the deceased estate. The High Court decided in favour of the wife. The administrators appealed the decision to the CA. On appeal it was held, inter alia, that the wife was not entitled to a share of the deceased's estate. The reasoning of the CA was that under judicial separation, a spouse is not legally entitled to a share of the deceased spouse's estate; because in the event of death, a decree of judicial separation excludes the surviving spouse from any interest in the deceased's property. The CA also held that in appointing a personal representative, the courts must consider the suitability of the person to be appointed.

Key Takeaways:

1. If a party to a marriage dies intestate while on judicial separation, the surviving spouse is excluded from any interest in the deceased's estate. Consequently, the estate of the deceased will be distributed among the remaining relatives of the deceased in accordance with the law. Thus, in this respect, the effect of judicial separation is the same as that of divorce.
2. The CA expanded the relevant factors that ought to be considered when a Court is deciding who should be appointed as administrator. It held that courts have the responsibility to assess the suitability of a personal representative and some key

characteristics include: trustworthiness, good standing, integrity, honesty, and accountability of the person. Additionally, the availability to discharge and oversee the functions of the office of the administrator should be taken into account. These considerations should exist independently of the legal qualifications for one to be appointed as administrator of the estate.

Conclusion

In conclusion, until this decision is overturned by the Supreme Court, a party to a marriage whose spouse dies while a judicial separation Order is in effect, will not have an interest in the estate of the deceased spouse. The CA recognised this as unfair but emphasised that until legislation changes to stipulate otherwise, the courts are bound to interpret the provisions of the law according to its plain meaning.



Nchimunya Mwale

Case Highlight: Elvis Mtonga vs. Bank of Zambia

By Norias Nonde

The case of **Elvis Mtonga vs. Bank of Zambia (Supreme Court Judgment No. 54 of 2018) SCZ 2018** is significant because it highlights the principle of freedom of contract in employment relationships; and the employee's right to payment of wages. In this article, we discuss the efficacy of bonding agreements in employment relationships.

Material Facts:

The Appellant, Elvis Mtonga ("the employee") was employed as an economist by the Respondent, Bank of Zambia, ("the employer"). In May of 2002, the parties entered into a bonding agreement, where the employer agreed to grant the employee assistance in form of paid study leave, maintenance, and book allowances for the four (4) year period of his PhD studies in South Africa. It was a further term of the agreement that the employee after completion of his studies would be bonded to work for the employer for a period of 4 years. It was also a term of the agreement that should the employee decide to leave the employer during the bonding period, he would pay all expenses incurred by the employer during his studies. However, the employee on completion of his studies resigned from work. A dispute arose as to whether the salaries he received during the study leave were expenses repayable under the bonding agreement. The employer sued the employee, seeking repayment of all expenses incurred in sponsoring the employee.

Decision of the Trial Court: The Appeal:

The High Court, held that the salaries the employee received during his study leave were an expense incurred by the employer and were due and payable by the employee in accordance with the terms of the bonding agreement.

The Appeal: Decision of the Supreme Court:

Dissatisfied with the decision of the Trial Court, the employee appealed to the Supreme Court against the decision of the High Court. The sole issue for determination by the Supreme Court was whether the salary was an incident of the employee's employment to which the employee was entitled for the entire period of study leave; or whether it was an expense that was repayable by the employee.

Decision of the Supreme Court:

1. The Supreme Court restated the established principle of freedom of contract and that individuals of full age and capacity are bound by whatever terms and conditions they set out for themselves. The Supreme Court further held that, the paid study leave was part of the financial assistance granted to the employee under the bonding agreement, and that the salary was an expense incurred by the employer which the employee had to payback. Accordingly, the Supreme Court upheld the decision of the High Court.

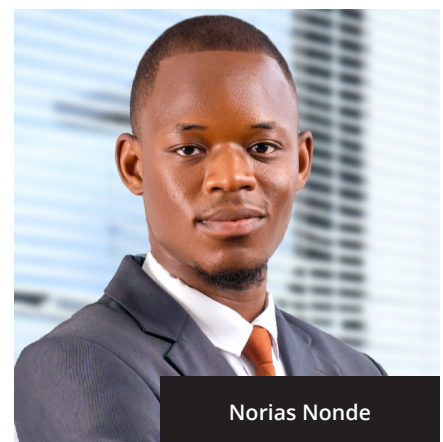
2. In addressing the issue of an employer's duty to pay employee salaries during the employment relationship, the Supreme Court stated that any employment contract is underpinned by two mutual and complementing obligations of the parties: firstly, that of the employee to provide their labour in the manner outlined in the employment contract, and secondly, that of the employer to pay reasonable remuneration for the employee's work. Further, the Supreme Court stated that, it is illegal to employ someone to work and not pay them their wages. However, the Supreme Court.

Key take aways:

1. Employee's right to be paid: This case aptly shows that all employees have a right to be paid for their services and that an employer must not employ workers without pay.

2. Wages or salaries are tied to work: the case highlights that the employment relationship is one of quid pro quo. One in which the employee provides their labour, and the employer pays a reasonable salary to the employee for their services. Therefore, the employer's duty to pay the employee's wages is a continuing one during the employment relationship, unless the employee breaches the employment contract or agrees to waive the contractual right to be paid i.e., consents to a period of unpaid leave.

3. Freedom of contract: employment contracts like ordinary contracts are binding on the parties who sign them. Therefore, after the parties settle their terms in an agreement they are bound and must follow what was agreed. In addition to the agreed terms, the laws and regulations provide several legal requirements that are binding and must be complied with by the parties i.e., laws on minimum wages and mandatory leave days.



Norias Nonde

Do you need a money lenders licence to loan money?

By Liyena Phola

In Zambia, it is illegal for anyone to carry on the business of money lending without a licence issued to them in accordance with **the Money Lenders Act Chapter 389 of the Laws of Zambia (hereinafter "the Act")**. Particularly, Section 3(3)(b) of the Act, prohibits money lending by unlicensed persons. The said Section states that, "if any person carries on business as a money-lender without having in force a proper money-lender's licence authorising him so to do, or, being licensed as a money-lender, carries on business as such in any name other than his authorised name, or at any other place than his authorised address or addresses they shall be guilty of an offence."

In the case of *Neighbours City Estates Limited vs. Mark Mushili (Appeal No. 47/2013) SCZ* the Supreme Court in interpreting the effect of the Act in the context of a money lending transaction where a money-lender did not possess a money-lender's licence, held that, the lending or borrowing between the Appellant ("the borrower") and the Respondent ("the money-lender") in that case was caught by the provision of the Money Lenders Act. Further that as the Respondent who was engaged in the business of money-lending had not been appropriately licenced, the transaction was illegal.

The consequence of entering a money-lending contract with an unlicensed lender who is in the business of money lending, is that it would render the contract between the parties illegal and unenforceable in the courts of law. However, it is not uncommon for people who are not in the business of money lending to engage in money lending and borrowing transactions without a licence. It is also not uncommon, in the case of default, for the borrower to allege that the lender did not have a license and as such the transaction is illegal under the Act.

The preamble to the Act, and definition of a money-lender under the Act describe the persons to whom the Act applies. The preamble provides that the Money Lenders Act is, "An Act to make provision with respect to persons carrying on business as money-lenders; and to provide for matters incidental thereto." Further, according to Section 2 of the Act, a money lender is "every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business." In the case of *Banda vs. Lungu (Appeal 73 of 2016) [2017] ZMSC 160 (2 June 2017)* the Supreme Court, in interpreting the definition of a money-lender under the Act stated that the general scheme of the Money Lenders Act reveals that a money-lender can only be such if: that person's business is that of money-lending; or they advertise or announce, or in any way holds themselves out as carrying on the business of money-lending.

Further, in the case of *Andrew Anthony Miti vs. Howard Katuba Lungu (2017/HP/1318) ZMHC 2018*, the Court held that, a person who is not a money-lender can lend money and recover a profit or interest on it and there is no illegality in such an arrangement. However, such person cannot charge interest like a money lender.

Moreover, illegality alone does not prevent a party from recovering their money from an illegal transaction. In this regard, the Supreme Court in the case of *Banda vs. Lungu* (cited above) stated that, when a party seeks to have the court decline to enforce contracts on the basis that the same had been tainted with illegality, the mere fact of proof of illegality having tainted a contract would not always render such a contract void and unenforceable. Hence, an otherwise illegal contract may be enforced by the courts where factors exist which tend to support the enforcement of the contract.

It is also important to note that, a loan agreement is a simple contract that requires no formalities. Thus, in the case of *J.L Morison (Export) Limited vs. Chibesakunda and Another (2016/HPC/0209) [2018] ZMHC 390 (10 January 2018)* the Court held that, indeed, it is trite law that a simple contract need not be in a particular form and does not need to conform to formalities which a deed would need to.

Conclusion

In conclusion, a person needs a money lenders licence if they intend to engage in the business of money lending. However, a person does not require a Money-Lender's Licence before they can lend money out in a one-off transaction. Therefore, a legitimate loan, lawfully created, will be enforced by the Courts.



Liyena Phola

Legal Updates

Developments at the Ministry of Lands and Natural Resources

Issuance of E-Certificates of Title: the Ministry of Lands and Natural Resources has done away with physical Certificates of Title (CoTs) and now issues and maintains CoTs in an electronic form. This is in accordance with the Lands and Deeds Registry Amendment Act No.39 of 2021. Once the electronic certificate is issued, links to the lease agreement and the survey diagrams will be shared with the certificate.

Firm Updates

The Firm celebrated its 5-year Anniversary:

We're excited to share this milestone with our valued clients. Click on the link to view the special video we've prepared for you.

https://www.linkedin.com/posts/novushmlegal_novushmlegal-5thanniversary-activity-7185588685470396416-YLfb?utm_source=share&utm_medium=member_android

Supporting Aisha Community School!

As part of our Corporate Social Responsibility our Firm partnered with Young Women's Christian Association (YWCA) and made a donation to Aisha Community School. Please view the images below to see our contribution.





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