

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Civil Case
No. 19/3093 SC/CIVL**

**BETWEEN: Benee Namen Kali trading as NBK
Lending Scheme**
Claimant

AND: Jay Ngwele
Defendant

Date of Trial: 5 September 2023
Before: Justice V.M. Trief
In Attendance: Claimant – Ms J. Kaukare
Defendant – no appearance (Mr S. Kalsakau)
Date of Decision: 13 September 2023

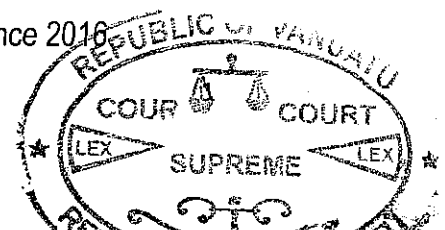
JUDGMENT

A. Introduction

1. This was a contested Claim for the repayment of money lent which included a claim for compound interest.
2. The Defendant Jay Ngwele and his lawyer did not appear at the trial. I proceeded to hear the Claimant's case and then closing submissions from Ms Kaukare.
3. This is the judgment.

B. Background

4. The Claimant Benee Namen Kali and her husband Jean-Yves Namen Kali operate a money lending business under the registered business name, "NBK Lending Scheme" ('NBK').
5. Mr Ngwele is a Member of Parliament for Ambae and has been since 2016



6. In 2018, Mr Ngwele came to NBK to borrow money. On 17 July 2018, he signed a written agreement with NBK in the following terms and then borrowed VT50,000:

Mi agree se mi bin receivim loan long amount blong: VT50,000

Long NBK Lending Scheme today: 17 July 2018

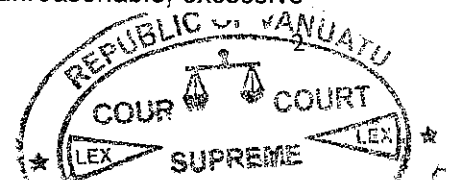
Mi agree blong pem back loan ia long paydays /or amount blong VT10,000

Wetem 10% interest long amount we l stap long each paydays.

Deduction through Finance System – Yes – Starting date: 17 July 2018

NB: > **Interest of 10% is calculated fortnightly as from the date of your loan.**
> **Monthly administration fee of VT1,000**
> **No additional loan until your loan is paid off.**
> **Failure in respect to that agreement, the 10% will be automatically added fortnightly to your outstanding balance.**

7. On 23 July 2018, Mr Ngwele repaid the VT50,000 loan plus 10% interest and then promptly borrowed a further sum of VT200,000 and signed instructions to deduct VT60,000 from his salary each pay day. On 23 August 2018, he borrowed another VT100,000, then a further VT60,000 on 27 August 2023, a further VT150,000 on 31 August 2028 and another VT440,000 on 10 September 2018 saying that he needed financial assistance to help his people who were being evacuated from Ambae as a result of the Manaro Volcano eruption. The total sum borrowed in the period 23 July 2018-10 September 2018 was VT950,000.
8. From the 27 July 2018 pay day onwards, NBK charged 10% interest fortnightly (every Government pay day) on the outstanding balance as well as an administration fee of VT1,000 per month.
9. In terms of repayments, there were 4 fortnightly salary deductions of VT60,000 totally VT240,000, cash repayments totalling VT210,000, 19 fortnightly salary deductions of VT16,407 totalling VT311,733, two fortnightly salary deductions of VT16,437 totalling VT32,874 and seven fortnightly salary deductions of VT111,567 totalling VT780,969. The total sum that Mr Ngwele has repaid is VT1,575,576.
10. Mrs Namen Kali calculated the interest amount fortnightly and added it to the outstanding balance as well as the VT1,000 monthly administration fee until the 18 October 2019 pay day. At that point, she and Mr Kali decided that they would not calculate any further interest but proceed to Court for the balance owed. By the Claim, Mrs Namen Kali seeks judgment in the sum of VT7,493,314 for the balance owed including compound interest; interest of 10% p.a.; costs of VT300,000 and any other order deemed just.
11. In the Defence filed on 30 January 2020, it is alleged that Mr Ngwele ceased repayments as he was of the opinion that he had already repaid the debt owed and had overpaid on the interest amount.
12. By the Counter Claim filed on 8 May 2020, Mr Ngwele alleged that he naively signed the NBK loan agreement but that its interest rate clause is unreasonable, excessive

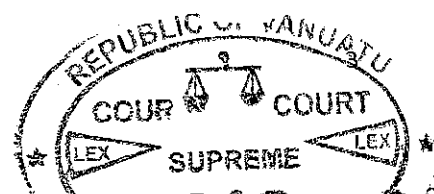


and unconscionable as the borrower would have to pay 260% interest per annum in the event of default and the interest rate and repayment terms are set up in a way as to make the borrower fall in to more debt. Further, that Mr Ngwele has over-paid the loan given his repayments of VT1,575,574 whereas the principal sum borrowed was VT950,000. The relief sought includes an order declaring that the interest rate clause is unreasonable, excessive, unconscionable and unenforceable; an order that NBK reimburse Mr Ngwele his over-payment of VT625,574; interest of 5% p.a. from the date of Mr Ngwele's last payment on 18 October 2019 until the judgment sum is fully paid; indemnity costs; and any other order deemed just.

13. The Counter Claim is disputed.

C. Evidence

14. **Mrs Namen Kali** deposed in her Sworn statement filed on 21 November 2019 [**Exhibit C1**] that Mr Ngwele signed a written agreement with NBK on 17 July 2018 [**Annexure "NBK6"**] then borrowed an initial sum of VT50,000. On 23 July 2018, he paid that back plus 10% interest then borrowed a further sum of VT200,000 and signed instructions to deduct VT60,000 from his salary each pay day [**Annexure "NBK3"**]. He went on to borrow a total sum of VT950,000 (including the VT200,000 borrowed on 23 July 2018). On 10 September 2018, he signed new instructions to deduct VT150,000 from his salary each pay day [**Annexure "NBK5"**] but such deduction has never happened.
15. Mr Ngwele's repayments by way of both cash and salary deductions, and the amount of interest incurred, are set out in **Annexure "NBK7"**. By 18 October 2019, the loan plus interest totalled VT7,493,314 and despite follow up, Mr Ngwele had stopped making repayments therefore she filed the Claim in this matter.
16. In Mrs Namen Kali's Sworn statement filed on 15 February 2023, she deposed that she clearly explained to Mr Ngwele the interest rate of 10% and that it was calculated fortnightly. He clearly understood that and then signed the loan agreement [**Exhibit C2**].
17. I consider that Mrs Namen Kali's evidence as to what Mr Ngwele understood is her view as to his level of understanding of the interest rate clause in the agreement. However, that evidence is not conclusive. I otherwise accept Mrs Namen Kali as a witness of truth and accept her evidence.
18. **Mr Namen Kali** deposed in his Sworn statement filed on 21 November 2019 that his wife runs the business while he checks the records of payment and of monies borrowed. In May 2019, he noticed that Mr Ngwele was not making regular payments so he approached Mr Ngwele at his house at Numbatu area. Mr Ngwele refused to speak with him and chased him out of his yard. By letter dated 5 June 2019, Mr Ngwele alleged that he was threatening him (Mr Ngwele). He wrote a letter back and then in October 2019, engaged counsel to make demand and then file the Claim in this matter [**Exhibit C3**].



19. I accept Mr Namen Kali as a witness of truth and accept his evidence.
20. Even though it was not tendered at trial, Mr Ngwele's Sworn statement filed on 7 July 2020 was evidence in this matter: rule 11.7(1) of the *Civil Procedure Rules*.
21. **Mr Ngwele** deposed that he borrowed a total of VT950,000 from NBK [**Annexure "NBK7, Exhibit C1** and reproduced as **Annexure "JN2"** to Mr Ngwele's sworn statement]. He signed the loan agreement with NBK in haste and under duress given the situation faced by his electorate and their urgent need to be relocated to Santo, Pentecost and Port Vila. He has made repayments in cash and salary deductions as shown in **Annexure "NBK7, Exhibit C1**. He stated that if anything, he should be refunded the amount being the total he has paid less the VT950,000 principal sum borrowed as he has overpaid NBK.
22. From **Annexure "NBK7, Exhibit C1**, I calculate the total of Mr Ngwele's repayments as **VT1,575,576**.
23. I disregard Mr Ngwele's assertion that he signed the agreement under duress as that is a conclusion of law for the Court to draw therefore is inadmissible. Otherwise Mr Ngwele's evidence was consistent with that of Mr and Mrs Namen Kali that he borrowed VT950,000 and has repaid, by my calculation, VT1,575,576. The dispute between the parties is whether Mr Ngwele is liable for compound interest of 10% fortnightly and if not, whether or not NBK should reimburse or repay a sum of money to Mr Ngwele.

D. Discussion

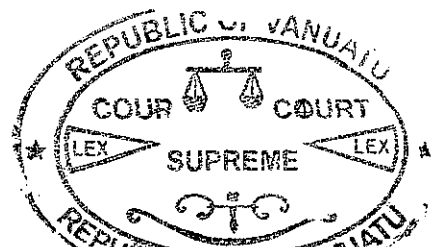
24. Counsel could not refer me to any Vanuatu legislation applicable to the question of whether interest in respect of a loan can be compound interest. I therefore turned to *Halsbury's Laws of England* (4th ed., Butterworths) which, in general terms, summarises English law prior to Vanuatu's Independence in 1980 and therefore the applicable common law. It is stated at para. 153 of *Halsbury's Laws of England* (4th ed., Butterworths), vol. 32 at para. 153 as follows:

153. ***Prohibition of compound interest and interest chargeable on default.*** Any contract for the loan of money by a moneylender is illegal so far as it provides, directly or indirectly, for the payment of compound interest...

25. Bullen & Leake & Jacob's *Precedents of Pleadings* (17th ed., Sweet & Maxwell), vol. 1 at para. 13-03 set out the following:

13-03 ***Interest.*** ...

Compound interest is recoverable pursuant to an agreement or by virtue of an established custom binding on the parties, but not otherwise.



26. In the subsequent footnote numbered 271, it was stated as follows:

... It is now possible to recover compound interest at common law, provided that it can be shown that this represents the loss suffered by the lender: Sempra Metals Ltd v Commissioners of Inland Revenue [2007] 3 W.L.R. 354.

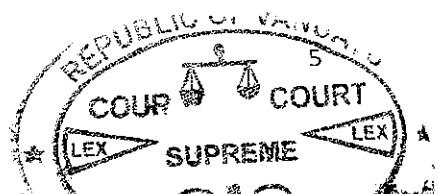
27. In the present matter, Mrs Namen Kali did not bring any evidence to show that her claim for compound interest represented the loss suffered by NBK. On the contrary, she relies on the parties' agreement for the claim for compound interest. That term of course is challenged by Mr Ngwele as being unreasonable, excessive and unconscionable as it would constitute 260% interest per annum and was set up in a way as to make him fall in to more debt.

28. The evidence establishes that as of 21 September 2018, by which time Mr Ngwele had borrowed the total principal sum of VT950,000, the balance owed was VT905,173. He made two cash repayments totalling VT210,000 but his salary deductions each fortnight were only VT16,407 or VT16,437 up until 12 July 2019. After that, Mr Ngwele made 7 repayments by salary deduction of VT111,567 each [Annexure "NBK7", Exhibit C1]:

Date	Interest 10%	Admin Fee	Paid	Balance (VT)
Brought forward				4,001,611
12/07/2019	400,161	1,000	16,437	4,386,335
26/07/2019	438,635		111,567	4,713,402
9/08/2019	471,340	1,000	111,567	5,074,175
23/08/2019	507,418		111,567	5,470,026
6/09/2019	547,003	1,000	111,567	5,906,462
20/09/2019	590,646		111,567	6,385,541
4/10/2019	638,554	1,000	111,567	6,913,528
18/10/2019	691,353		111,567	7,493,314
				7,493,314

29. It is clear that even if the amount of Mr Ngwele's repayment was higher than the amount of interest occurred, given that 10% interest was added onto the balance owed every fortnight, sooner or later the balance owed would be so high that even the largest amount of Mr Ngwele's repayments, VT111,567, would be lower than the interest amount.

30. That rate of interest which was effectively compound interest has the effect of inflating the balance owed far beyond and in excess of the principal sum borrowed, to the point that the borrower is faced with repaying a sum that is excessive and extortionate. As already stated, there is no evidence that the compound interest claimed represented any loss suffered by NBK. It is claimed because that was the rate of interest set out in the parties' agreement. However, I consider that that rate is manifestly unjust and unconscionable and the Court cannot condone such interest for which no loss nor genuine commercial reasons have been shown. Accordingly, I consider that the claim for compound interest must be dismissed and the interest

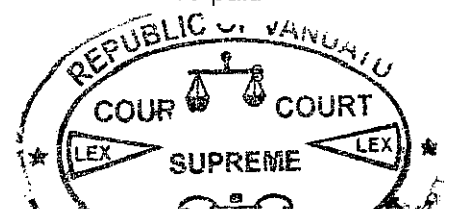


rate clause in the agreement declared excessive, extortionate, unconscionable and unenforceable.

31. The other aspect of the Counter Claim was a claim that Mr Ngwele had already repaid the principal sum borrowed. That claim is made out as the principal sum borrowed was VT950,000 whereas the total of Mr Ngwele's repayments is VT1,575,576. With his repayment on the 9 August 2019 pay day (a salary deduction of VT111,567), Mr Ngwele achieved the repayment of the principal sum borrowed.
32. However, NBK is entitled to charge interest in respect of money that it has lent. The usual rate of interest applied by the Supreme Court is 5% per annum. Mr Ngwele had borrowed the whole of the principal sum of VT950,000 on 10 September 2018. From 10 September 2018 to 9 August 2019 (when he repaid the whole of the principal sum borrowed), interest at the rate of 5% per annum is VT43,541. Accordingly, NBK is entitled to interest of VT43,541 which added to the principal sum borrowed is VT993,541.
33. The difference between the sum VT993,541 that NBK is entitled to and the total sum of Mr Ngwele's repayments must, however, be repaid to Mr Ngwele (VT1,575,576 – VT993,541 = VT582,035). Accordingly, an order will issue that Mrs Namen Kali reimburse or repay to Mr Ngwele the sum of VT582,035.
34. In summary, Mrs Namen Kali's claim for compound interest is dismissed. As to the Counter Claim, a declaration will be made in respect of the interest rate clause of the agreement and an order made that Mrs Namen Kali reimburse or repay to Mr Ngwele the sum of VT582,035.

E. Result and Decision

35. The Claim for repayment of money lent, including compound interest, is **dismissed**.
36. Judgment is entered in favour of the Defendant on the Counter Claim and it is ordered as follows:
 - a. That the interest rate clause in the written agreement between the Claimant and the Defendant dated 17 July 2018 is declared excessive, extortionate, unconscionable and unenforceable;
 - b. That the Claimant is to reimburse or repay to the Defendant the sum of VT582,035 (the 'judgment sum'); and
 - c. That the Claimant is to pay interest on the judgment sum from the date of the Defendant's last repayment (i.e. 18 October 2019) until the judgment is fully paid, at the Supreme Court rate of 5% per annum.
37. Costs shall follow the event. The Claimant is to pay the Defendant's costs on the standard basis as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.



F. Enforcement

38. This matter is listed for Conference at **1.10pm on 17 October 2023** for the Claimant to inform the Court: (i) that she has paid the judgment sum or (ii) to explain how she intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for enforcement action.
39. For that purpose, this judgment must be personally served on the Claimant and proof of service filed.

**DATED at Port Vila this 13th day of September 2023
BY THE COURT**


Justice Viran Molisa Trief



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem of a scale of justice. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLIQUE DE VANUATU' along the bottom inner edge. The words 'COURT' and 'SUPREME' are prominently displayed in the center, with 'LEX' on the right and 'IUSTITIA' on the left. There are also some smaller, less legible markings within the seal.