

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2013/HPC/0295

(Civil Jurisdiction)

IN THE MATTER OF : A THIRD PARTY LEGAL MORTGAGE
REGISTERED AT THE REGISTRY OF DEEDS ON
15TH JANUARY, 2008

IN THE MATTER OF : A FURTHER CHARGE REGISTERED AT THE
REGISTRY OF DEEDS ON 18TH JANUARY
2008

IN THE MATTER OF : SUBDIVISION B1 OF FARM NO. 380a LUSAKA

B E T W E E N :

ZAMBIA STATE INSURANCE PENSION TRUST
FUND BOARD OF TRUSTEES

APPLICANT

AND

ZAMBIA EXTRACTS OILS AND COLOURANTS
LIMITED

1ST

RESPONDENT

ENVIRO OILS AND COLOURANTS LIMITED

2ND RESPONDENT

For the Applicant : Mr. Ngandu of Messrs Shamwana & Company
For the Respondents : Mr. D.M. Chakoleka of Messrs Mulenga Mundashi & Company

J U D G M E N T

CASES REFERRED TO:

1. *Valsamoskoufou Vs Nthon Greenberg (1982) ZR 30*
2. *Mohamed S Itowala Vs Variety Bureau De Change SCZ NO. 10 of 1987*
3. *Bereford Vs Royal Insurance Co Ltd (1937) 2 All ER 254*
4. *Gideon Mundanda Vs Timothy Mulwani & 2 Others (1987) ZL 29*
5. *Central London Property Trust Limited Vs High Trees House Limited (1947) 1 KB 130*

6. *Galaunia Farms Ltd Vs National Milling Company Ltd (2002) ZR 135*
7. *Phoenix General Insurance Co of Greece SA Vs Administratia Asigurarilor de Stat (1987) 2 All ER 152*
8. *St. John Shipping Corporation Vs Joseph Rank Ltd (1956) 3 All ER 683*
9. *Archbolds (Freightage) Ltd Vs S Spanglett Ltd (1961) 1 All ER 417*
10. *Mahmoud & Ispahani, Re (1921) All Er Rep 217, CA*
11. *Snell Vs Unity Finance Ltd (1963) 3 All ER 50*
12. *Ellis & Company & Costain Simamba Vs Admac Carmichael Limited & Alan Plamer, Judgment dated 26th March 2013*
13. *Krige & Another Vs Christain Council of Zambia (1975) ZR 152*
14. *Attorney General Vs E.B Jones Machinists Limited (2000) ZR 114*
15. *City Express Service Limited Vs Southern Cross Motors Limited SCZ No 8/262/2006*
16. *Embassy Supermarket Vs Union Bank Zambia Limited (In Liquidation) SCZ No/2007*
17. *Holman Vs Johnson 1975 coup 341*
18. *Saunders Vs Edwards (1987) 1 WLR 1116 at page 1134*
19. *Yango Pastoral Company Pty Limited Vs First Chicago Austrial Limited 1978) WLR*
20. *Wetherell Vs Jones Lord Tenterden C.J.*
21. *Delgety and New Zealand Loan Company Vs Imeson Pty Limited 1964 NSW 638*
22. *Daylesford Syndicate Limited Vs Dott 1905 2 Ch. 629-630 Brickley J*

LEGISLATION AND OTHER WORKS:

1. *The High Court Act Chapter 27 of the Laws of Zambia*
2. *Halsbury's Laws of England Volume 4*
3. *Chitty on Contracts Volume 1 General Principles*
4. *Artkins Court Forms, Volume 12 (2) 2nd Edition 2009*
5. *The Banking and Financial Services Act Chapter 387 of the Laws of Zambia*

The Applicant Zambia State Insurance Pension Trust Fund Board of Trustees by way of Originating Summons made pursuant to *Order 30 Rule 14 of the High Court Rules* claims the following against the Respondents;

- (i) *Repayment of the sum of KR20,206,398.31 being the Kwacha equivalent of US\$3,826,969.97;*
- (ii) *Foreclosure;*
- (iii) *Interest on the monies found to be owed under (i) and (ii) above;*
- (iv) *An Order for sale of the property subject to the third party legal mortgage and further charge;*
- (v) *Costs.*

According to the affidavit in support dated 30th May 2013, the Applicant lent the 1st Respondent a total sum of US\$3,282,564.41. The sum of US\$2,000,000.00 was disbursed on the 15th January, 2008 for tenure of twenty four (24) months with interest at 16% per annum. A further sum of US\$1,283,564 was disbursed accordingly. Part of Loan was paid to the 1st Respondent and another part paid to PTA Bank on behalf of the 1st Respondent. The interest rate for the total amount owed was 9% per annum to run for tenure of forty eight (48) months. The repayment schedule for the total amount lent to the Respondents was to be semi annually with effect from the 31st December, 2007 and the maturity date being the 31st December, 2011.

The security given for the said loan was Subdivision B1 of Farm 380a Lusaka which belongs to the 2nd Respondent. It is stated that to secure the first disbursements of funds to the 1st Respondent, a Third Party Mortgage Deed was executed by the 1st and 2nd Respondents. A further charge was executed to secure the second and third disbursement of funds to the Respondent. In order to guarantee the borrowing the Directors of the Respondents Companies executed Directors Personal Guarantee in favour of the Applicant as further security for the first disbursement of US\$2,000,000.00.

The Applicant's states further that to date the 1st Respondent has only made a repayment of US\$520,000 despite numerous reminders. The amount outstanding as at the 31st May 2012 is US\$3,826,969.37 equivalent to KR20,206,398.31. The

Respondents have failed to honor its obligations and the Applicant is entitled to recover its money due.

The Respondents opposed the application and filed affidavits dated 5th March 2014 and 15th April 2014 respectively supported by Skeleton Arguments dated 27th March, 2014. It is stated that pursuant to the loan facility, the 1st Respondent was availed a total of US\$3,283,564.41 by the Applicant between November 2006 and October 2007 which was repackaged in January 2008 at an annual interest rate of 9% per annum. The security given was subdivision B1 of Farm 380a Lusaka which belongs to the 2nd Respondent. The said property became free of any encumbrance after the 1st Respondent paid off the PTA Bank loan balance of US\$1,304,556 on behalf of the 2nd Respondent. The repackaged loan facility with the 1st Respondent was to run for a period of 48 months with semi annually interest payable and the maturity date being the 31st December, 2011. It is stated that to date the 1st Respondent has made payments to the Applicant amounting to US\$520,000 towards the liquidation of the total loan amount of US\$3,283,564.41.

The Applicant is not licensed under the *Banking and Financial Services Act* and the whole transaction was an illegality. The Applicant by extending credit facilities effectively provided banking services for which an entity requires to be licensed under the *Banking and Financial services Act* and that the Applicant was not licensed for such business.

The Respondents state that the Applicant illegally provided banking and financial services to the Respondents when the Applicant was fully aware it was not licensed to do so. The mortgage is not enforceable as to enforce it would entail encouraging and furthering an illegality. The Respondents have been desirous of settling the moneys advanced by the Applicant and attempts to make part payments.

It is further stated that on 21st March, 2014 a search was conducted at the Bank of Zambia to determine whether the Applicant is licensed to provide financial services to the 1st Respondent. The search revealed that the Applicant does not have a license to enter into a finance transaction such as one entered with the 1st Respondent. A perusal of the list of all licensed financial institutions indicates that the Applicant is not in possession of a license to enable it to enter into the said transaction. Therefore the transaction is tainted with illegality on account of the Applicant not having the requisite license under the *Banking and Financial Services Act*.

The Applicant in its submissions dated 19th March, 2014 contends that the Respondents having not advanced any defence to the Applicant's claim, the Court should enter judgment on admission in the sum of KR20,206,398,31 the equivalent of US\$3,849,696.65 plus interest calculated on the daily overdrawn balance. The Respondents have not offered proof to their allegation that the mortgage and further charge was illegal. The learned authors of *Halsbury's Laws of England* were referred to where it is stated;

“An agreement to do that which is a crime or a tort is illegal and will not be enforced by the Courts”.

In addition the case of ***Valsamoskoufou Vs NthonGreenberg*** ⁽¹⁾ was referred to. It is submitted that the transaction between the Applicant and the Respondents was not meant to perpetuate a tort nor commit a crime. For a contract or an act to be illegal, both parties must have been aware at the beginning of its illegality. The case of ***Mohamed S. Itowala Vs Variety Bureau De Change*** ⁽²⁾ was cited where it was held that;

“A party cannot sue upon a contract if both knew that the purpose, the manner of performance and participation in the performance of the contract necessarily involved the commission of an act which to their knowledge is legally objectionable”.

The transaction entered into between the Applicant and the Respondents was a Mortgage which was entered into willingly by both parties. A mortgage can never be an illegal agreement. The Respondents allege that the whole transaction was illegal merely because the Applicant did not possess a license under the Banking and Financial Services Act. It is submitted that the said allegation does not qualify the transaction to be illegal. The case of ***Berefored Vs Royal Insurance Co Ltd*** ⁽³⁾ was brought to my attention. Further the case of ***Gideon Mundanda Vs Timothy Mulwani & The Agricultural Finance Ltd & S.S Mwiinga*** ⁽⁴⁾ was cited where it was held that;

“The legal performance of a possibility illegal contract is enforceable”.

The Applicant submits that if the Court is of the view that the Mortgage and Further Charge executed by the Applicant and the Respondent were illegal, it should nonetheless enforce the same on the Respondents as they have failed to honour their obligations and to pay back the money due. The Respondents having willfully agreed to enter into the Mortgage agreement with the Applicant and having received US\$3,849,696.65 cannot now turn around and allege that the whole transaction is illegal. The case of **Central London Property Trust Limited Vs High Trees, House Limited** ⁽⁵⁾ was cited where it was held that;

“There are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise must be honored. These are promises intended to be binding, intended to be acted upon and the Courts have refused to allow the party making it to act inconsistently with it. It is in that strict sense, and that sense only, that such a promise gives rise to stopped”.

The case of **Galaunia Farms Ltd Vs National Milling Company Ltd** ⁽⁶⁾ was cited where it was held that;

“The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct”.

The Applicant submits further that the alternative claim of foreclosure should also succeed because there is no defence by the Respondents.

The Respondents in response submits that the lending or credit transaction which forms the basis of the mortgage action by the Applicant is a financial service for which one must be licensed. *Section 2 and 17 of the Banking and Financial Services Act* was referred to. The issue of whether or not the Applicant has a license to provide a financial service is a question of fact and the Applicant would have produced one to dispute the Respondent's assertions. There is clearly no denial on the part of the Applicant to the fact that they do not have a license to provide financial services and that the same is an offence for which one can be liable to imprisonment for a period of 5 years. It is submitted that a contract prohibited by statute is illegal when entered into and such a contract is not enforceable by the Courts. The case of ***Phoenix General Insurance Co of Greece SA Vs Administratia Asigurarilor De Stat*** ⁽⁷⁾ and ***St. John Shipping Corporation Vs Joseph Rank Limited*** ⁽⁸⁾ was cited where it was held in the latter that;

"...the Court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what he intent of the parties is, if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not".

The learned authors of *Artkins Court Forms* were referred to particularly the passage stating that;

"The Court will not enforce a contract which contravenes a statutory provision or the necessary consequences of such a provision".

The case of **Archbolds (Freightage) Ltd Vs S Spanglett** ⁽⁹⁾ was cited where it was held that;

“If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not hold the Plaintiffs in any way that is a direct or indirect enforcement of rights under the contract; and for this purpose both parties are presented to know the law”.

It is submitted that the illegality of a transaction is not based on whether the parties entered into the same willingly. The very act of lending on the security of a mortgage or other interest in land is prohibited by the *Banking and Financial Services Act* if one is not licensed. The Applicant’s contention that the transaction does not fall in the category of an illegal contract does not have a legal basis as the Respondents state that the transaction itself is the crime and thus illegal and unenforceable by a Court of Law. The case of **Valsamos Koufou Vs Anthon Greenberg** ⁽¹⁾ was referred to. It is submitted that the principle of law enunciated is that a Court of Law will not entertain a claim which is founded on a transaction expressly prohibited by statute. It is submitted further that the case of **Gideon Mundanda Vs Timothy Mulwani & 2 Others** ⁽⁴⁾ relied upon by the Applicant does not apply because the said case dealt with a situation where it was possible for the contract to be performed legally. In addition the case of **Re Mahmoud Vs Ispahani’s Arbitration** ⁽¹⁰⁾ was cited where it was held that;

“In my view the Court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes from the

statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract”.

The cases of ***Snell Vs Unity Finance Ltd, Bridget Mutwale Vs Professional Services Limited*** ⁽¹¹⁾ and ***Ellis & Company & Costain Simamba Vs Admac Carmichael Limited & Alan Palmer*** ⁽¹²⁾ which dealt with the issue of illegality. It is submitted that the Court must dismiss the claims by the Applicant as the mortgage and further charge are fraught with illegality. It is submitted that it is trite law that estoppel can only be used as a shield and not as a sword. The case of ***Krige Vs Christian Council of Zambia*** ⁽¹³⁾ was cited where it was held that;

“In order to plead estoppel, one must show that the other party made a representation to him and he altered his position to his prejudice on the basis of the representation”.

It is submitted further that the Applicant has not shown any representation of the fact which was made to it by the Respondents and therefore the pleading of estoppel is totally misplaced and misconceived. Estoppel cannot be pleaded against provisions of a statute. As authority the case of ***Attorney General Vs E.B. Jones Machinists Limited*** ⁽¹⁴⁾ was cited where the Court held that;

“Further, the learned trial judge misdirected herself when she ruled that by conduct the Attorney - General could not rely on Section 14 of the Sheriffs Act. There cannot be an estoppel to a statute”.

The learned authors of *Halsbury's Laws of England* was referred to where it is stated that;

“The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid”.

Further the cases of ***City Express Service Limited Vs Southern Motors Limited*** ⁽¹⁵⁾ and ***Embassy Supermarket Vs Union Bank Zambia Limited (In Liquidation)*** ⁽¹⁶⁾ were cited on the principle of law as regards estoppel. It is submitted that the Applicant cannot use estoppel to render valid a transaction which is expressly prohibited by the *Banking and Financial services Act*. The Applicant's claim should therefore be dismissed on account of illegality and the alternative claim for foreclosure and order of sale of the mortgaged property is not enforceable.

I have considered the claim by the Applicant. I have further considered the affidavits on record, the authorities cited and the submissions by the Advocates on record.

It is not in dispute as admitted by the 1st Respondents that it obtained a Loan Facility from the Plaintiffs in the sum of US\$3,564.41. As security for the Loan the 2nd Respondent executed a Third Party Mortgage over Subdivision B1 of Farm 380 (a) Lusaka and a Further Charge. In addition the Directors of the Respondent Company executed personal guarantees in favour of the Applicant.

It is further not in dispute that the 1st Respondent made a part of payment of the sum of US\$520,000 towards liquidation of the

Loan, leaving a balance of US\$3,826,969.37 equivalent to ZMW20,206,398.31 outstanding.

The Respondents clearly admit liability but contend in their defence that the Applicant was not licenced under the *Banking and Financial Services Act* to lend out money on the security of a Mortgage and as such the whole transaction is void on account of illegality. And further that the mortgage herein is not enforceable by virtue of the illegality. A number of authorities were cited on the effect of illegality on transactions.

In essence the Respondents want to evade liability by raising illegality as a defence.

The issue is whether the claims by the Applicant are unenforceable by virtue of the illegality.

It is pertinent to identify the illegality in issue. The contended illegality is the provisions of financial services, i.e. the lending of the money to the Respondents secured by a mortgage contrary to the *Banking and Financial Services Act Chapter 387 of our Laws*. The Applicant is alleged not to be licenced under the said *Act* to offer such services.

The arguments by the Respondents relate to the principles of Law relating to illegality and the effect thereon on contracts entered into.

The defence of illegality raised by the Respondent arises where a Defendant in a private law action argues that the claimant should not be entitled to their normal rights or remedies because they have been involved in illegal conduct which is linked to the claim.

The underlying principle of illegality as stated by *Lord Mansfield* in the case of ***Holman Vs Johnson 1975 coup 341*** ⁽¹⁷⁾ is that;

“The Court will not lend its aid to someone who founds his case of action upon an immoral or illegal act”.

Illegality affects a contract in a number of ways. The illegality can be as to formation, or as to performance. Illegality as to formation refer to a situation where the contract itself is at the time of the formation illegal. Illegality as to performance refers to a contract which is on its face legal but which is performed in a manner that is illegal. I refer to *Chitty on Contracts Volume 1 General Principles*.

Where the Contract is illegal by virtue of formation, the Courts will not enforce the contract or provide any other remedies.

The effect of illegality is that it prevents a Plaintiff from enforcing the illegal transaction. The Respondent has put up a defence of illegality namely a breach of statute law.

In granting or refusing to grant the relief where the defence of illegality is raised, there are a number of relevant considerations or circumstances that the Court shall have regard to these include;

- a) *The public interest*
- b) *The seriousness of the illegality*
- c) *Whether denying the relief will act as a deterrent*
- d) *Whether denying relief will further the purpose of the rule which renders the transaction illegal.*

I have perused *Section 17* of the *Banking and Financial Services Act*. It stipulates that;

- “1. A person shall not conduct or offer to conduct banking business unless the person holds a licence for that purpose.***
- 2. A Person other than a licenced bank or a licenced financial institution or a licensed financial business shall not conduct or offer to conduct financial service business.***
- 3. A bank, a financial institution or financial business shall not conduct any banking or financial service business-***
 - a) that it is not authorized, by this Act or the terms and conditions of its licence, to conduct; or***
 - b) in contravention of the conditions of its licence.***
- 4. A person who contravenes this Section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term of not exceeding five years, or to both”.***

The Respondents contend that the Applicant has no License as required above to provide any financial Services or Banking Services such as the lending of the money secured by a Mortgage. As such the contract herein is prohibited by statute and is illegal and unenforceable by the Courts.

The general position of the law as to contracts unenforceable or prohibited by Statue have been amply stated by the Parties. In a nutshell the Courts will not enforce a contract expressly or impliedly prohibited by statute whether the Parties meant to break the law or not. Though the Parties have stated the general position of the Law on contracts unenforceable by statute they did

not allude to the construction of statutes, which in my view is cardinal to the determination of the issue herein, whether the contract entered into by the Parties is unenforceable by virtue of statutory illegality.

According to *Chitty on Contracts Volume 1 General Principles (2008)* unenforceability of contracts by statute arises where a statute itself on its true construction deprives one or both Parties of their civil remedies under the contract in addition to or instead of imposing a penalty upon them.

In considering whether a contract is rendered illegal by statute one has to consider not what acts the statute prohibits but what contracts it prohibits.

Where the statute is silent but penalizes the making or performance of the contract, ***“the Courts must consider whether the Act on its true construction is intended to avoid contracts of the class to which the particular contract belongs or whether it merely prohibits the doing of some particular act”***. I refer to *Chitty on Contracts page 1177* already cited.

The question faced by the Courts is whether the statute means to prohibit the contract. The key consideration being whether on the construction and purpose of the statute, the doing of the particular act is illegal or whether there is a mere charge imposed upon it. Where a mere penalty is imposed, it is clear that the contract is not prohibited.

If the object of statute is to protect the public from possible injury, or fraud or promote some public object then the inference is that the contracts made in contravention of the statute are prohibited.

The other concerns considered by the Courts in regard to non enforcement of contracts is that it may result in unjust enrichment to the Party to the contract who has not performed his obligations but has benefited from the performance by the other Party.

The Applicant contends that even if it is assumed that it contravened the provisions of the *Banking and Financial Services Act*, this does not render the transactions illegal or void.

The transactions entered into by the Parties was a mortgage action which it is contended can never be an illegal action.

The issue of illegality in my view is an issue which the Courts have to approach from two sides. As stated by *Bingham L.J.* in the case of ***Saunders Vs Edwards*** ⁽¹⁸⁾

“... on one hand it is unacceptable that that any Court of law should aid or lend its authority to a Party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the Court should on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the Plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct”.

I have considered all the case authorities cited by the Parties as to illegality. I have further perused the provisions of *Section 17* of the *Banking and Financial Services Act*.

The Respondents are essentially contending that though they do not dispute having obtained the loan in the colossal sum of

US\$3,283,564, the Parties entered into a transaction or contract which is unauthorized or prohibited by the *Banking and Financial Services Act* and that the mortgage, the loan and guarantees therein are illegal, void and unenforceable.

The cardinal questions or issues for determination in my view are as follows.

- i) *Whether the provisions of the Section 17 of the Banking and Financial Services Act render illegal and void the contract and Mortgage Loan granted by the Applicant to the 1st Respondent secured by the Third Party Mortgage.*
- ii) *Whether by virtue of the provisions of Section 17 cited above the Court will not grant the reliefs sought by the Applicant by virtue of the principle that a Court will not tend its assistance to a Party where the transaction is illegal.*

It is not in issue that the Applicant lend the 1st Respondent the said sum of money. *Section 17 of the Banking and Financial Services Act* prohibits unlicensed business other than a Licensed Bank or a Licensed financial institution to offer or conduct financial services. The Applicant did not adduce any evidence that it is licenced accordingly.

The question to be determined is whether *Section 17* on its proper construction prohibited the making or performance of the contract in issue. As a general rule a contract expressly or implied prohibited by statute is void and unenforced.

Perusal of *Section 17(4) of the Financial and Banking Services Act* provides a penalty for contravention of the *Act* namely a fine of 100,000 penalty units.

Where a statute stipulates or imposes a penalty where a contract is made or performed, in contravention of the statute, it is a question of construction whether the statute (*Section 17*) intends to prohibit the contract in issue and render it void and unenforceable or whether the statute intends that penalty for the contravention shall be imposed upon the person where a contract is made or performed which is prohibited by the statute.

How does the Court construe whether the statute intends to void or vitiate a contract made in breach of the said provisions?

It is my view that the ordinary principles of construction of statutes apply. In the cited case of ***St. John's Shipping Corporation Vs Joseph Rank Limited*** ⁽⁸⁾, it was stated that the deciding fact is the true effect and meaning of statute.

One must have regard to the language used and the purpose of the statute in issue as well as regard to all the relevant considerations.

Though the principle that the making of a contract which is expressly or impliedly prohibited by statute is illegal and void is the general preposition of law that has been long standing, the said principle is subject to any contrary intention of the statute and is a question of statutory construction. In construing the statute, regard is had to the language, the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and effect of the prohibition.

I have already stated that there is a penalty imposed on the breach of Section 17. *The Banking and Financial Services Act* is an Act formulated to provide for **“the regulation of the conduct of banking and financial services to provide safe guards for investors in and customers of Banks and Financial Institutions”**.

The question for determination where a statute imposes an express prohibition against carrying on of a business or transaction without Licence or authority and the transaction is carried on by entry into a contract, is whether the statute intends to penalize the person who contravenes the prohibition (statute) or whether it intends to go further and prohibit contracts the making of which constitutes the carrying on business of a financial services nature.

In my view *Section 17* of the *Banking and Financial Services Act* does not expressly prohibit the making or performance of contracts such as the case in *casu*. The language of *Section 17* is not directed at the making of particular contracts. In my view it is directed at the carrying on of any Banking and Financial Services without a Licence. A body corporate in the course of carrying on business may make and perform contracts. A contract to lend money on a mortgage like the case in *casu* is one of the many contracts that can be made.

It is my view that Legislature did not intend to invalidate all such contracts.

It does not follow that a statute which prohibits the carrying on of any financial services business except under certain conditions like obtaining a licence is intended to forbid the lending of money

on a mortgage by a body corporate which is carrying on such a business.

Having had regard to *Section 17 of the Banking and Financial Services Act*, it is my holding that the said Section on its proper construction does not invalidate or vitiate the contract entered into by a body corporate on a financial service business in breach of the Section.

The purpose of *The Banking and Financial Services Act Chapter 387* is served by the imposition of the very heavy penalty prescribed for contravention of Section 17 and in my view does not prohibit and render illegal and void the contract or transactions entered into by the Parties herein.

I refer to the case of ***Yango Pastoral Company Pty Limited Vs First Chicago Austrial Limited 1978 WLR*** ⁽¹⁹⁾. The facts were that the Respondent had sued the Appellant for the sum of \$132,600 arising out of a Mortgage Deed. The (Appellant) Defendant had pleaded that the Plaintiff had entered into the transaction in question as part of an unauthorized banking business and that the mortgage, loan and guarantees were illegal and unenforceable. *Lord Mason of the Court of Appeal* stated that;

“the Legislative intention expressed by the Act is that a contract made by a corporation carrying on banking business in breach of Section 8 is not illegal and void, but rather that it is a valid contract and that the only penalty which the corporation suffers in consequence of its breach of the Section is liability to conviction and fine under the provisions of the Section”.

Section 25 of Act Number 2005 of the Pension Scheme Regulation (Amendment) provides for the power of the Trustees to invest in such type of Investments as may be approved by the Registrar. The lending in issue was approved it cannot be said that the contract was performed for any illegal purpose.

In the case of **Wetherell Vs Jones Lord Tenterden C.J.** ⁽²⁰⁾ stated that;

“Where a contract which a Plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect But where the consideration and the matter to be performed are both legal, we are not aware that a Plaintiff has ever been precluded from recovering by an infringement of the Law, not contemplated by the contract in the performance of something to be done on his part”.

I have perused the cited case of **St. John Shipping Corporation Limited Vs Joseph Rank Limited cited 1957 1QB 267** ⁽⁸⁾ cited by the Respondents. The said case does not aid them. The facts in that case were that a contract was entered into between a Cargo owner and a Shipping Company for a carriage of freight. The ship was overloaded in breach of a statutory provision. The Shipper alleged the contract was voided by this illegality. Devlin J held that the contract was not voided; the Legislation was not aimed at the voiding of contracts of carriage. The contract was one of a type where illegality was of collateral and a central character and the Courts are reluctant to strike down such contracts. Where the Courts do otherwise they would deny access to the Courts by *Minor Transgressors*.

In the case of ***Delgety and New Zealand Loan Company Vs Imeson Pty Limited 1964 NSW 638*** ⁽²¹⁾ where the Plaintiff at an auction sold cattle to the Defendant which unknown to the Parties had tubercular and legislation prohibited sale of deceased cattle. The Defendant argued no liability to pay because of an element of illegality. The full Supreme Court of New South Wales found for the seller on the basis that the statute intended only to apply a discretionary penalty and not to render such a contract void for illegality.

In any event where the statute is intended to protect the public, this protection in case of unwitting breach would be adequately served by the penalty described. Avoidance of a contract in such a case as this would be inconvenient in producing commercial certainty. I refer to the cited case of ***Archbalds (Freightage) Limited Vs S. Spanglett Limited 1961 1 QB 390*** ⁽⁹⁾.

It is my considered view that the Applicant is able to enforce the Mortgage action against the Respondents because the contract is not rendered void, either expressly or impliedly by *Section 17 of Banking and Financial Services Act*.

It is further my view that enforcement of the Respondents contractual rights would not be contrary to public interest. In the case of ***Daylesford Syndicate Limited Vs Dott 1905 2 Ch. 629-630 Brickley J*** ⁽²²⁾ stated that;

“I think that the purpose of the statute is sufficiently served by the penalties prescribed for the offender: the avoidance of the contract would cause grave inconvenience and injury to

innocent members of the public without furthering the object of statute. More over the value of the relief given to the wrong doer if he could escape what would otherwise have been his legal obligation might as would in this case, greatly outweigh the punishment that could be imposed upon him”.

Allowing the Respondent to escape liability which is not disputed would impose substantial hardship on the Applicant. I refer to the holding in the cited case of ***Yango Pastoral Company Pty Limited Vs First Chicago Austrial Limited*** ⁽¹⁹⁾ it was stated by the Court of Appeal that;

“In the present case the effect of relieving the Defendants from their contractual obligation to repay the money to the Plaintiff would not be confined only to the substantial detriment resulting to the Plaintiff. The ability of the Plaintiff to meet its obligations to its investors and other creditors in part if not entirely on its ability to enforce the terms of the repayment of its contracts of loans with persons such as the Defendants. To hold the contract enforceable at the suit of the Plaintiff would be to provide a windfall gain to the Defendant and other borrowers in a similar position and although indirectly, to impose substantial hardship on those who originally made funds available to the Plaintiff”. (underlined Courts emphasis)

It is my view that having found that the making and the performance of the contract subject of the mortgage action herein was not unlawful, the fact that the contract was made and performed in contravention of *Section 17 of the Banking and Financial Services Act* provides no ground for denying the Applicant the reliefs sought. *Section 17* of the Banking and

Financial Services Act does not prohibit the making or performance of the contract herein. The fact that the Applicant infringed or breached the said *Section 17* does not in my firm view affect its rights under the contract.

The non enforcement of the contract in my view would further result in unjust enrichment to the Respondents who have not performed their obligations but have benefited from the performance by the Applicant who disbursed the Loan to the Respondents.

For the foregoing reasons, I find that the Applicant has proved its case on balance of probabilities and hereby enter Judgment in its favour against the Respondents for the payment of the sum of US\$3,826,969.97 (ZMW20,206,398.31) being outstanding money borrowed by the 1st Respondent secured by the 2nd Respondent.

The said sum be paid with simple interest from date of Writ of Summons to date of complete payment.

It is further ordered that the said sum be paid within ninety (90) days from date hereof.

In the event of default, the Applicant shall foreclose, have possession of Subdivision B1 of Farm No. 380a Lusaka and exercise its power of sale and thereafter render an account to the Respondents of the proceeds of sale.

Costs are awarded to the Applicant to be taxed in Default of Agreement.

Leave to appeal is granted.

Dated the 5th Day of August, 2014

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Hon. Mrs. Justice F. M. Chishimba
HIGH COURT JUDGE