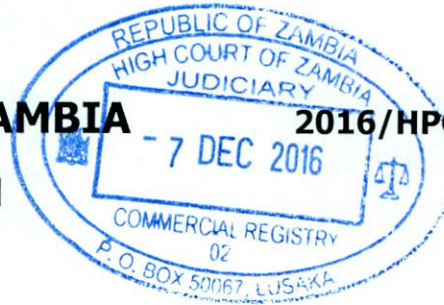


**IN THE HIGH COURT FOR ZAMBIA**

**IN THE COMMERCIAL DIVISION**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**



**2016/HPC/0209**

**IN THE MATTER OF:                    A MORTGAGE ON STAND NO. 465,  
KABULONGA, LUSAKA AND A THIRD PARTY  
MORTGAGE ON STAND NO. 502/CL/A/2**

**AND**

**IN THE MATTER OF:                    ORDER 30 RULE 14 OF THE HIGH COURT  
RULES, CHAPTER 27 OF THE LAWS OF  
ZAMBIA**

**BETWEEN:**

**J. L. MORISON (EXPORT) LIMITED**

**APPLICANT**

**AND**

**CHITA CHIBESAKUNDA**

**1<sup>ST</sup> RESPONDENT**

**ABODE PROPERTIES LIMITED**

**2<sup>ND</sup> RESPONDENT**

Before Hon. Madam Justice Dr. W. S. Mwenda at Lusaka on the 7th day of December, 2016.

For the Applicant     :     Mr. M. H. Masengu of Messrs Mwenya Mwitwa and  
Advocates

For the Respondent :     Mr. B. Luo of Messrs Palan and George Advocates.

---

## **RULING**

---

***Cases referred to:***

- 1. Zambia State Insurance Pension Trust v. Zambia Extract Oils and Colourants Limited and Another (2014) ZMHC 178.***
- 2. Yango Pastoral Company Pty Limited v. First Chicago Austria Limited***

**Legislation referred to:**

- 1. Order 14A and Order 33 rule 3 of the Supreme Court Practice, 1999 (The White Book)**
- 2. Order 47 of the High Court Rules, Chapter 27 of the Laws of Zambia**
- 3. The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia**

The application before this Court arises out of a Notice of Intention To Raise Preliminary issue pursuant to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court, 1999 Edition (The White Book) as read together with Order 47 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia. The ground upon which the application is based is that this Court is being asked to adjudicate on a matter which arose out of an illegal contract and as such is unenforceable.

In support of the said application, the Respondent filed an Affidavit in Support of Notice of Intention to raise Preliminary issue sworn by one Chita Chibesakunda, a director in the 2<sup>nd</sup> Respondent Company as well as 1<sup>st</sup> Respondent herein; List of Authorities, Skeleton Arguments in support of the application and Skeleton Arguments in Reply. The gist of the Respondents' application is that the Agreement entered into on 21<sup>st</sup> March, 2011 between the Applicant and the Respondent is ultra vires section 17 of the Banking and Financial Services Act (BFSA) Chapter 387 of the Laws of Zambia which expressly proscribes the provision of banking business or financial services by entities other than those registered in accordance with the said Act. It is the Respondent's contention that the Applicant is not registered as provided for under the BFSA and therefore the Agreement entered into on 21<sup>st</sup> March, 2011 is ultra vires the law and illegal and consequently unenforceable.

The Applicant did not file an Affidavit in Opposition. However, it indicated that it was opposing the application and in this regard filed Skeleton Arguments in Opposition as well as a List and Extracts of Authorities.

The Applicant also indicated that it would also rely on the Originating Summons and Affidavit in support thereof filed in the matter.

The application came up for hearing on 29<sup>th</sup> August, 2016. Mr. Luo, learned Counsel for the Respondents, reiterated that the Respondents' contention is that the agreement that the matter is premised on contravenes the provision of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia and as such it is illegal and consequently unenforceable.

In response Ms. Masengu, learned Counsel for the Applicant submitted that the premise of the Applicant's submission is that the carrying on of banking or financial services in breach of section 17 of the Banking and Financial Services Act does not render void or unenforceable a contract made in that respect. To this end, Counsel cited the case of ***Zambia State Insurance pension Trust v. Zambia Extract Oils and Colourants Limited and Another (1)***, which according to Counsel, is on all fours with the case in casu. Counsel also referred this Court to the case of ***Yango pastoral Company Pty Limited v. First Chicago Austria Limited (2)***.

Counsel submitted in the alternative, that foreign companies which are neither registered nor incorporated under the Zambian Companies Act cannot fall under the purview of regulation by the Banking and Financial Services Act. She submitted that on this basis, the Respondents' application lacks merit and should be dismissed with costs. It was Counsel's further prayer that judgment on admission be entered for the Applicant on the outstanding amount appearing as exhibit "FM6" in the Applicant's Affidavit in Support of Originating Summons. In the alternative, Counsel prayed that the matter be allowed to proceed to trial so that it may be determined on the merits.

I have perused the authorities cited by both parties in support of their respective cases. I have also considered the submissions by learned Counsel on both sides.

The Respondents' contention is that the Applicant's claim arises out of an illegal contract and as such, is unenforceable. In support of their contention, they have cited the provisions of Section 17 of the BFSA. The said section requires a person or institution to be registered as provided for under the Act in order to carry out the business of providing banking business or financial services.

The Respondents contend that the Applicant is not registered as required by the Act and therefore, execution of the Loan Agreement was ultra vires the law and therefore, illegal and unenforceable by the Applicant against the Respondents.

The Applicant opposed the application on the grounds that Section 17 does not render the Loan Agreement void and unenforceable because a contract is not automatically rendered as such by breach of the statute. That a contract can only be rendered void and unenforceable if the statute expressly prohibits the making of the contract and denies either party or both parties the remedies available.

The Applicant's submission rests on the judgment of Justice F. M. Chishimba, in the Zambia State Insurance Pension Trust judgment cited above where the judge, finding in favour of the Applicant, held that section 17 of the BFSA does not invalidate or vitiate a contract entered into by a body corporate on a financial service business in breach of the section but that the purpose of the Act is served by the imposition of a very heavy penalty prescribed for contravention of section 17.

The Respondent appealed to the Supreme Court against Justice Chishimba's judgment and the superior Court upheld the lower court's judgment.

The court agreed with the appellants that it is a fundamental principle of the common law that a court will not lend its aid to a plaintiff who founds a course of action upon an immoral or illegal act, particularly where both parties are equally at fault. By this the court meant that if a contract is illegal as formed or where the making of the contract is expressly or impliedly prohibited by statute, it is void *ab initio*, meaning neither party has any rights under the contract, therefore, the courts will not uphold the contract or enforce it in any way.

However, the Supreme Court agreed with the position taken by the lower court that the fundamental principle in assessing the effect of statute law upon contracts is whether the statute intended to affect contracts and make them void. In other words, the court needs to examine the intention of the legislature, namely, whether it intended to penalise the specific conduct mentioned in the statute or if it intended to go further to deprive the contracting party the benefits under the contract.

The Court went further and agreed with the trial judge's application of the decision in the case of ***Yango Pastoral Company Pty Limited***, which it adopted entirely as it set out proper principles on interpretation of statutory provisions where illegality is in issue, that section 17 of the Act on its proper construction, does not invalidate or vitiate contracts entered into by a body corporate on a financial service business in breach of that section.

It was the Supreme Court's view that the spirit of the Act is not to prohibit any form of secured lending between consenting persons or entities. The Court found that in the case before it, the mortgage transaction as found by the trial judge, was performed contrary to section 17 of the Act as the Respondent lent out monies to the 1<sup>st</sup> Appellant on the security of a mortgage without a licence. However, the court was of the view that upon a proper construction of Section 17 of the Act, the making and performance of the mortgage transaction prima facie, does not involve the doing of any illegal act.

In the case in casu there is no doubt that the Applicant provided a financial service to the Respondents since it lent out money to the Respondents on the security of a Legal Mortgage and a Third Party Mortgage and was therefore required to be licenced under section 17 of the BFSa in order to transact in such business.

Section 17 of the BFSa provides as follows:-

*"(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 licensed financial institution or a licenced 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 is not authorised 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 not exceeding five years or to both (Repealed and replaced by Act No 18 of 2000, amended by Act No. 25 of 2005)".*

The Applicant also submitted that to render the Loan Agreement, Mortgage Deed and Third Party Mortgage void and unenforceable against the Respondents, would give them unjust enrichment. Further that the application by the Respondents before this Court is on a Preliminary issue and therefore the main issues in the Originating Summons have not been considered.

It would indeed be unjust enrichment on the part of the Respondents if the matter proceeded to trial and the claims against the Respondents were proved only for the Court to find that the contract or agreement was unenforceable for violating section 17 of the BFSAs.

The second ground advanced in the alternative by the Applicant for opposing the application before Court is that the BFSAs does not regulate foreign companies within the meaning of the Companies Act. The Court does not consider it necessary to deal with this ground in view of the finding that section 17 of the BFSAs does not render the Loan Agreement void and unenforceable against the Respondents.

In view of the above findings, the Respondents' application is dismissed for lack of merit. The main cause shall proceed for hearing on the merits.

Costs for the application are awarded to the Applicant, which costs shall be agreed and in default thereof, taxed.

Dated at Lusaka this 7<sup>th</sup> day of December, 2016.



**W. S. MWENDA (Dr)**  
**HIGH COURT JUDGE**