

IN THE COURT OF APPEAL OF ZAMBIA: APPEAL NO 315/2023
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN

HAI SHENG MINING ENTERPRISES LIMITED: APPELLANT

AND

CUPWELL NG'AMBI MINING LIMITED: RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA AND PATEL SC, JJA

On 11th and 21st November 2024

FOR THE APPELLANT: MRS. W. CHIMANKATA-SIMBEYE OF
MESSRS SHAMAKAMBA &
ASSOCIATES (standing in for Mr.
Mosha of Messrs Mosha & Co)

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA JP: delivered the majority Judgment

CASES REFERRED TO:

- 1. Learoyd v Bracken (1894) 1 QB 114*
- 2. Smith v Mawhood (1845) 14 M & W 452*
- 3. Hiteshbhai Patel v Agyen-Frempong Kofi & another SCZ Appeal No 13 of 2017*

4. *Mohamed S. Itowala v Variety Bureau de Change SCZ Appeal No 15 of 2001*

STATUTES REFERRED TO:

1. *Constitution of Zambia Act No 2 of 2016*
2. *Mines and Minerals Development Act No 11 of 2015*
3. *Road and Roads Traffic Act No Chapter 464 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This appeal arises from the Judgment delivered by the Honourable Mrs. Justice Irene Zeko Mbewe, in the Commercial Division of the High Court on 6th June 2023. The Appeal impugns the Judgment in so far as it holds that the Respondent was the holder of a valid Artisanal Mining License.

2.0 BACKGROUND

2.1 On 11th March 2022, the parties herein entered into a Cooperative Mining Contract. The Contract described the Respondent as the owner and the Appellant as the investor.

2.2 The terms of the contract were that the Respondent was licensed to own and operate one small scale mining license No 24767 – HQ – AMR valid for two years from 8th April 2021, on a piece of land in extent, 6.8 hectares situate in Chingola.

2.3 On the other hand, the parties agreed that the Appellant, as the investor, would use its machinery to mine copper and any other minerals occurring on the Respondent's property.

2.4 In clause 2.2, the Contract provided that the Appellant should mine for two (2) months and if it did not find copper, the contract would automatically come to an end without either party bearing the costs.

3.0 ACTION IN THE COURT BELOW

3.1 On 16th August 2022, the Respondent filed in the High Court's Commercial Registry, a writ of summons and a statement of claim. In the endorsement on the writ of summons and in the statement of claim, the Respondent made the following claims;

- (i) The sum of one million five hundred thousand United States Dollars (USD 1, 500, 000.00) being damages for loss of business
- (ii) Damages for breach of contract
- (iii) An order that the Plaintiff is at liberty to enter into a contract with other prospective investors
- (iv) Costs of and incidental to these proceedings
- (v) Any other relief that the court may deem fit

3.2 The Appellant filed a defence and counterclaim disputing the claims and asserting its position on the allegations by the Respondent.

3.3 The Appellant went on to counterclaim as follows;

1. For an order that it was in fact the Plaintiff that breached the contract and therefore, liable to the Defendant
2. For an order for special damages for hire of a low bed, hire for an excavator, cost of diesel, cost of mobilization and all overheads in food and accommodation, amounting to one hundred thousand Kwacha (K100, 000.00) only.
3. For an order for general damages and any other relief the Court may deem fit.
4. For an order for costs.

4.0 DECISION OF THE COURT BELOW

4.1 After hearing the evidence from both sides and analysing the issues before her, the learned Judge dismissed the claim for USD 1, 500, 000.00, awarded nominal damages for breach of contract in the sum of USD 1, 500.00, granted an order for the Plaintiff (Respondent), to treat the contract as repudiated and to be at liberty to enter into a new contract with other prospective investors and granted costs to the Plaintiff.

4.2 The learned Judge dismissed the counterclaim in its entirety.

5.0 THE APPEAL

5.1 The Appellant was dissatisfied with the outcome and filed Notice and Memorandum of Appeal. The Memorandum of Appeal contains five grounds of appeal set out as follows;

1. The learned High Court Judge misdirected herself and erred in fact and law when she found that the Respondent (Plaintiff in the Court below) was a holder of a valid Artisanal Mining Licence for Quartz, when in fact not.
2. The learned High Court Judge misdirected herself and erred in fact and law when she found that the licence used by the Respondent was an Artisanal licence for Quartz and not copper and yet proceeded to validate the Mining Contract and ignored the fact that the Respondent did not possess a valid licence or any licence at all.
3. The learned High Court Judge misdirected herself by failing to address the fact that by the Respondent portraying to be holders of a valid Mining Licence when in fact not, was a fundamental breach on its part and rendered the Mining Contract an illegality and unenforceable
4. The learned High Court Judge erred in law by finding that the Appellant, who was an innocent party, breached the Mining Contract, when the said contract was void ab initio.
5. That the learned High Court Judge erred in law by failing to find that the Appellant as an innocent party should instead be awarded damages and costs.

6.0 ARGUMENTS IN SUPPORT

- 6.1 In ground one, the Appellant argues that the Artisanal Mining Licence the Respondent used does not belong to it but to a third party, Cupwell Ng'ambi. With reliance on

Section 29 (2) of the Mines and Minerals Development Act, (hereinafter, the Act), the Appellant asserts that an Artisanal Mining Licence is not available to a corporate entity like the Respondent.

- 6.2 The Appellant has further placed reliance on Section 66 (1) of the Act to assert that the Respondent holds no Artisanal Mining Licence to enable it execute a valid mining contract. That therefore, the mining contract the parties executed was an illegality in terms of Section 12 (1) (2) and (3) of the Act.
- 6.3 With regard to the fact that the Act provides for a penalty for breach of Section 12 above, as held by the learned Judge, the Appellant argues that the payment of a penalty does not cure an illegality.
- 6.4 In ground two, the Appellant criticizes the learned Judge for upholding the mining contract despite finding that the said licence was Artisanal and for Quartz and not Copper and for ignoring the fact that the Respondent did not have a valid or any licence at all. In this regard, the Appellant argues that the finding by the Court below that the Respondent only abrogated its mining rights and liable to a fine was erroneous as the Respondent had no rights capable of abrogation as it had no mining licence.
- 6.5 In ground three, the Appellant has argued that it was the Respondent that was in breach when it held itself out as

holding a valid mining licence when in fact not. The Appellant asserts that the Respondent engaged in fraudulent misrepresentation to entice the Appellant to execute the mining contract.

6.6 Overall. The Appellant believes the Respondent cannot benefit from its illegality and that the mining contract which contravenes statute is null and void and unenforceable.

6.7 Arguments in ground four are repetitive of those advanced for ground three and therefore, not worthy repeating, suffice to say that the Appellant pleads its innocence while pointing an accusing finger at the Respondent.

6.8 On the basis of its plea of innocence, the Appellant, in ground five, has protested the order for damages and costs in favour of the Respondent.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent filed its heads of argument on 2nd November, 2023 and argued all the grounds together. This is because the Respondent took the view that the grounds of appeal only disclosed one core issue. The Respondent stated the issue in controversy as the alleged failure by the Court below to declare the mining contract between the parties as void ab initio for contravening Act.

7.2 Having set out the issue as above, the Respondent further refined the issue as giving rise to the effect of the parties' failure to comply with statute requirements when entering

into contracts. In answering the question, the Respondent submits that the object of the statute should be discerned.

7.3 In support of that position, the Respondent called in aid the case of Learoyd v Bracken¹. In that case, the Court held that “if the object of the statute is to punish the contracting party that fails to furnish certain particulars, the contract is not itself prohibited and in no sense tainted with illegality.”

7.4 Another Court decision the Respondent called in aid is that of Smith v Mawhood². In that case, the Court made the following statement;

“I think the object of the legislation was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. But looking to the Act of Parliament, I think its object was not to vitiate the contract itself, but only to impose penalty upon the offending party for the purpose of the revenue.”

7.5 Based on the above referred to Court decisions, the Respondent posits that in constructing a statutory provision, where the statute imposes a penalty, then the contract is not prohibited and no illegality attaches to it. The Respondent backed this position with a decision of the Supreme Court of Zambia in Hiteshbhai Patel v Agyen-Frempong Kofi & another³. In that case, the Court stated as follows;

“In Zambia Extract Oils and Colourants Limited and another v Zambia State Insurance Pension Trust Fund

Board of Trustees, we held 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 thereby depriving the contracting party of the benefits under the contract. In that case, we held further that although a mortgage transaction was made and performed contrary to section 17 of the Banking and Financial Services Act, Cap 387 (since repealed) because the lender lent money without a licence, it did not invalidate the contract since the Act provided for a fine in the event of breach.”

8.0 OUR ANALYSIS AND DECISION

- 8.1 From the grounds of appeal and the arguments advanced by both parties to this appeal, it is clear that the Appellant disputes the decision of the Court below in so far as it validates the Co-operative Mining Contract entered into between the parties.
- 8.2 It is also clear that the main bone of contention is that the parties contracted in breach of Section 12 (1) of the Act. According to the Appellant, the Respondent led the Appellant to enter into the contract under a fraudulent representation that it was the holder of an Artisanal Mining Licence when in fact not.
- 8.3 For ease of reference Section 12 (1) provides as follows;

“A person shall not explore for minerals or carry on mining operations, mineral processing operations or gold panning except under the authority of a mining right,

mineral processing licence or gold panning certificate granted under this Act.”

- 8.4 Section 13 (1) provides the following as mining rights that may be granted under the Act namely; an exploration licence and a mining licence. It follows therefore, that for anyone to carry out mining or mineral exploration activities, they must enjoy mineral rights under Section 12 (1) as defined by Section 13 (1).
- 8.5 In this case, the parties entered into a Co-operative Mining Contract which entails that they needed to have a mining right under the authority of a mining licence pursuant to Section 13 of the Act.
- 8.6 In terms of the objections raised by the Appellant, the Respondent did not enjoy any mining rights on two fronts namely; that it did not have a valid mining licence and that under Section 29 (2) of the Act, an Artisanal Mining Licence was not available to a corporate entity such as the Respondent.
- 8.7 The first question then is; did the Respondent have a mining licence that would have conferred upon it the authority to carry on mining operations under the Cooperative Mining Contract? At page 76 of the Record of Appeal, there is a photocopy of an Artisan’s Mining Right, Licence No 24767 – HQ – AMR. The holder’s name is stated as Cupwell Ng’ambi.

8.8 It is not in dispute that Cupwell Ng'ambi, the holder of the Artisanal Mining Licence, is different from Cupwell Ng'ambi Mining Limited. The parties to the Cooperative Mining Contract are the Appellant and the Respondent. It cannot therefore, be in contention that neither the Appellant nor the Respondent herein was not licenced to carry out mining activities.

8.9 As regards the capacity of the Respondent to enjoy mining rights under Section 12 (1), Section 29 (2) restricts artisanal mining rights to citizens and co-operatives whose composition is wholly of citizens. Section 2 of the Act defers the definition of "citizen" to the one in the Constitution and Article 266 of the Constitution defines "citizen" as; "Means citizen of Zambia."

8.10 Given the restrictive definition of "citizen" by the Constitution, the assumption is that corporate citizens are excluded from enjoying artisanal mining rights. However, Section 12 (3) (b) of the Act includes a body corporate in its penalty regime.

8.11 This implies that a body corporate is recognized under Section 12 of the Act as eligible to enjoy the authority of mining rights perhaps in exception of an Artisanal Mining Licence as proscribed by Section 29 (2) of the Act. This limb of the argument is however, moot because there is no claim

on the part of the Respondent that it owned an Artisanal Mining Licence.

- 8.11 The only defence tendered by the Respondent to the issue is that a contract executed in breach of a statutory provision was not necessarily void for illegality where the act imposes a fine for the breach.
- 8.12 The Respondent argued this position with reference to some Court decisions, among them, the decision of our own Supreme Court of Zambia in Hiteshbhai Patel (supra), a 2020 decision. In this case, at J9 of the Judgment, is found the portion quoted above in paragraph 7.5 of this Judgment.
- 8.13 Guided by the position taken by the Supreme Court of Zambia in the Hiteshbhai case, it then rests upon the trial Court to decipher the intention of the statute where a penalty is provided for its breach and what its effect on the contract is.
- 8.14 In this appeal, Section 12 (3) is brought into view as it provides for as follows;
- “A person who contravenes subsection (1) or (2) commits an offence and is liable upon conviction –
- (a) In the case of an individual, a partnership or co-operative, to a fine not exceeding seven hundred thousand penalty units or to imprisonment for a term not exceeding seven years or to both; or
- (b) In the case of a body corporate, to a fine not exceeding five million penalty units.

8.15 Section 12 (3) of the Act provides penalties that are quite severe including a term of imprisonment. Can it then be said that the Act, in that section, intended anything beyond or in addition to the prescribed penalties such as rendering the contractual obligations and benefits accruing to the parties being wiped out by a declaration of nullity of contract?

8.16 In many pieces of legislation, offences are created and various penalties provided for each offence. The nature of the penalty will depend on the severity of the offence and what the Legislature intends to deter or achieve. Sometimes, the Act will provide a cocktail of penalties for one offence or confer discretion on the Court to impose other punitive measures.

8.17 For instance, Section 104 of the Roads and Road Traffic Act provides as follows;

“Where the holder of a motor dealer’s vehicle licence is convicted before any court of an offence contrary to any of the provisions of this Act or of any regulations made thereunder relating to such licences, the court may in addition to imposing any other penalty order the cancellation of such licence.”

8.18 This Section demonstrates that although the primary intention of the Legislature was to have the offender suffer criminal sanctions, it left it open to the Court to decide whether, in particular cases, the circumstances demand the imposition of a civil remedy of cancellation of the licence.

8.19 In this appeal, Section 12 (3) of the Act does not confer such discretion on the Court and neither does it provide for any other penalty. The section focuses on the criminal side of the law by providing for fines and terms of imprisonment.

8.20 In the case of Mohamed S. Itowala v Variety Bureau de Change,⁴ the Supreme Court of Zambia, held that a client who had entered into a contract to convert ZMW 24,000,000.00 into USD10,000.00, was entitled to get back the ZMW 24,000,000.00 when the Bureau de Change refused on account that the contract was entered into in contravention of the directive of the Bank of Zambia pursuant to a Statutory Instrument.

8.21 In that case, the Supreme Court held as follows;

- (i) 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.
- (ii) The Appellant's title to his money is unaffected and did not result from an illegal transaction.

8.22 A synopsis of the facts of the above case is that the Appellant went to the Respondent to buy US Dollars. He accordingly gave the Respondent ZMW 24, 000,000.00 to purchase USD 10,000.00. The Respondent issued two

receipts worth USD 5,000.00 each but did not give the Appellant the USD 10,000.00.

8.23 The Respondent also refused to give back the ZMW 24,000,000.00 to the Appellant on the basis that the transaction was tainted with illegality. The illegality arose from a circular from the Bank of Zambia which restricted transactions with individuals to not more than USD 5,000.00 per day.

8.24 In this case, there was a clear infraction of the directive by the Bank of Zambia at the instance of the Respondent, resulting in an illegality. However, both parties were entitled to revert to their original positions before they entered into the contract to purchase and sell US Dollars.

8.25 The difference between this case and the appeal before us is that while the former involved a prohibition of performing the contract in a particular way, the latter deals with the effect of abrogating a statutory provision on a contract.

8.26 In view of the guidance drawn from the decision of the Supreme Court of Zambia in the Hiteshbhai case (supra), and the way Section 12 (3) is couched, it is clear that the intention of the statute was to penalize the party in breach of the law and not to affect the contract entered into.

8.27 On the argument that the Respondent misled the Appellant by holding out as having a valid Mining Licence when in fact

not, the truth is that the Appellant saw the Artisan's Mining Licence. This should have set it on inquiry to confirm its scope. As a matter of fact, the licence clearly states that it confers rights to Quartz and not Copper.

8.28 The Appellant has also argued that the Respondent was in breach of the contract for holding out that it was a holder of a valid mining licence when in fact not.

8.29 This argument does not hold water because, it was incumbent upon the Appellant to carry out due diligence to ascertain the validity of all documents presented by the Respondent before signing the contract.

8.30 Further to the above, in the view we have taken that the cardinal issue in contention is whether the contract in issue was null and void for illegality, and having found that it was not, the arguments on the other issues are otiose.

9.0 CONCLUSION


9.1 In the view we have taken to the effect that breach of Section 12 (1) of the Act does not render the contract void, it follows that the learned Judge in the Court below was on firm ground.

9.2 We dismiss the appeal for lack of merit. However, in view of the nature of this appeal, which is to the effect that the

Respondent did not hold a mining right under Section 12 of the Act, we order each party to bear its own costs.



M.J. SIAVWAPA
JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL SC
COURT OF APPEAL JUDGE

Dissenting Judgment

Patel, JA delivered the minority Judgment.

Legislation Referred to:

1. The Mines and Minerals Development Act No. 11 of 2015
2. The Banking and Financial Services Act, Cap 387 (since repealed)
3. The Property Transfer Tax Act, Cap 340

Cases Referred to:

1. Salomon v Salomon & Co Ltd (1897) AC 22
2. Hiteshbhai Patel v Agyen-Frempong Kofi & Anr – SCZ Appeal No.13 of 2017
3. Mohamed S. Itowala v Variety Bureau de Change – SCZ Judgment No.15 of 2001
4. Zambia Extract Oils and Colourants Limited & Anr v Zambia State Insurance Pension Trust Fund Board of Trustees ZLR (2016) 2 ZLR 316 and SCZ Appeal No. 181 of 2009
5. Learoyd v Bracken (1894) 1 QB 114

Works Referred to:

1. Chitty on Contracts “General principles” 26th Edition- Sweet & Maxwell

1.0 INTRODUCTION

- 1.1 This appeal raises pertinent questions of considerable importance based on the principles of the law of contract, the capacity of the contracting Parties, when a contract which appears legal on its face, may actually be unenforceable as formed and the circumstances in which a Court ought not to grant reliefs sought based on an unenforceable contract.
- 1.2 The Judgment of the lower Court, which has been upheld on appeal by the majority, may pose significant challenges and undermine the specific prohibitions of the relevant statute, in its interpretation that where statute provides a penalty for its breach, a Court of law may treat the underlying contract as enforceable and capable of conferring rights and liabilities on the parties nonetheless.
- 1.3 I hold a different view from the majority Judgment of my learned seniors and my dissenting Judgment will be read separately as below.

2.0 Background

- 2.1 I see no need to repeat the contents of the Appeal, nor re-state the competing arguments ably advanced by Counsel, save to state that I have seriously interrogated the Appeal, the competing arguments and reflected on the Judgment of the lower Court, the subject of the Appeal.
- 2.2 I adopt the facts and background information as cast in **paragraphs 1 to 4** of the Judgment of the Majority. I believe it is imperative for me to address

what I consider the real issue in controversy, being the *locus* or capacity of the Respondent to enter into the Mining Cooperative Contract (CMC), with the Appellant. (*The Plaintiff and Defendant in the lower Court respectively*).

2.3 It is not disputed that the Respondent entered into a CMC describing itself as the 'Owner' of a small-scale mining licence No. 24767-HQ-AMR, when in fact the licence was granted to one **Cupwell Ngambi**. The doctrine of corporate personality as established by the House of Lords, in the seminal case of **Salomon v Salomon & Co Ltd**¹ has stood unimpeached for over a century and needs no further pronouncement.

2.4 I recast the five grounds of appeal before the Court for context:

1. *The learned High Court Judge misdirected herself and erred in fact and law when she found that the Respondent (Plaintiff in the Court below) was a holder of a valid Artisanal Mining License for Quartz, when in fact not.*
2. *The learned High Court Judge misdirected herself and erred in fact and law when she found that the license used by the Respondent was an artisanal license for Quartz and not copper and yet proceeded to validate the Mining Contract and ignored the fact that the Respondent did not possess a valid license or any license at all.*
3. *The learned High Court Judge misdirected herself by failing to address the fact that by the Respondent portraying to be holder of a valid Mining License when in fact not, was a fundamental breach*

on its part and rendered the Mining Contract an illegality and unenforceable.

4. *The learned High Court Judge erred in law by finding that the Appellant, who was an innocent party, breached the Mining Contract, when the said contract was void ab initio.*
5. *That the learned High Court Judge erred in law by failing to find that the Appellant as an innocent party should instead be awarded damages and costs.*

2.5 My point of disagreement with the Judgment of the lower Court rests on its determination as follows:

- i. The finding that the Respondent was the holder of an artisanal mining licence;
- ii. The penalty available (against the Respondent) for breach of **section 12 (1)** of the MMDA;
- iii. The award of damages (*nominal or otherwise*) for breach of contract;
- iv. The grant of an order to treat the CMC as repudiated and for the Respondent to be at liberty to enter into a new contract with other prospective investors;
- v. The award of costs to the Respondent.

2.6 Consequently therefore, my point of respectful departure from the Judgment of the majority, follows the reasoning below.

3.0 Analysis and determination

3.1 In my considered opinion, all the grounds of appeal stem from one main consideration, namely the capacity and *locus standi* of the Respondent (the Plaintiff), to seek redress in the lower Court. In addressing the grounds of appeal collectively, I ask myself the following questions:

3.2 *Who is the Respondent, in other words who is Cupwell Ng'ambi Mining Limited?*

3.3 *Can this entity be brought under the scrutiny and provisions of the Mines and Minerals Development Act No. 11 of 2015 (MMDA) so as to attach any penalty or sanctions against it?*

3.4 *Depending on the answers to the two questions above, what is the effect of the contract, namely the CMC on the Parties to the contract?*

3.5 It is not contested that the Artisans Mining Right (AMR) as seen on **page 76** of the Record of Appeal, is in the name of **Cupwell Ngambi**, a non-party in these proceedings. It is further without doubt that what was conferred was an AMR and not a small scale mining licence. It is also not in dispute that the right conferred related to the mineral defined as Quartz. My understanding of the conditions of the grant of the Artisanal Mining as seen on **page 77** of the Record of Appeal confer rights and obligations on the mining holder. It is the breach of any of those conditions, that can attach liability under statute. In my considered opinion, any breach and consequent liability cannot attach to a non-holder on account of capacity.

3.6 I have directed my mind to the relevant definitions in the MMDA. **Section 2** has the following definitions:

*“ artisanal mining” means an artisan’s mining operation **undertaken by a citizen** pursuant to a mining licence granted under Part III.”*

(emphasis is mine)

“ citizen” has the meaning assigned to it in the Constitution, and in relation to a partnership, means a partnership which is composed exclusively of citizens”.

“holder” means the person in whose name a mining right or non-mining right is registered under this Act”

“small-scale mining” means mining over an area covering a minimum of three cadastre units and not exceeding one hundred and twenty cadastre units.”

3.7 **Section 29 (2)** provides that: *Artisanal mining shall only be undertaken by a citizen or a co-operative wholly composed of citizens.”*

3.8 I have considered the cited Judgments of the Supreme Court in the cases of **Hiteshbhai Patel v Agyen-Frempong Kofi & Anr** ²and **Mohamed S. Itowala v Variety Bureau de Change**, ³ on which the majority Judgment derives its understanding, that in construing a statutory provision, where statute provides a sanction, then the underlying contract is not prohibited, and no illegality attaches to it.

3.9 With respect, I believe the cited Judgments are applied out of context to the facts in *casu*. In the **Mohamed S. Itowala** matter, Mr. Mohamed Itowala was the beneficial owner of money held in Zambian currency and which he attempted to convert to United States Dollars in an amount in excess of the permissible regulations in force at the time. In that matter, the Supreme Court held that the Appellant's title to his own money is unaffected by a tainted contract, as it did not result from an illegal transaction. The issue in that case did not question the Appellant's capacity or locus to sue the Bureau de Change for the recovery of his own money.

3.10 In the case of **Hiteshbhai Patel**, the Apex Court did not find proof that the contract was tainted with illegality and in any event the Supreme Court found that **section 12** of the Property Transfer Tax Act provided for the recovery of tax under the Act, while not making contracts such as the one (in that case), illegal. Again, I do not believe that the facts of the case, or its holding are applicable to the facts in the appeal before us.

3.11 In the case of **Zambia Extract Oils and Colourants Limited & Anr v Zambia State Insurance Pension Trust Fund Board of Trustees**,⁴ the Supreme Court held 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 thereby depriving the contracting party the benefits under the contract. In that case, the Supreme Court held that although a mortgage transaction was made and performed contrary to **section 17** of the Banking and Financial Services Act, Cap 387 (since repealed), the fact that the lender lent money without a licence, did not invalidate the contract since the Act

provided for a fine in the event of a breach. In this decision, the identity or locus of the party, or indeed its right to lend money, was not the subject of the appeal.

3.12 It is my considered view that this authority, is distinguishable from the facts in *casu*, as the Respondent did not own a mining licence or at all, and therefore the sanctions or penalties applicable under **section 12** of the MMDA, did not and could not attach to it at all. I am also of the view that regard should not be had to **section 12** in isolation of the other provisions of the Act. I also disassociate myself with the comparison made with the Roads and RoadTraffic Act.

3.13 It is my considered opinion that the issue before the Court is to distinguish between illegal contracts and the consequence of the illegality. Where the contract is illegal as formed, the contract is totally void and no party can sue on it. On the other hand, where the contract is illegal as performed, the court may void the contract or may find a way to find that the contract is not entirely void. The cited case of **Learoyd v Bracken**⁵ illustrates the position where the legislature was concerned to regulate the way a contract was performed, but did not extend the conduct to be prohibited. These must be distinguished with contracts which are illegal as formed and those which are illegal as performed. While the former type of contract is totally void and no party can sue on it, the latter may be declared void by the Court or the Court may find a way to hold that the contract is entirely void and unenforceable.

3.14 I am of the considered view, that the Appellant was or ought to have been put on notice that the Respondent, firstly was not the owner of the AMR, secondly the licence granted, was for quartz and not copper, the licence was an Artisan's Mining licence, and not a small-scale mining licence. I have noted also the prohibition in the MMDA under **section 2** and **section 29 (2)** (see **paragraph 7 & 8** above), as to who could obtain and operate an artisans mining right.

3.15 Having established that the Respondent was not the holder of any licence or benefit under the MMDA, I am of the considered opinion that the CMC was an illegal and consequently unenforceable contract and accordingly, the latin maxim, *ex turpi causa non oritur actio* (meaning no disgraceful matter can ground an action) will apply.

3.16 I take this opportunity to reaffirm, as did the learned authors of **Chitty on Contracts**¹ at paragraph 1257, that when a contractual right is said to be unenforceable on the ground of *ex turpi causa non oritur actio*, this is an illustration of the general principle of the law regarding the effect of illegality on the formation, performance and enforcement of a contract.

3.17 **Chitty on Contracts** in discussing the position at common law at paragraph 1138,¹ observed under the sub-heading '*Both parties aware of legally objectionable features*'. Neither party can sue upon a contract if:

- a. *both knew that it necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that is illegal or otherwise against public policy,*

- b. both knew that the contract is intended to be performed in a manner which, to their knowledge is legally objectionable in that sense, or*
- c. the purpose of the contract is legally objectionable and that purpose is shared by both parties, or*
- d. both participate in performing the contract in a manner which they know to be legally objectionable.”*

3.18 My understanding of the CMC is that the contract is void for illegality and cannot be enforced by either party to the ill-fated contract for the following reasons:


- i. The Respondent was not the owner of the licence No. 24767-HQ-AMR
- ii. The licence was in fact an Artisanal Mining Right available only to a citizen or co-operative under **section 29 (2)** of the MMDA
- iii. The licence was for the mineral known as quartz as opposed to copper
- iv. The purported contract referred to a small-scale mining licence for copper.
- v. The contract could not bestow any rights on the Parties that a Court may enforce.

3.19 By way of obiter, I may have been inclined to take a different view had the CMC been entered into between Cupwell Ngambi and the Appellant. In those circumstances, I may have been persuaded to adopt the reasoning that where statute provides a penalty for breach, the underlying contract is not invalidated.

3.20 The principles of equity are well entrenched in our legal system, and it is trite that he who comes to equity must come with clean hands. In my considered opinion, the contract being illegal and unenforceable must as a necessary consequence mean that neither party can sue under it.

3.21 In allowing the appeal, I would set aside the Judgment of the lower Court, including the counterclaim and order that Parties bear their own costs, here, and in the Court below.

This concludes my dissenting Judgment.



Abha N. Patel S.C.
COURT OF APPEAL JUDGE