

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2024/HP/0204

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

IN THE MATTER OF: AN APPLICATION FOR DELIVERY OF POSSESSION OF
SUBDIVISION J OF SUBDIVISION 14 OF SUBDIVISION
G OF FARM NO. 4142, LUSAKA TO THE APPLICANT AS
MORTGAGEE WITH POWER OF SALE TO RECOVER
DEFAULT AMOUNT OF DEBT AND INTEREST THEREON

BETWEEN:

PRUDENT SOLUTION LIMITED

AND

MUTALE CHONTA



APPLICANT

RESPONDENT

Before the Honourable Lady Justice S. Chocho, in chambers on the 16th day of
April, 2025.

For the Applicant: Mrs. N Daka of Messers G.M Legal Practitioners.

For the Respondent: Mr. K Nkunta of Messers August Hill and Associates.

R U L I N G

Cases referred to:

1. *Edman Banda v Charles Lungu Appeal No. 73 of 2016.*
2. *Gideon Mundanda and Timothy Mulwani v he Agricultural Finance Co Ltd and Mwiinga (1987) ZR 29.*
3. *Magic Carpet Travel Tours Ltd Zambia National Commercial Bank [1999] ZR 61.*
4. *Kasabi Industries v Intermarket Banking Corporation SCZ Appeal No 168 of 2009.*
5. *Great Lenders Services Limited and Others v Indo Zambia Bank Appeal No. 219/2020.*

Legislation referred to:

- 1. Order 14A of the Rules of the Supreme Court of England, 1965, 1999 Edition (White Book). Z**
- 2. Section 6 of the Banking and Financial Services Act, Act No. 7 of 2017.**
- 3. Section 16 of the Money Lenders Act, Chapter 398 of the Laws of Zambia.**
- 4. Section 3(2)(b) of the Banking and Financial Services Act, Act No. 7 of 2017.**
- 5. Section 2 of the Statutory Instrument No. 12 of 2024.**

1. INTRODUCTION

- 1.1. This is a Ruling on the Respondents application to raise Preliminary Issues made pursuant to **Order 14A of the Rules of the Supreme Court of England, 1965, 1999 Edition (White Book)**.
- 1.2. The application is supported by an affidavit in support of summons to raise preliminary issues, a list of Authorities and skeleton arguments filed into Court on May 28th, 2024.

2. BACKGROUND

- 2.1. The background to this matter as per pleadings and affidavit evidence presented before Court is that the Applicant commenced an action against the Respondent on February 27th, 2024 by way of Originating Summons claiming for the following reliefs:
 - i) An Order of recovery of the sum of K2,322,683.18 plus interest and costs; and

- ii) In the alternative an Order for delivery of possession of the property known as Subdivision J of Subdivision NO. 14 of Subdivision G of Farm No. 4142, Lusaka with power to sale to recover/debt amount.
- 2.2. The Respondent filed an affidavit in opposition to the affidavit in support of Originating Summons on May 20th, 2024.
- 2.3. The Respondent made an application to raise preliminary issue(s) on May 28th, 2024.
- 2.4. The Respondent's application was heard inter-partes on January 14th, 2025. The following are the questions/issues of law:
- i) Whether the Applicant can lend on the security of a mortgage or any interest in real property; and
 - ii) Whether the Applicant can commence an action for the recovery of money in the High Court of Zambia.

3. AFFIDAVIT EVIDENCE

- 3.1. The Respondent filed an affidavit in support of summons to raise preliminary issue on May 28th, 2024 deposed by one Mutale Chonta who is the Administrator of the estate of late Charles Chonta.
- 3.2. The Respondent avers that according to the Applicant, the Applicant advanced the sums of ZMW 183, 000.00 and ZMW 503,350.00 with an interest rate of 4% per month to the deceased by two money lending contracts dated January 7th, 2022 and May 31st, 2022.

- 3.3. The Respondent avers that the said debts were purportedly secured by equitable mortgages over the deceased's property namely Subdivision J of Subdivision No. 14 of Subdivision G of Farm No. 4142, Lusaka in favour of the Applicant.
- 3.4. The Respondent avers that only an entity registered with and licensed by the Bank of Zambia can take security over real property and take out a mortgage action.
- 3.5. The Respondent avers that as at April 30th, 2024, the Applicant was not such an institution registered with the Bank of Zambia.
- 3.6. The Respondent avers that the mortgage action is improperly before this Court as the Applicant cannot take security over real property.
- 3.7. The Respondent further avers that a contract in contravention of a statute is unenforceable to the extent of its contravention.
- 3.8. The Respondent avers that the correct forum for recovery of a debt is the Subordinate Court.
- 3.9. The Applicant filed an affidavit in opposition on October 14th, 2024 deposed by one Collins Kapungwe Kabali.
- 3.10. The Applicant avers that it has an equitable mortgage and has to seek a Court Order before possession is done.
- 3.11. The Applicant avers that this action is properly before this Court and should be heard and determined on merit.
- 3.12. The Applicant avers that the Respondent has not demonstrated sufficient reasons to warrant a dismissal of the Applicant's case.

4. THE LAW AND SUBMISSIONS

- 4.1. I have had occasion to review and consider the application, having read the Parties affidavits, skeleton arguments and list of authorities.
- 4.2. The Respondent submits that this Court has the jurisdiction to and dispose of a matter on a point of law pursuant to **Order 14A Rule 1 of the rules of the Supreme Court of England** which provides as follows:

“1. (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that

a) such question is suitable for determination without a full trial of the action; and

b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) the Court shall not determine any question under this Order unless the parties have either-

(a) had an opportunity of being heard on the question, or

(b) consented to an Order or Judgment on such determination”.

- 4.3. The Respondent submits that **Section 6 of the Banking and Financial Services Act** provides for which institutions are permitted to provide financial services. Section 6 of the Banking and Financial Services Act provides as follows:

(1) A company shall not conduct a banking business without

a banking licence.

(2) A body corporate shall not conduct a financial business without a financial business licence, or provide a financial service without a financial institution licence.

(3) A person that contravenes this section commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding four years, or to both.

- 4.4. The Respondent submits in light of the above provision that it is clear that only licensed financial service providers can take out security over landed property as a security for debt.
- 4.5. The Respondent submits that the **Banking and Financial Services Act** states that only financial providers registered with the Bank of Zambia can conduct financial services including lending on the security of real property.
- 4.6. The Respondent further submits that the **Banking and Financial Services Act** does not recognize financial institutions registered in accordance with the **Money Lenders Act** as financial service providers.
- 4.7. The Respondents further submits that the Applicant's action is incompetently before this Court as the Applicant does not have the requisite licensing under the **Banking and Financial Services Act** to take security over real property.
- 4.8. The Respondent submits that the Applicant's act of taking security is illegal and in contravention of the **Banking and Financial Services Act**

and it is on this basis that the contracts entered into by the parties cannot be enforced to the extent of their illegality.

- 4.9. The Respondent submits that under the **Money Lenders Act**, a money lender can only recover the money lent or enforce security in the Subordinate Court.
- 4.10. The Respondent submits that the mortgage action is incompetently before this Court and should be dismissed.
- 4.11. In response, the Applicant submits that the Applicant is a registered money lender and can create an equitable mortgage with a borrower and in order to recover its sums, a Court Order is needed.
- 4.12. The Applicant submits that the **Banking and Financial Services Act** does not apply to money lenders registered under the **Money Lenders Act**.
- 4.13. The Applicant further submits that **Order 30 Rule 14 of the High Court Rules** provides that a mortgage action ought to be commenced by Originating Summons in the High Court which has original and inherent jurisdiction to hear such cases.

5. COURTS DECISION

- 5.1. I have had occasion to review and consider the application, having heard Counsel for the Respondent and Counsel for the Applicant, read the affidavits, skeleton arguments and authorities cited by the parties for which I am grateful.

5.2. On perusal of the application, I am of the view that the following are the issues for determination:

- i) Whether this Court has the jurisdiction to hear and determine the Applicant's action in light of the Respondent's argument that a money lender can only commence an action for recovery in the Subordinate Court;
- ii) Whether the money lending contracts subject of this action amount to illegal contracts; and
- iii) Whether a money lender can create an equitable mortgage and subsequently commence a mortgage action.

The position on these issues will in turn point to answers for the points of law/ issues raised by the Respondent.

5.3. It is a trite principle of law that a Court can only hear and determine matters that are within its jurisdiction. It is the Respondent's contention that a money lender can only recover money lent or enforce a security in the Subordinate Court placing reliance on **Section 16 of the Money Lenders Act** which provides as follows:

“Subject as hereinafter provided, no action by a money-lender for the recovery of money lent by him or for enforcing any agreement or security relating to any such money shall be brought in any subordinate court other than a subordinate court of the first class: [underlined for emphasis] Provided that the Minister may, with the concurrence of the Chief Justice, by order direct that any subordinate court

specified in the order shall have the same jurisdiction as respects such actions as aforesaid as it would have had but for the provisions of this section, and any such order may contain provisions with respect to the making of rules for regulating the procedure to be followed in the case of any such action”.

- 5.4. From the reading of the above provision, the import is that a party is precluded from commencing matters relating to recovery of money lent or enforcement of security in any other Subordinate Court which is not a Subordinate Court of the First Class.
- 5.5. Assuming that **Section 16 of the Money Lenders Act** grants jurisdiction of such matters to the Subordinate Court of the First Class only, the question then is what value of transactions can the Subordinate Court of the First Class hear in light of **Section 2 of Statutory Instrument No. 12 of 2024**?
- 5.6. The record shows that the Applicant’s claim is for the sum of K1,322,683.18 which falls beyond the jurisdiction of the Subordinate Court which does not have jurisdiction over claims exceeding K1,000,000.00 as provided by **Section 2 of Statutory Instrument No. 12 of 2024** and jurisdiction over claims exceeding K1,000,000.00 lies with the High Court which has unlimited jurisdiction in civil matters.
- 5.7. I am of the of the considered opinion that the jurisdiction to hear and determine the Applicant’s claim lies with the High Court and therefore, the Applicant’s action is properly before me.

5.8. In dealing with whether the money lending contracts subject of this action are illegal contracts, I am guided by the authority in the Supreme Court decision of **Edman Banda v Charles Lungu Appeal No. 73 of 2016²** in which it was held as follows:

“... the mere fact of proof of illegality having tainted a contract would not always render such a contract void and unenforceable. Put differently, an otherwise 'illegal' contract would be enforced by a court of law where factors or considerations exist which militate against refusal to enforce... in the context of the Zambia Extracts Oils and Colourants Limited' case, we discounted the illegality argument on the basis that we felt satisfied that the mortgage contract which that argument had targeted had been intended to be binding by the parties to the same. In reaching this conclusion, we also felt satisfied that the question of contravention of S.17 of the BFSA did not arise at the time when the relevant contract was executed and was only raised by the party who had defaulted in its obligation of repaying the loan and, indeed, in a futile attempt to fend off what the lower court in that matter and this court adjudged to have been a legitimate loan which had been lawfully procured”.

5.9. In light of the above authority, I am of the view that the Respondent cannot raise the illegality argument at this late hour after the mortgage has already been entered into and the Respondent has benefited from it. This to me appears to be gimmick to avoid an obligation created under the contracts.

5.10. If the circumstances are that the contract is found to be illegal, the defaulting party may still be ordered to perform its obligations under the contract provided the contract can be performed legally. The Supreme Court decision in the case of **Gideon Mundanda and Timothy Mulwani v he Agricultural Finance Co Ltd and Mwiinga (1987) ZR 29** ² refers, in which it was held as follows:

“It must be made quite clear that the Courts will never in any circumstances condone the flouting of the law; but we must approach this matter by considering whether it was possible for the parties to comply with their contract legally, in which event we must encourage such compliance”.

5.11. Further, it is the Respondent’s contention that a money lender registered under the **Money Lenders Act** cannot create a mortgage. I find Respondent’s argument and interpretation of **Section 6 of the Banking and Financial Services Act** to be alien and misconstrued. This provision does not in any way provide or suggest to mean that a money lender registered under the **Money Lenders Act** is precluded from creating/holding equitable mortgages. This argument appears to be mere speculation and the Respondent has failed to state/bring to the attention of this Court the law/authority on which it bases its argument that a money lender registered under the **Money Lenders Act** cannot hold an equitable mortgage.

5.12. What **Section 6 (2) of the Baking and Financial Services Act** as reproduced in 4.3 above provides is that a body corporate shall not

conduct financial business without a financial business licence or provide a financial service without a financial institution licence.

5.13. Further the **Banking and financial Services Act in Section 3(2)(b)** clearly states that the Act shall not apply to a person registered under the **Money Lenders Act**. The provision provides as follows:

“(2) This Act does not apply to—

(b) a person registered in accordance with the Money Lenders Act”.

5.14. The **Banking and financial Services Act** does not define the term “*person*” and I am inclined to go with the position that the term person in the legal sense may be used to mean a natural person or a legal person (company/body corporate). The Applicant herein is such a person registered in accordance with the **Money Lenders Act** and I am of the considered view that the provisions of **the Banking and Financial Services Act** are not applicable to the Applicant herein.

5.15. A money lender is under the **Money Lenders Act** allowed to take security for purposes of securing a loan/debt. The Act however, does not state what can and cannot be taken as security.

5.16. An equitable mortgage is one such security that can be created to secure a loan. It is trite that all property whether real or personal which may be subject of a legal mortgage can also be charged in equity.

5.17. The law requires that in order for an equitable mortgage to be created, the certificate of title must be deposited with the lender as per the authority in the cases of **Magic Carpet Travel Tours Ltd Zambia**

National Commercial Bank [1999] ZR 61³ and Kasabi Industries v Intermarket Banking Corporation SCZ Appeal No 168 of 2009⁴.

5.18. Additionally, The Court of Appeal in the in the case of **Great Lenders Services Limited and Others v Indo Zambia Bank Appeal No. 219/2020⁵** held as follows:

“The learned authors of Halsbury’s Laws of England (4th Edition) Volume 32, paragraph 405 describe ways in which an equitable mortgage can be created. In the circumstances, it can either be by depositing title deeds or by an agreement to create a mortgage...”

5.19. On perusal of the record, it can be shown that an equitable mortgage was created and this can be evidenced from the money lending agreement exhibited by the Applicant in the affidavit in support of Originating Summons as “CKK1” containing an agreement to create a mortgage in clause 4.

5.20. I am of the firm view that a money lender registered under the **Money Lenders Act** can lawfully create an equitable mortgage so long as they are in compliance with the law which governs mortgages in Zambia and the general principles of contract law. The Respondent’s argument is therefore, a fishing expedition in futility.

5.21. In light of the above, I find that the Respondent’s Application is bereft of merit and I accordingly dismiss it.

6. CONCLUSION

- 6.1. For the foregoing reasons, **I ORDER** that the Respondent's application **BE** and **IS HEREBY** dismissed.
- 6.2. Costs to the Applicant to be taxed in default of agreement.
- 6.3. This matter shall be heard on May 27th at 09:00 Hours

Delivered at Lusaka on the 16th day of April, 2025.



S. CHOCHO

HIGH COURT JUDGE

