SELECTED JUDGMENT NO. 22 OF 2017

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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 73/2016
SCZ/8/49/2016

BETWEEN:

EDMAN BANDA — **APPELLANT**

AND

CHARLES LUNGU — **RESPONDENT**

Coram: **Malila, Kaoma and Musonda, JJS.**
On 9th August, 2016 and 2nd June, 2017

For the Appellant: Mr. W. Mutofwe of Messrs Willa Mutofwe & Associates.

For the Respondent: Mr. I. M. Mabbolobbolo of Messrs Makala & Company.

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Phillips vs. Copping (1935) 1K.B. 15.**
2. **Kalusha Bwalya vs. Chadore Properties and Another Appeal No. 222/2013.**
3. **Re Mahmoud vs. Ispahani's Arbitration (1921) ALL ER 417.**
4. **Printing and Numerical Registering Company vs. Sampson (1875) LR 19 Ex. 462.**
5. **Renard Construction (ME) Pty Limited vs. Minister of Public Works 33 Con. LR 72 at 112-113.**

6. **Roland Leon Norton vs. Nicholas Lostrom [2010] 1 Z.R. 358**
7. **Neighbours City Estates Limited vs. Mark Mushili: Appeal No. 47/2013**
8. **Zambia Extracts Oils and Colourants Limited & Enviro Oils and Colourants Limited vs. Zambia State Insurance Pension Trust Fund Board of Trustees: SCZ/Selected Judgment No. 31 of 2016**
9. **Yango Pastoral Co. Pty Limited vs. First Chicago Australia Ltd. (1978) 139 CLR 410**
10. **Mohamed S Itowala vs. Variety Bureau de Change SCZ Judgment No. 15 of 2001**
11. **Les Laboratoires Servier vs. Apotex Inc. (2013) BUS L.R. 80**

Legislation referred to:

1. **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.**
2. **Money Lenders Act, Chapter 398 of the Laws of Zambia.**

Other Materials referred to:

1. ***Halsbury's Laws of England*, 4th edition Volume 9 paragraphs 386 and 424.**
2. ***Law of Contract*, 13th edition, Butterworth's (1996) at page 29.**
3. **Roy Goode on *Commercial Law*, 4th edition, Penguin Books, London (2010) at page 90.**

The simple issue or question which this appeal raises is whether or not it is legally permissible for a person who is neither licensed as a money lender under the Money Lenders Act, Chapter 398 of the Laws of Zambia, nor appropriately licensed under the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia (also referred to in this judgment as "the BFSA") to avail a personal loan to another person and recover a 'profit' upon such a loan. The court from which this appeal arose resolved the above

question in the affirmative. It is that affirmative resolution of the issue we have identified above which prompted this appeal against the entire judgment of the court below dated 17th February, 2016.

The gist of the judgment of the learned trial judge was that, as the appellant and the respondent had freely and voluntarily entered into the written agreements by which the duo had agreed that the amount owing to the Respondent was K560,000.00, the two protagonists were bound, hand and foot, by the said agreements and, consequently, the liability of the appellant to the respondent to the tune of K500,000.00, which the agreements in question had evidenced, could not be assailed even by way of coercive judicial intervention.

The learned trial judge was also in no difficulty in reaching the conclusion that the agreements which the two parties to this appeal had entered into were not illegal both under the **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia** and the **Money Lenders Act, Chapter 398 of the Laws of Zambia** and that, contracts such as the loan agreements in question could not be rendered unenforceable merely because the person who had

availed the loan was not appropriately licensed under either of the two pieces of legislation earlier alluded to.

The history and background facts surrounding this matter are scarcely controvertible.

Sometime during the month of August, 2012, the respondent sold a car on credit to the appellant, who was his acquaintance. The price was agreed at K60,000.00 and the same was to be paid before the month of September, 2012.

In early September, 2012, the appellant approached the respondent with a view to borrowing a sum of K200,000.00 which the former required for the purpose of financing his business. The respondent proceeded to avail the K200,000.00 to the appellant on the apparent understanding that, on repaying the borrowed money (the K200,000.00), the appellant was to add a sum of K80,000.00 by way of 'profit' for the respondent.

Sometime in December, 2012, the appellant repaid the K200,000.00 which he had borrowed from the respondent. When the appellant was reminded about the K80,000.00 agreed *'profit'*

on the K200,000.00 by the respondent, the latter was told not to worry and requested to keep the K200,000.00 for him (the appellant) for another business opportunity.

On 23rd January, 2013, the appellant, once again, telephoned the respondent and informed him that he, the appellant, had an order to supply goods to the Mines in Kitwe for which he required a sum of K160,000.00 to fulfil that order. The appellant accordingly sought to have the respondent lend him that sum of money. According to the record, the respondent took advantage of the appellant's fresh request for his financial intervention to remind the appellant about his K80,000.00 'profit' which the appellant had yet to settle and the K60,000.00 for the car. In response, the appellant suggested to the respondent that he, the respondent, should add the K80,000.00 and K60,000.00, which were outstanding and due to the respondent at the time, to the K160,000.00 fresh financial intervention which the appellant was seeking at that time and that the new total indebtedness would then stand at K300,000.00. According to the respondent, a fresh

and additional sum of K100,000.00 was agreed upon as the respondent's profit on the enhanced global debt.

In order to consummate the fresh arrangements between the appellant and the respondent as highlighted above, the duo signed a personal loan agreement on 23rd January, 2013 in respect of the K400,000.00 total debt to the appellant. This fresh agreement was also duly witnessed.

On 6th February, 2013, the appellant successfully sought an additional sum of K120,000.00 from the respondent on the basis that the K160,000.00 which the appellant had earlier secured from the respondent had proved inadequate for the purpose of fulfilling the appellant's order from the Mines as earlier noted. The understanding and agreement between the two parties was that this fresh intervention by the respondent would earn him K40,000.00 by way of profit.

The net effect of all the arrangements between the appellant and the respondent was that the former's total indebtedness to the

latter rose to K560,000.00. This total indebtedness was to be liquidated by not later than 30th April, 2013.

According to the respondent, out of the total amount of K560,000.00 which represented the appellant's total indebtedness to the respondent, only a sum of K60,000.00 was paid by the appellant to the respondent despite the parties having agreed, via the two last agreements in question, that the appellant's indebtedness would be liquidated by not later than 30th April, 2013.

Following the appellant's default, the respondent proceeded to institute an action in the court below for the recovery of-

(i) the sum of K500,000.00 outstanding balance on the appellant's total indebtedness to the respondent;
(ii) damages for breach of agreement;
(iii) interest;
(iv) costs; and
(v) any other relief the court may deem fit.

In his defence to the court action, the appellant denied owing the respondent the sum of K500,000.00 but admitted that he had received a total sum of K280,000.00 from the respondent and that,

out of that amount, he had repaid the respondent K60,000.00 thereby leaving a balance of K220,000.00 due and owing to the respondent. The appellant further averred in his defence that he had not paid the Respondent the K220,000.00 which he had been owing him because the respondent had unreasonably charged what the former described as 'illegal interest' on the loan contrary to the agreement between the parties.

According to the appellant, the loan agreements which he and the respondent had signed were illegal and, therefore, unenforceable, by reason of the fact that the respondent was never licensed under either the **Money Lenders Act, Chapter 398 of the Laws of Zambia** or the **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.**

The matter came up for hearing in the court below and, after hearing the parties and upon considering the submissions by counsel for the parties, the trial court came to the conclusion that the lending of the monies to the appellant as well as the agreements which the two parties to this appeal had entered into in connection with that lending were not illegal both under the **Banking and**

Financial Services Act, Chapter 387 of the Laws of Zambia and the **Money Lenders Act, Chapter 398 of the Laws of Zambia** and that the same could not be rendered unenforceable merely because the person who had availed the loan was not licensed under either of the two pieces of legislation earlier identified. The learned trial Judge reasoned that, neither of the two pieces of legislation on which the appellant had anchored his resistance to settle the debt in question operated to take away the rights of individuals such as the two contestants in this matter to freely and voluntarily enter into agreements such as the ones in question so long as they did not violate the law. The learned Judge accordingly concluded by entering judgment in favour of the respondent for the sum of K500,000.00 together with interest at short term deposit rate from the date of the writ up to the date of judgment and thereafter at current bank lending rate as determined by the Bank of Zambia. The learned Judge also pronounced costs in favour of the respondent which were to be taxed if not agreed.

The appellant was dissatisfied with the decision of the trial court and expressed his disaffection by launching this appeal to

this court on the basis of a solitary ground which was expressed in the Memorandum of Appeal in the following terms:

> **"GROUND ONE**
>
> **The learned trial Judge erred in law and in fact when he dismissed the Appellant's claim that the Respondent is not a registered money lender under the Money Lender Act, Chapter 398 of the Laws of Zambia as such he is not allowed to charge interest on the two personal loan agreements.**
>
> **Further grounds to follow".**

A point worth of immediate note from the filed Memorandum of Appeal is that the same provided for *'further grounds [which were] to follow'*.

On 29th April, 2016, the appellant's advocates filed the Record of Appeal together with the requisite Heads of Argument. A perusal of the Heads of Argument revealed that the same addressed two grounds of appeal. This meant that the appellant had introduced another 'ground' beyond the solitary ground which had been set out in the Memorandum of Appeal. This purported second ground was couched in the following terms:

> **"The learned trial Judge erred in law and in fact by admitting the two (2) personal loan agreements, as a basis of arriving at the decision to award the Respondent the claim of K500,000.00, when he declined to admit into evidence the Respondent's Bundle of**

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Documents, for the reason that the Respondent did not refer to any document in his witness statement as shown in the first Plaintiff's witness statement on pages 61-67 and, also as shown in the proceedings in the court below on page 157 of the Record of Appeal."

We have described this second ground as a *purported* ground because it appears to have been sneaked into the appellant's Heads of Argument in a manner which clearly offended the rules of this court. We propose to return to this matter latter in this judgment.

In arguing the appellant's solitary ground of appeal, Mr. Sinyangwe, the learned counsel for the appellant, started by pointing out that when the respondent was cross-examined, he admitted that he was not a registered money lender under the provisions of the **Money Lenders Act, Chapter 398 of the Laws of Zambia** and that, arising from the respondent's own admission as aforesaid, the interest which had been charged on the two personal loan agreements was illegal. Counsel further contended that this illegality of the interest was compounded by the fact that the respondent was not licensed under the **Banking and Financial Services Act, Chapter 387 of the Law of Zambia** to conduct the business of financial services for members of the public. Counsel

referred us to a passage in ***Halsbury's Laws of England*, 4th Edition, Volume 9, paragraph 386** which states that there are several classes of contracts which, though perfect in form, are not given effect because they "*...may be illegal in the sense that they involve the commission of a legal wrong, whether by statute or the common law, or because they offend fundamental principles of order or morality.*" Counsel for the appellant accordingly submitted that the interest in the total sum of K220,000.00 which had been charged on the two personal loan agreements which had been entered into between the appellant and the respondent as shown in the appellant's Witness Statement was illegal and void as the respondent was neither a registered money lender pursuant to the **Money Lenders Act** nor was he licensed under the **Banking and Financial Services Act** to undertake the business of providing financial services.

The appellant's counsel further contended that the court below had the power to interfere with the interest which had been charged on the two personal loan agreements in question since they were illegal and that awarding the respondent the

K500,000.00 he was claiming amounted to unjust enrichment to the respondent. Counsel then referred us to a passage by **Scrutton LJ** in the case of **Phillips vs. Copping**[1], where His Lordship stated the following at page j15:

> **"It is the duty of the court when asked to give judgment which is contrary to statute to consider to take the point, although the litigants may take it. Illegality once brought to the attention of the court overrides all questions of pleadings including any admissions made therein".**

The appellant's counsel also referred us to the case of **Kalusha Bwalya vs. Chadore Properties and Another**[2] and argued that the present appeal was distinguishable from the **Kalusha Bwalya**[2] appeal. According to counsel, the difference between the **Kalusha Bwalya**[2] case and the present appeal lay in the fact that in the former, Kalusha Bwalya had borrowed USD26,250.00 from one of the respondents who was not a money lender on condition that Mr. Kalusha Bwalya deposited the certificate of title relating to a real property known as stand No. 921, woodlands, Lusaka with the respondent. Aside from depositing the title deeds as explained above, Mr. Kalusha Bwalya executed a contract of sale and a Deed of Assignment in respect of

his said property in favour of the respondent. However, in the present matter, so argued counsel, the appellant and the respondent signed a loan agreement and an acknowledgement of debt. When the appellant (Mr. Bwalya) defaulted, the respondent sold the property and Mr. Bwalya's arguments that he had been a victim of fraud, mistake and misrepresentation when he executed the contract of sale and the Deed of Assignment failed to sway the court even after he told the court that he believed that he had signed a loan agreement with the respondent on account of the USD 26,250.00. The court accordingly entered judgment against Mr. Kalusha Bwalya after upholding the validity of the contract in terms of which Mr. Bwalya had borrowed USD 26,250.00 from the respondent.

According to counsel for the appellant, the present appeal stemmed from a totally different factual matrix in that the evidence adduced in the court below showed that the respondent invested the money into the business that the appellant had with a view of making a profit but which business had failed. Counsel maintained that the monies which the respondent invested in the failed

business are the monies which he subsequently converted into a personal loan to the appellant. Counsel submitted that the respondent, not being a licensed money lender pursuant to the **Money Lenders Act**, nor being licensed under the **Banking and Financial Services Act**, and further having confirmed in cross examination that he was not a money lender, was not entitled to charge interest on the monies that he had invested in the failed businesses.

Counsel went on to quote Section 2 of the **Money Lenders Act**, and argued that the provisions of the said Act show that the respondent was not a money lender as he was not in the business of lending out money or advertising or announcing himself or holding himself out in any way as carrying on that business. Further, counsel argued that where a person is a money lender, Section 3(1) of the **Money Lenders Act** requires that he must, on a yearly basis, take out a license to that effect to authorise him to conduct such business. It was the learned counsel's further argument that once a money lender is licensed he is entitled to levy

interest which, in accordance with Section 5(1) of the **Money Lenders Act**, should not exceed 48% per annum.

Counsel submitted that there was no denying that the respondent did not have a money lender's licence and as such, he was not allowed to charge interest and that the interest in the total sum of K220,000.00 which the respondent had charged the appellant, as contained in the two personal loan agreements earlier referred to in this judgment, was illegal.

The appellant's counsel further submitted that a contract prohibited by statute is illegal when entered into and cannot be enforced by the courts. To buttress his argument, counsel cited the following cases and authorities:-

1. **Phoenix General Insurance Company of Greece SA vs. Adminstratia Asigurarilor De Stat (1987) 2 All ER 152,**
2. **St John Shipping Corporation vs. Joseph Rank Limited (1956) 3 ALL ER 683,**
3. **Atkins Court Forms,**
4. **Archibald (Freightage) Limited vs. S. Spanglett (1961) 1ALL ER 417.**

Counsel submitted that the illegality of the contract is not based on whether the parties entered into the same willingly,

adding that the very act of lending with interest is prohibited by the **Money Lenders Act** and the **Banking and Financial Services Act**. Counsel supported his arguments by referring to the case of **Re Mahmoud vs. Ispahani's Arbitration**[3]. The appellant's counsel concluded by stating that the respondent was not entitled to the K500,000.00 he was seeking as this sum included interest which had rendered the personal loan agreements unenforceable.

In opposing this appeal, counsel for the respondent, Mr. Mabbolobbolo, also relied on the Heads of Argument which he had filed on behalf of the respondent.

Counsel begun his arguments by giving a brief background to the matter which we propose not to recount here.

In response to the sole ground of appeal involved, counsel argued that this ground had been set out in the form of arguments and did not clearly set out the particulars of the matters in respect of which the court below is alleged to have erred. Notwithstanding this reservation, counsel for the respondent went on to submit that the court below was on firm ground in taking the view that the law

does not deprive parties of the right to enter into contracts such as the ones the appellant and the respondent entered into merely because the person advancing the money is not a licensed money lender. Counsel argued that the lower court rightly observed that the appellant and the respondent freely and voluntarily entered into the contract of lending and agreed on the sum of K560,000.00 as the amount to be paid back by the appellant. In this regard, the learned counsel agreed with the trial court's view that the primary function of the law of contract is to secure for each contracting party the benefit of the bargain he has made.

Counsel went on to argue that the appellant's evidence as gleaned from the Record of Appeal did not point to anything suggestive of such vitiating factors as duress or undue influence or unconscionability of the bargain to warrant the court's refusal to enforce the loan agreements between the parties. Counsel accordingly submitted that the absence of duress, undue influence or unconscionability meant that the ends of justice would not have been best served had the court below accepted the arguments by

the appellant and imputed bad faith to the respondent in relation to the transaction in question.

The respondent's counsel further submitted that the authorities cited by the appellant in his Heads of Argument were all out of place, inapplicable and clearly distinguishable from the present case. Counsel contended that there was nothing illegal about the respondent expecting a return as profit in consideration of him having contributed towards the money which the appellant had required for his investment of supplying goods to the mines and that the appellant himself admitted under cross examination that there was no provision in the loan agreements in question for interest in the block amounts that were agreed upon by the appellant and the respondent.

Counsel contended further that there was also no illegality in the decision of the parties to agree on the profits payable in consideration of the respondent having advanced money to the appellant for his investment and that the appellant cannot reasonably be heard to argue that if the respondent is awarded his claim of K500,000.00, the same will amount to unjust enrichment.

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According to the respondent's counsel, it was, in fact, more reasonable to argue that it was the appellant who had unjustly enriched himself by keeping the money he received from the respondent, including the respondent's pre-agreed profits, even after using the respondent's money to finance his orders for goods he supplied to the mines. Counsel argued that to classify such profit as interest would surely defeat common sense and business logic and that all businessmen who earn profits from business would be described as applying illegal interest and therefore, engaged in illegal business.

Counsel referred to ***Law of Contract*, 13th Edition, Butterworths (1996) at page 29**, stating that the authors, in writing on the phenomena of agreement, put it this way:-

> **"Behind all forms of contract, no doubt, lies the basic idea of assent. A contracting party, unlike a tortfeasor is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."**

Counsel cited the case of **Printing and Numerical Registering Company vs. Sampson**[4], which was quoted with

approval in the case of **Kalusha Bwalya vs. Chadore Properties and Another**[2], wherein Jessel, MR stated that if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely and voluntarily shall be enforced by the courts of justice.

Citing the Australian case of **Renard Construction (ME) Pty Limited vs. Minister of Public Works**[5], Counsel for the respondent further argued that it is also trite law that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

In conclusion, counsel submitted that the learned trial Judge correctly evaluated the pleadings and evidence tendered by both parties in arriving at the decision to hand down judgment in favour of the respondent. Counsel invited us to review the Record of Appeal, uphold the judgment of the court below and dismiss the appellant's appeal in its entirety for lack of merit with costs.

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At the hearing of the appeal, Mr. W. Mutofwe, the learned counsel for the appellant, informed us that he had filed Heads of Argument and that it was his desire to rely upon those filed Heads of Argument by way of supporting this appeal.

Upon being reminded by the court that the Heads of Argument that he was seeking to rely upon had addressed a ground which was not contained in the memorandum of appeal, Mr. Mutofwe quickly sought our leave to have the ground which had been irregularly sneaked into the appellant's Heads of Argument expunged therefrom, which leave was promptly granted. Thus, the appeal remained founded and anchored on one ground. For his part, Mr. Mabbolobbolo, the learned counsel for the respondent, confirmed that he had also filed Heads of Argument on behalf of the respondent upon which he was relying. Beyond this, the respondent's counsel invited us to also take into account our decision in **Roland Leon Norton vs. Nicholas Lostrom**[6] when considering this appeal. Counsel drew our specific attention to the following passage which was drawn from page 372 of that judgment:

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> **"... It is trite law that a party to a contract is bound by it even though it may not have been in the interest of that party entering into that contract... Even a bad contract if it is valid, is binding."**

Mr. Mabbolobbolo concluded the argumentation of his written arguments by submitting that the money which the respondent had availed to the appellant was of the nature of an investment upon which he had expected a return. However, learned counsel was unable to credibly explain why his client had chosen to style the agreements which had evidenced the transactions in question as personal loan agreements and not investment agreements beyond opining that the two protagonists were lay people.

We are indebted to counsel for both parties to this appeal for their perspicuous and profitable, nay, helpful, exertions. As we observed at the beginning of this judgment, the central issue which this appeal raises and which fell to be resolved by the trial court was whether or not it is legally permissible for a person who is neither licensed as a money lender under the **Money Lenders Act, Chapter 398 of the Laws of Zambia** nor appropriately licensed under the **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia** to avail a personal loan to another person and

earn or recover a 'profit' upon such a loan. As we earlier observed, this appeal was engendered or excited by the trial court's affirmative resolution of the question we have posed above. The reasoning of the trial court in reaching the conclusion which it reached has also been exposed above.

We have examined the judgment appealed against, the record of appeal and the arguments which were canvassed around the solitary ground of appeal by counsel for the parties to this appeal.

It can scarcely be disputed that the thrust of the appellant's attack against the judgment now being assailed is that the availing of the personal loan facilities by the respondent to the appellant in the circumstances earlier exposed in this judgment offended both the **Money Lenders Act, CAP. 398 of the Laws of Zambia** and the **Banking and Financial Services Act, CAP. 387 of the Laws of Zambia** and, consequently, was not only null and void but wholly incapable of enforcement in a court of law.

The appellant anchored the position he had taken largely on English Law as expressed in decided cases and some authoritative

works such as ***Halsbury's Laws of England and Atkins Court Forms.***

The appellant's resistance was also founded on his understanding of the meaning and effect of certain provisions of the **Money Lenders Act, Chapter 398 of the Laws of Zambia**.

For his part, the respondent's exertions, in the way of fending off the appellant's resistance, were founded on English cases, one of which had inspired a High Court of Zambia judgment which subsequently found favour with us when the relevant matter was escalated to this court **(Kalusha Bwalya vs. Chadore Properties and Another[2]).**

We wish to observe, as we begin our own reflections around this appeal, that there are two judgments of this court which we consider it imperative to examine in the context of this appeal namely, our judgments in the case of **Neighbours City Estates Limited vs. Mark Mushili[7]** and in the case of **Zambia Extracts Oils and Colourants Limited & Enviro Oils and Colourants Limited vs. Zambia State Insurance Pension Trust Fund Board**

of Trustees[8]. The former was handed down on 9th September, 2015 while the latter was delivered on 26th August, 2016. We should observe, somewhat pertinently, that the two judgments were not the subject of consideration when this matter was considered by the trial court, nor were the same referred to or relied upon by either side to this appeal when we heard the same on 9th August, 2016.

The case of **Neighbours City Estates Limited vs. Mark Mushili[7]** interpreted the meaning and effect of the **Money Lenders Act, Chapter 398 of the Laws of Zambia** in the context of a Lending/Borrowing transaction which had arisen under circumstances where the lender was not possessed of a licence issued to him pursuant to the provisions of the named statute while, on the other hand, the case of the **Zambia Extracts Oils and Colourants Limited & Enviro Oils and Colourants Limited vs. Zambia State Insurance Pension Trust Fund Board of Trustees[8]** interpreted the meaning and effect of the provisions of the **Banking and Financial Services Act, CAP. 387 of the Laws of Zambia** in the context of a Lending/Borrowing transaction where the lender was not appropriately licensed under the above-named statute.

Given the evident similarities between the facts and circumstances surrounding the present appeal and the two cases we have just alluded to above, we consider it distinctly useful and appropriate to briefly recount the relevant factual matrixes of the two cases, the respective conclusions which we reached in those cases and whether those conclusions have any and what bearing upon the outcome of this appeal.

In **Neighbours City Estates Limited vs. Mark Mushili**[7], the appellant had obtained a loan in the sum of K400,000,000.00 (unrebased) from the respondent. The parties agreed that the loan would attract 10% interest per month. Subsequently, the appellant defaulted in its repayment obligations, thereby forcing the respondent to seek coercive judicial intervention by way of a court action which was instituted in the High Court of Zambia for the recovery of the K200,000,000.00 which was then outstanding. The appellant reacted to the court action by alleging that the loan agreement was illegal because the respondent was not appropriately licensed in accordance with the requirements of the **Money Lenders Act**. Aside from advancing the general illegality

argument, the appellant contended that the 10% monthly interest which had been provided for in the loan agreement translated into 120% annual interest which, according to the appellant, was not only excessive but wholly unconscionable. Accordingly, the appellant's counsel urged the dealing court to reverse the judgment of the trial court on that aspect.

For his part, the respondent took the position that he was not caught by the provisions of the **Money Lenders Act** because he was not a Money Lender within the meaning of that statute. Accordingly, the respondent invited the court to dismiss the appellant's illegality argument. Beyond seeking to have the court discount the illegality argument, the respondent invited the court to uphold the integrity and sanctity of the loan transactions on the basis that the same had been entered into freely and voluntarily by two willing parties.

On the facts of the **Neighbours City Estates Limited case**[7], as summarized above, we reached the conclusion that the lending/borrowing in question between the appellant and the respondent in that case was caught by the provisions of the **Money**

Lenders' Act, CAP. 398 of the Laws of Zambia and that, as the respondent had not been appropriately licensed, the transaction was illegal. Notwithstanding this conclusion, the question of losses or gains remaining where they had fallen did not arise because we upheld the alternative argument which counsel for the respondent had advanced and which was to the effect that the agreement between the parties was of the nature of an ordinary contract which we accordingly upheld on the footing that the borrowed money (which had since been repaid) was to attract interest at the average short term deposit rate from the date of the writ up to the date of the judgment and thereafter at bank lending rate until full payment.

Turning to the **Zambia Extracts Oils and Colourants Limited case**[8], we earlier noted that an issue, quite germane to the present appeal, which arose in that case was the implications and effect of certain provisions of the **Banking and Financial Services Act, CAP. 387 of the Laws of Zambia** upon a lending/borrowing transaction which arises and is effected under circumstances where the lender was not appropriately licensed under this statute.

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The facts in **Zambia Extracts Oils and Colourant Limited,**[8] which we consider germane to the issues at play in our present appeal, were that the respondent in that case lent a sum of US$3,282,564.41 to the 1st appellant. The agreed interest rate was 9% per annum to run for a period of 48 months. The maturity date was set for 31st December, 2011.

Following the appellant's default, the respondent took out an originating summons seeking the recovery of the outstanding total debt of ZMW20,206,398.31 or the U.S. Dollar equivalent.

In their defence, the appellants admitted having borrowed US$3,282,564.41 from the respondent but contended that, as the respondent had effectively offered banking services by lending the moneys in question to the appellants for which a license under the **Banking and Financial Services Act, CAP. 387** was required but which the respondent did not have, the whole transaction was illegal and unenforceable.

At first instance, the trial court, after examining several decided cases, rejected the illegality argument and proceeded to

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enter judgment in the amount which was the subject of the originating summons as earlier indicated.

In rejecting the illegality argument, the trial court in the **Zambia Extracts Oils and Colourants case**[8] drew heavily upon the Australian case of **Yango Pastoral Co. Pty Limited vs. First Chicago Australia Ltd.**[9] where Acting Chief Justice Gibbs made the following observations:

> **"Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."**

When the **Zambia Extracts and Colourants matter**[8] was escalated to us on appeal, we intensely examined Section 17 of the BSFA and came to the conclusion that:

> **"...On its proper construction, [Section 17] does not invalidate or vitiate contracts entered into... in breach of that Section..." (at page J38).**

For completeness, Section 17 of the BFSA enacts as follows:

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"(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 licensed bank or a licensed 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 not exceeding five years, or to both. (Repealed and replaced by Act No. 18 of 2000, amended by Act No. 25 of 2005)."

After reviewing numerous authorities, we took the liberty to make the following observations in relation to Section 17 of the BFSA:

> **"In [enacting] S.17 (4) of the BFSA we are satisfied that the legislature did not aim at the voiding of contracts like the one in issue or at punishing transgressors twice, that is, by imposing criminal sanctions and by voiding their contracts as this would amount to double punishment. Hence the learned trial Judge was on firm ground when she held that the statutory objective of regulating ...banks and [other providers of] financial services is achieved by the imposition of a heavy penalty" (at p. J42).**

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Having made the above observations, we proceeded to review our decision in **Mohamed S Itowala vs. Variety Bureau de Change**[10] and concluded our reflections around the illegality argument by stating the following:

> **"In this case, we are satisfied that the parties intended to create a legally binding mortgage contract ... and the issue of contravention of S. 17 of the BFSA did not arise at the time of contracting but only when the appellants defaulted in repaying the loan. Besides, the 1st appellant has since paid back a sum of US$520,000.00 under the same transaction which they now want to impugn." (at pages J44-45).**

The compelling picture which emerges from our discussion of the two cases in which it was sought to have the court decline to enforce contracts on the basis that the same had been tainted with illegality is that 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 making this proposition, we call to mind the following words by Etherton L.J. in the case of **Les Laboratoires Servier vs. Apotex Inc.**[11] which

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we adopted with much alacrity in the **Zambia Extracts Oils and Colourants Limited case[8]:**

> **"It is not necessary in order to resolve [a matter where illegality is alleged] to undertake a comprehensive analysis of the decided cases. Such an exercise would, in any event, be complex, very lengthy and, in a large part, unrewarding. The decisions inevitably turn on their own particular facts. The statements of law or principle they contain are not all consistent or easily reconciled ... What is required in each case is an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality." (at page J31).**

In the context of the **Zambia Extracts Oils and Colourants Limited[8]** 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.

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Applying what we have canvassed above to the aspect of the solitary ground of the present appeal which alleged illegality founded, in part, on non-compliance with the BFSA, it is clear that that aspect of the ground of appeal cannot possibly succeed.

With regard to the appellant's argument around non-compliance with the **Money Lenders Act**, we have taken note of the position which we took in **Neighbours City Estates Limited vs. Mark Mushili**[7], namely, that it is illegal for anyone to carry on the business of money lending without a licence issued to them under the **Money Lenders Act**.

However, in the context of this appeal, the position which was articulated on behalf of the respondent in his Heads of Argument was that he was not caught by the provisions of the Money Lenders Act because he was neither a money lender nor did he hold himself out as such to the public. The respondent also denied having been involved in the business of money lending.

The respondent's position resonated with the trial judge who, in the judgment now being assailed, made the following observations:

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> **"The evidence of the plaintiff was that he and the defendant are close friends and that it is on the basis of the said friendship that he extended the moneys to the defendant. The defendant on his part did also confirm the friendship. Further, the plaintiff has not claimed to be, or held himself out as a money lender. He is therefore, not a money lender. The evidence I have referred to in the earlier part of this judgment reveals that the two parties freely and voluntarily entered into the contract of lending and agreed on the sum of K560,000.00 as the amount to be paid back. The view I take is that the law does not deprive parties of the right to enter into contracts such as the ones the two parties entered into merely because the person advancing the money is not a licensed money lender..."**

In their Heads of Argument, counsel for the appellant also lent credence to the respondent's position that he was not a money lender. According to the appellant's counsel,

> **"the interests that were charged on the two personal loan agreements [were] illegal as the respondent [was] not a registered money lender, pursuant to the Money Lenders Act... nor [is] the respondent regulated by [the BFSA] ... to conduct the business of financial services to ... members of the public" (P 1 Appellant's Heads of Argument).**

If the position be accepted as having been settled in the court below as the appropriate trier of fact that: the respondent was not carrying on business as a money lender; he did not advertise or

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announce or hold himself in any way as carrying on the business of money-lending so that, to all intents and purposes, the respondent was not a money-lender, it does seem odd indeed that he should have been in possession of a Money Lender's licence.

If there be some lingering appetite for more to be said about the avowed status of the respondent, one need not look further than the same evidence in the court below which established the following additional and unimpeached facts:

- **That the appellant had approached the respondent as his friend;**
- **That the respondent expected to receive a profit or a share of the profit out of the money that the appellant was going to earn after investing the money he was going to receive from the respondent for the purpose of financing the orders which the appellant had secured from the Mines.**

The point should also perhaps be made that, going by its preamble, the purpose of the **Money Lenders Act** is to make provision with respect to persons carrying on business as money lenders and to provide for matters incidental thereto.

As regards the definition of a money lender, Section 2 of the Act provides that a money lender ***"...includes every person whose***

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business is that of money lending or who advertises or announces himself or holds himself out in any way as carrying out the business [of money-lending]".

Although the use of the word "includes" in the above-quoted definition of a 'money lender' would seem to render the definition of the term imprecise, a careful and patient examination of the Section in relation to the general scheme of the **Money Lenders Act** would reveal that a money-lender can only be such if:

(a) his business is that of money-lending; or
(b) he advertises or announces or in any way holds himself out as carrying on the business of money-lending.

In the context of this appeal, there was no evidence before the court below which suggested, even faintly, that the respondent was caught by any of the definitions or descriptions which the statute assigns to a money-lender.

Needless to say, there is no attempt in this appeal, indeed, not even a feeble one, to demonstrate that the analysis of the evidence and the conclusions of the learned trial judge thereon were assailable.

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For the avoidance of doubt, even if the learned trial Judge had the benefit of considering our decision in **Neighbours City Estates Ltd vs. Mark Mushili**[8], he would have reached the same conclusion which he had correctly reached, not least because, in **Neighbours City Estates Limited**[8], unlike in the present appeal, there appears to have been no dispute that the respondent had been a money-lender.

All said, this appeal fails. The respondent will have his costs and these are to be taxed in default of agreement.

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DR. M. MALILA, SC
SUPREME COURT JUDGE

.....
R.M.C. KAOMA
SUPREME COURT JUDGE

.....
M. MUSONDA, SC
SUPREME COURT JUDGE