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

2015/HPC/0540

BETWEEN:

PAN AFRICAN BUILDING SOCIETY — PLAINTIFF

AND

EVOLUTION GROUP LIMITED — DEFENDANT

Coram: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka the 16th day of July, 2018.

For the Plaintiff: *Mr. K. Musaila of Chonta Musaila and Pindani Advocates.*

For the Defendant: *Mr. L. Mudenda appearing with Mr. L. Lumela, both of Kalokoni and Company.*

JUDGMENT

Authorities referred to:

1. *Bank of Zambia v. Chibote Meat Corporation Limited (1999) Z.R. 103.*
2. *Trust SPRL v. Danubian Trading Company Limited (1952) 2 QB 297.*
3. *Chipango v. Attorney General (1970) Z.R. 31 (H.C.).*
4. *Khalid Mohamed v. The Attorney General (1982) Z.R.49 (S.C.).*
5. *Mpashi v. Avondale Housing Project Limited (1988-1989) Z.R. 140 (S.C.).*

6. *Mobil Oil (Zambia) Limited v. Loto Petroleum Distributor Limited (1977) Z.R. 336 (S.C.).*
7. *Craven Ellis v. Canons Limited (1936) 2 K.B. 403.*
8. *DP Services Limited v. Municipality of Kabwe (1976) Z.R. 110 (S.C.).*
9. *The Rating Valuation Consortium and Another v. The Lusaka City Council and Another (2004) Z.R. 109 (S.C.).*

Legislation referred to:

1. *Building Societies Act, Chapter 412 of the Laws of Zambia.*
2. *Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.*
3. *Section 25 of the Companies Act, Chapter 388 of the Laws of Zambia.*

Publications referred to:

1. *Bryan A. Garner (ed) Black's Law Dictionary, 8th Edition (West Publishing Company, St. Paul Minnesota, 2007), at p.949.*
2. *Joseph Chitty and H.G. Beale (ed) Chitty on Contracts, 28th Edition, Vol. 1, (London: Sweet & Maxwell Limited, 1994) paragraphs 30-004 and 30-005.*
3. *Halsbury's Laws of England, 4th Edition, Volume 9, [Butterworths 1974], p.265.*

On 11th January, 2016, the Plaintiff caused to be filed in the Commercial Registry of the High Court of Zambia, a Writ of Summons and Statement of Claim against the Defendant for the sum of US$159,534.25; interest; any other relief the Court may deem fit and costs.

The Statement of Claim alluded to discloses that the Plaintiff is a Building Society registered as such under the Building Societies

Act, Chapter 412 of the Laws of Zambia and is also regulated as a non-bank deposit-taking financial institution under the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia while the Defendant is a company incorporated in Zimbabwe and a customer of the Plaintiff.

The Plaintiff claims that by a Facility Letter dated 31st March, 2015, the Plaintiff availed the Defendant a loan facility in the sum of US$150,000.00 which was for a term of ninety (90) days. That by the terms of the said loan facility, the Defendant agreed to pay interest at the rate of 15% per annum and to repay the loan plus interest in one instalment at the end of the ninety-day period commencing at the date of the drawdown.

According to the Plaintiff, the loan fell due on 8th October, 2015 and the Defendant breached the terms of the loan facility whereupon the Plaintiff effected a demand on the Defendant for payment of the sum of US$159,534.25 outstanding from the Defendant as at 26th November, 2015. It is the Plaintiff's further contention that the Defendant has refused or neglected to attend to payment as demanded and that the Defendant has no defence whatsoever to the

Plaintiff's claim. That by reason of the aforesaid, the Plaintiff has suffered loss and damage.

In its Defence filed into court on 7th June, 2016, the Defendant denies the contents of paragraph 3 of the Statement of Claim and asserts that the Facility Agreement referred to in the said paragraph was concluded in August, 2015 and not 31st March, 2015 as alleged. That hitherto, the said Facility Agreement had not yet been presented to the Board of the Defendant as well as the Reserve Bank of Zimbabwe for approval. Further, that the aforesaid agreement was presented solely on the basis that it was a Facility Agreement only and that drawdown requests would be made only after the requisite approval had been obtained from the Reserve Bank of Zimbabwe as required by law. That no such approval was ever received from the Reserve Bank of Zimbabwe.

The Defendant asserts, additionally, that the Board of Directors were unable to approve the Facility Agreement as approving the same would have been in violation of the Exchange Regulations of Zimbabwe which require facility agreements to be approved by the Reserve Bank of Zimbabwe. The Defendant denies that the agreed interest rate was 15% per annum and states that the Reserve Bank

of Zimbabwe places restrictions on terms of loans and in the premise, to the extent that the Facility Agreement seeks to charge interest at 15%, the same is in violation of the law and cannot be approved by the Reserve Bank of Zimbabwe. That consequently, the Board of the Defendant intimated to the Plaintiff's Managing Director that the facility was defective and impressed on the same to be amended so that the Facility Agreement would be in tandem with the law and the relationship between the parties.

The Defendant denies the allegation by the Plaintiff that the monies claimed were advanced by the Plaintiff and claims that to the contrary, the said monies were advanced by Pan African Zambezi Investments Limited (hereafter referred to as "PAZI Limited") as part of the general merger funding arrangements. That the funds were remitted as a straight inter-company advance and only became an issue when the merger process stalled. Further, the Defendant denies that the loan fell due on 8th October, 2015 or that the Plaintiff effected demand on the Defendant for payment of US$159,534.25; or that it refused or neglected to attend to payment as demanded. The Defendant denies that it has no defence to the claim or that the Plaintiff has suffered loss and damage.

At trial, the Plaintiff called three witnesses while the Defendant called one witness. The first witness for the Plaintiff was Sonke Soko, a Senior Relationship Manager at Stanbic Bank Zambia Limited (PW1). Under cross-examination PW1 admitted that he was not privy to the loan agreement between the Plaintiff and the Defendant. PW1 was asked whether there was anything in writing in his documents which supports the assertion in the first sentence of paragraph 3 of his witness statement to the effect that Stanbic sent a total of US$150,000.00, as a loan from the Plaintiff to the Defendant out of the Plaintiff's bank account with Stanbic, on the basis of a Reserve Bank of Zimbabwe approval number NMB/EL193/EVOLUTION2/4-2015 dated 8th April 2015 which was supplied to Stanbic by the Plaintiff prior to the funds being sent to Zimbabwe. In response, PW1 answered in the affirmative and said that the document on pages 5-6 of the Plaintiff's Bundle of Documents does so.

In further cross-examination, PW1 admitted that there is no express instruction at page 8 of the Plaintiff's Bundle of Documents that supports the first sentence in paragraph 3 of his witness statement. He, however, stated that the document on pages 5 - 6 of the Plaintiff's Bundle of Documents quoted the number

NMB/EL193/EVOLUTION02/4-2015 which was the basis for the bank's transfer of the money to Zimbabwe.

PW1 admitted in further cross-examination that there was nowhere on pages 5 – 6 where it shows that the transfer of US$150,000.00 was authorised. He admitted that he is aware that in Zimbabwe each transaction of such a nature requires specific authorisation. He stated that he was not in a position to know whether the authorisation number that he had given was for a completely different facility.

In re-examination, PW1 said that the bank relied on instructions that the money was being transferred to Evolution Group after the said transfer was approved by the Reserve Bank of Zimbabwe (hereinafter referred to as "RBZ"). He also said that there was a line of credit approved for Evolution Group to get credit from Pan African Building Society, the Plaintiff herein (hereinafter referred to as "PABS"). He testified that a line of credit equates to a loan. PW1 stated in further re-examination, that when he stated in his witness statement that the Bank had transferred the funds as a loan, that statement was based on the additional documents that their client PABS provided to the Bank from NMB Bank Limited of Zimbabwe

with approval number from RBZ which is on page 5 of the Plaintiff's Bundle of Documents.

The Plaintiff's second witness was Harry Sutherland, a non-executive director at PAZI Limited (PW2). This witness identified his witness statement and had it duly admitted into evidence. However, Counsel for the Defendant indicated to the Court that he had no questions for the witness.

The Third witness for the Plaintiff was Urvesh Desai, the Plaintiff's Acting Chief Executive Officer/Managing Director (PW3). It was his testimony in cross-examination that he was not the Managing Director of the Plaintiff at the time of the transaction in question. He agreed that according to the paragraph entitled "Formal Approval" on page 3 of the Plaintiff's Bundle of Documents, there were two conditions which needed to be satisfied, namely, approval of the Board of Directors of PABS and Evolution Group Limited as condition one and approval of RBZ as the second condition. When asked to show the Court where the approval of RBZ was, PW3 pointed at document number 5 in the Plaintiff's Bundle of Documents, being a letter from NMB Bank Limited of Zimbabwe to Evolution Group Limited dated 8th April, 2015. He said that the document was a

submission from the Defendant's bankers in Zimbabwe for a loan agreement between Evolution Group Limited and PABS for a line of credit of US$500,000.00 and refers to the RBZ's approval for the transaction. When it was put to him by Counsel for the Defendant that the facility he referred to was for US$500,000.00 and not US$150,000.00, and that there was no express approval for a particular credit facility for US$150,000.00, PW3 said that what Counsel said was not correct because even though the line of credit was for US$500,000.00, anything below that amount could be advanced. He said the interest shown on the document was at the rate of 3 Month Libor plus 7% per annum. When asked whether it was true that according to the laws and regulations of Zimbabwe an interest rate of 15% is not allowed, PW3 said that he was not fully aware of what is allowed by the laws of Zimbabwe. He agreed that he was not in a position to confirm whether or not the RBZ would not approve any interest rate above 7% per annum as he was not privy to the information. When asked by Counsel to point to a statement at page 7 of the Plaintiff's Bundle of Documents which states that the regulatory requirements by the Bank had been adhered to, PW3 said that the very first sentence in the email addressed to the Chief

Executive Officer says "Please find attached an approval letter for Evolution to establish a loan relationship with PABS.". The email goes on to state "In the light of this, please can you remit US$50,000.00 to Evolution Group as discussed? This approval allows Evolution to service the interest and the capital at the end of the loan period with the approval of the Reserve Bank of Zimbabwe." According to PW3, the quoted paragraph showed that approval had been given. PW3 said he did not know whether by April, 2015 the loan facility in question had not been approved by the Defendant's Board.

In further cross-examination PW3 said that he was not in a position to confirm that the loan facility for US$150,000.00 was fully executed in August and not March as he was not the Plaintiff's Managing Director at that time. According to PW3, he did not find it strange that a Zambian bank would give a loan to a foreign entity for such an amount of money without security because that depended on the circumstances.

In re-examination PW3 stated that the Agreement was executed as a deed and delivered by PABS acting by Mkuzo Kuwani. With regard to the email on page 7 of the Plaintiff's Bundle of

Documents, PW3 said that it came from Fungai Mparadzi, the Chief Executive Officer of Evolution Group Limited. It was PW3's evidence that according to the Agreement the interest rate was 15%, that the bottom of page 2 it states that the interest rate on the capital balance outstanding is 15% per annum. He reiterated that executives from Evolution Group, namely, Tapfuma Nhengu and Elizabeth Mukamura signed and executed the loan agreement.

This marked the close of the case for the Plaintiff. The Defendant's only witness was Fungai John Mparadzi, the Defendant's Chief Executive Officer (DW1). DW1 filed two witness statements dated 15th February, 2017 and 8th August, 2017, respectively, which were tendered and duly admitted as part of the Defendant's evidence.

In cross-examination DW1 confirmed that the letter on page 5 of the Plaintiff's Bundle of Documents is a letter from the Defendant's Bank, NMB Bank Limited dated 8th April, 2015. He agreed that according to the document the borrower is Evolution and the lender is PABS. Further, that the line of credit is for US$500,000.00. DW1 agreed in further cross-examination that on 8th April, 2015 he sent an email to the then Chief Executive Officer of PABS, Mr. Mkuzo

Kuwani and that following the email, PABS remitted to Evolution Group US$50,000.00 as requested. DW1 further agreed that according to the document on page 10 of the Plaintiff's Bundle of Documents, PABS transferred US$100,000.00 to Evolution Group Limited. He said that he could not dispute the testimony of the witness from Stanbic Bank Zambia Limited to the effect that the said transfer was done. He also said that his email confirmed the approval and nothing else. When asked if he relied on the approval to receive US$50,000.00, DW1 answered in the negative. He said that at the bottom of his email there is an attachment which is the approval. According to DW1, the approval was obtained by submitting a copy of a contract between PABS and Evolution Group for a loan of US$500,000.00; therefore, there was a loan agreement for US$500,000.00 and an approval. When asked whether he was changing what he had said in his email in light of the statement there that PABS should send US$50,000.00 to Evolution Group in light of the fact that there was an approval letter for Evolution to establish a loan relationship with PABS, DW1 said he did not want to change the contents of his email.

In further cross-examination, DW1 identified the Facility Agreement signed between PABS and Evolution Group dated 31st March, 2015 which was exhibited on pages 1 – 4 of the Plaintiff's Bundle of Documents. He told the Court that the agreement was signed by Tapfuma Nhengu on behalf of the Evolution Group and was witnessed by Elizabeth Mukamura, the Company Secretary. He admitted that the document was executed and delivered as a deed. DW1 confirmed that the agreement on page 17 of the Plaintiff's Bundle of Documents was between PAZI Limited and Evolution Group and that it did not involve PABS. DW1 also confirmed that the transaction on pages 14 and 15 of the Plaintiff's Bundle of Documents fell through. In further cross-examination, DW1 testified that he did not have any documents before the Court to show that Evolution Group paid PABS the US$50,000.00 it requested for on 8th April, 2015. He also admitted that there was no document before the Court to show that the US$100,000.00 reflected on page 10 of the Plaintiff's Bundle of Documents was paid by Evolution Group to PABS.

In re-examination DW1 was referred to page 5 of the Plaintiff's Bundle of Documents and explained that the process of obtaining

approval for a Zimbabwean company to enter into a foreign loan arrangement requires submission of documents to the RBZ. According to DW1, the approval on page 5 of the Plaintiff's Bundle of Documents from MNB Bank relates to an agreement between PABS and Evolution Group for US$500,000.00. DW1 explained further, that the RBZ approves individual agreements; that it does not give any leeway in terms of its approval, thus the statement on page 6 of the Plaintiff's Bundle of Documents to the effect that prior Exchange Control approval should be sought for any changes in the terms and conditions of the loan facility. For this reason, there was an agreement between PABS and Evolution Group that formed the basis of this approval.

When referred to page 7 of the Plaintiff's Bundle of Documents, DW1 explained that there seemed to be a degree of confusion about which agreement was being referred to. He said that the agreement he was referring to in the email on page 7, is the one which was supported by the US$500,000.00 approval. That the approval on pages 5 and 6 of the Plaintiff's Bundle of Documents was against a specific loan agreement of US$500,000.00.

In further re-examination, DW1 clarified that the Plaintiff is seemingly seeking to claim on the Facility Agreement on page 1 of the Plaintiff's Bundle of Documents, but that there is no approval from the RBZ for this Agreement. Further, that on page 5 of the Plaintiff's Bundle of Documents, the interest rate which is stipulated in the approval is 3 Month Libor plus 7% per annum. However, on page 2 of the Loan Agreement, it is provided at the bottom that the interest rate on the capital balance outstanding is 15% per annum. It was DW1's contention that the rate in this Agreement is significantly higher than the rate that was approved by the RBZ. That as a Zimbabwean company, the Defendant is required to submit all loan agreements with non-Zimbabwean entities to the RBZ for approval. Therefore, according to DW1, if the Loan Agreement on page 1 of the Plaintiff's Bundle of Documents had been approved, there would have been a similar letter from the Bank, but there is no such letter and none was requested for.

With regard to the attachment referred to in the email at page 7 of the Plaintiff's Bundle of Documents, DW1 explained that the attachment was the letter from their Bank which is exhibited on page 5 of the Plaintiff's Bundle of Documents. He said that the position is

that the Loan Agreement that supports the approval on page 5 of the Plaintiff's Bundle of Documents is not the Loan Agreement on pages 1 – 4 of the Plaintiff's Bundle of Documents and that even though it states the date as 31st March, 2015, it was only effected in August, 2015. DW1 stated that this created a problem for the Evolution Group as the documents that it would have been required to submit to the RBZ would have been a loan application and the loan application is dated August, 2015. Referring to pages 36 and 37 of the Defendant's Bundle of Documents, DW1 said that Tapfuma Nhengu, who could be identified as an Executive Director of the Evolution Group signed the signature page of the application form and the letter of representation on 26th August, 2015. That it was, therefore, not possible for the RBZ to have approved the Facility Agreement on page 1 of the Plaintiff's Bundle of Documents in retrospect. With regard to the issue of evidence of the US$50,000.00 and US$100,000.00 having been paid back to PABS, DW1 said that the payments that were made to Evolution Group from PABS were part of a larger major agreement; that the very advantageous terms offered to Evolution Group were a direct consequence of this agreement. That he was a senior member of the executive team of

both PABS and PAZI Limited and under no circumstances would any commercial loans be granted without collateral security, especially to non-resident borrowers.

This marked the end of the re-examination and close of the Defendant's case.

The parties filed submissions through their respective Counsel. The Plaintiff submitted that the Defendant's defence that the monies claimed herein were not advanced by the Plaintiff but by PAZI Limited, is not true because the witness statement of one Harry Sutherland (PW2) who is a director in the said company clearly shows that PAZI Limited did not at any time in 2015 advance to the Defendant the sum of US$150,000.00. Further, that PW2's evidence was not challenged as he was not cross-examined by Counsel for the Defendant. Additionally, that DW1 admitted under cross-examination that the transaction between PAZI Limited and the Defendant, which transaction the Defendant had claimed led to the payment of the US$150,000.00 herein, fell through. It was the Plaintiff's contention that this admission by DW1 was in direct contradiction to DW1's testimony in his witness statement.

With regard to the Defendant's contention that the Facility Agreement had not been approved by RBZ and the Board of Directors of the Defendant as required by the 'approval' clause of the Facility Agreement, the Plaintiff submitted that the witness statement of PW3 shows that the said approvals were actually obtained by the Defendant who was obliged to obtain the said approvals under the Agreement. That the Defendant cannot rely on its own alleged default in answer to the Plaintiff's claim. Further, that the evidence on record, namely, the email on page 7 of the Plaintiff's Bundle of Documents, which was sent by the Defendant through its director, DW1, attached the requisite approval exhibited on pages 5 and 6 of the Plaintiff's Bundle of Documents. That therefore, the Plaintiff dealt with duly authorised representatives of the Defendant who represented that all approvals for the loan herein had been obtained by the Defendant.

In further support of its case, the Plaintiff submitted that the evidence of PW3 as well as documents exhibited on pages 8 and 9 of the Plaintiff's Bundle of Documents show that the Plaintiff instructed its Bank, Stanbic Bank Zambia to transfer US$50,000.00 and US$100,000.00 into the Defendant's account with NMB Bank

Limited on 9th April, 2015 and 10th July, 2015, respectively. That this position was confirmed by the testimony of PW1, an employee of Stanbic Bank.

The Plaintiff submitted in addition, that while DW1 testified that the RBZ's approval of 8th April, 2015, related to a prior US$500,000.00 loan agreement between the Plaintiff and the Defendant, no such agreement was produced in Court by the Defendant. That what is clear from the evidence on record is that RBZ approved a line of credit of US$500,000.00 between the Plaintiff and the Defendant as evidenced by the approval on pages 5 -6 of the Plaintiff's Bundle of Documents. The Plaintiff invited the Court to apply the definition of "line of credit" by Black's Law Dictionary at page 949 which states as follows:

> *"**Line of credit.** The maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed."*

It was the Plaintiff's contention that the maximum amount of borrowing approved by the RBZ was US$500,000.00 but that the Defendant only borrowed US$150,000.00. Further, that the Plaintiff transferred a total sum of US$150,000.00 to the Defendant based on the RBZ's approval of 8th April, 2015. It was the Plaintiff's further

contention that DW1 admitted in cross-examination that he sent the 8th April, 2015 email to the Plaintiff which stated that the RBZ had approved a loan relationship between the Plaintiff and the Defendant and a line of credit of US$500,000.00; that he further requested for US$50,000.00 from the Plaintiff on the basis of the said approval.

The Plaintiff cited Chitty on Contracts, 28th Edition, Volume 1, paragraph 30 – 004 which states as follows:

> *"If the parties have made an express choice of law in the contract itself, then, subject to certain limitation, the law that they have chosen will govern."*

In paragraph 30 – 005, the authors state thus:

> *"Determination of the proper law of the contract should not involve any difficulty if the parties have stipulated expressly which legal system is to apply to their agreement."*

It was the Plaintiff's argument that since the Facility Agreement stipulates that any and all disputes arising under the Agreement which cannot be settled by agreement between the parties will be submitted to the exclusive jurisdiction of the Courts of Zambia and be determined by the laws of Zambia, the law governing the said Facility Agreement is Zambian law and not Zimbabwean law. That this is what the parties agreed in the Facility Letter at pages 1 – 4 of the Plaintiff's Bundle of Documents and what the RBZ approved as

per the document on page 6 of the Plaintiff's Bundle of Documents where it is clearly stated as follows: "Governing Law: Republic of Zambia."

Submitting further, the Plaintiff referred to the case of *Bank of Zambia v. Chibote Meat Corporation Limited*[1], where the Supreme Court stated that Section 25 of the Companies Act, Chapter 388 of the Laws of Zambia was for the protection of third parties and that it is no longer possible to raise internal irregularities against an innocent third party. The Supreme Court held in the case cited above that management of internal procedures of a company is not the concern of third parties. The Plaintiff argued that the Facility Agreement between the Plaintiff and the Defendant is legally binding between the parties and was duly executed by the parties. That the Defendant in executing the said Facility Agreement acted through its director Mr. Tapfuma Nhengu and therefore on the authority of the case of *Bank of Zambia v. Chibote Meat Corporation Limited* above, it is not possible for the Defendant to raise the Defendant's alleged internal irregularities against the Plaintiff who is an innocent third party and therefore, any and all claims by the Defendant that its

internal approvals for the loan herein were not obtained, should be dismissed.

The Plaintiff submitted furthermore, that the evidence on record shows that the Plaintiff relied on the email dated 8th April, 2015 produced on page 7 of the Plaintiff's Bundle of Documents to perform its obligations under the Agreement by paying a total sum of US$150,00.00 into the Defendant's bank account with NMB Bank Limited which account was also provided to the Plaintiff by the Defendant in the email of 8th April, 2015. Moreover, PW1, an employee of the Plaintiff's bank, testified in cross-examination that the Bank relied on the approval by the RBZ to effect the transfers and that the transfers would not have been made without the said approval. That, therefore, the Defendant is seeking to unjustly enrich itself and since there is no justification for the Defendant to retain the said money, it would be unjust and inequitable to allow the Defendant to be unjustly enriched at the Plaintiff's expense. The Plaintiff submitted that based on the evidence on record and the applicable law, this is a proper case for the Plaintiff to be granted the relief sought under this action.

In response the Defendant submitted, through its Counsel, that the Agreement in issue had contingent conditions that the parties agreed needed to be satisfied before it could be binding, namely, approval of the Board of Directors of the Plaintiff; approval from the RBZ and the subjecting of the Agreement to the rules and regulations of the RBZ. To buttress its submission, the Defendant cited Denning LJ in the case of *Trust SPRL v. Danubian Trading Company Limited*[2], where he observed as follows:

> *"What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all..."*

The Defendant also cited Halsbury's Laws of England, 4th Edition, at page 265 where it is stated as follows:

> *"...A similar construction has been put on the following expressions: 'subject to the preparation and approval of a formal contract;'...'subject to a proper contract to be prepared by a vendor's solicitor;' ...'subject to a formal contract to be prepared by the vendor's solicitor if the vendor shall so require;'...Where an agreement is made in the above mentioned circumstances, even a signed offer, prima facie, cannot be accepted so as to conclude a binding contract, the reason being that the offeror clearly does not intend to be bound at that stage."*

Furthermore, the Defendant cited the case of *Chipango v. Attorney General*[3], where the High Court stated as follows:

> *"It is true that in the case of a contract, breach of a condition precedent prevents the contract from ever becoming operative, whereas breach of a*

condition subsequent need not render the contract void, but may be answerable in damages only."

Submitting with regard to the need for approval of the Plaintiff's Board of Directors and the RBZ, the Defendant said that a perusal of page 31 of the Defendant's Bundle of Documents shows that the facility application herein was made on or about 26th August, 2015 and this is supported by the email dated 25th August, 2015 which appears on page 23 of the Defendant's Bundle of Documents, wherein the then Managing Director for the Plaintiff was sending the application form for the US$150,000.00 to be filled in by the Defendant. Further, that pages 21 to 30 of the Plaintiff's Bundle of Documents contains a trail of emails between the parties relating to the Facility Agreement in question which show that the discussions took place in August, 2015. That moreover, the ratification of the loan by the Plaintiff's Board was only done in early September, 2015 as evidenced by the document on page 12 of the Plaintiff's Bundle of Documents and lastly, that the transfers of the alleged payment by the Plaintiff of US$50,000.00 and US$100,000.00 was done by July, 2016.

It was the Defendant's argument that the Plaintiff failed to address the question on what basis the Defendant was submitting a loan application form in August, 2015 if the drawdowns were made in April and July, 2015 as claimed by the Plaintiff. The Defendant contended further, that the RBZ could not be said to have approved a transaction in April as required by the said agreement if the application and ratification were done in September, 2015. According to the Defendant, the situation was compounded by the fact that PW1 could not confirm in cross-examination under which loan the sums of US$50,000.00 and US$100,000.00 were disbursed. That, therefore, the foregoing feeds into the Defendant's case that there was no way drawdowns would have been made in April with regard to a loan facility entered into in March and subsequent approval from the RBZ made in April, 2015 when the parties herein where still conducting negotiations relating to the Facility Agreement as late as August, 2015. The Defendant submitted that on the strength of the authorities cited above, the stipulation in the Facility Agreement that the facility was subject to approval of the Board of Directors of the Plaintiff and approval from the RBZ was a condition precedent to the performance of the agreement and therefore, since

the same was not adhered to, there was no binding obligation between the parties.

With regard to the issue of approval from the RBZ, the Defendant submitted that the approval shown on pages 5 to 6 of the Plaintiff's Bundle of Documents is very specific in that it provides for an interest rate of about 7% which is in tandem with the regulations in Zimbabwe. Further, that there is a clear qualification on page 6 aforesaid, namely, that prior exchange control approval should be sought for any changes in the terms and conditions of the facility.

The Defendant submitted that in view of the aforesaid, the Plaintiff's claim that RBZ approved a loan relationship or line of credit is untenable for the following reasons, namely; (i) that from page 3, paragraph 4 of the Plaintiff's Bundle of Documents, it is evident that the loan facility in issue is for the sum of US$150,000.00 and not US$500,000.00. Further, that the interest therein is 15% as opposed to 7% in the approval shown on page 6 of the Plaintiff's Bundle of Documents. That it is evident that there are two distinct Facility Agreements and as such there was need for RBZ's approval for the Facility Agreement herein; (ii) that RBZ places restrictions in terms of loan agreements, thus to the extent that the Facility Agreement in

question places interest at 15%, the same could not be sanctioned by RBZ. That this went to the root of the contract since the same was subject to the regulations obtaining in Zimbabwe; (iii) that even assuming, without stating the same to be the case, that the approval under pages 5 to 6 of the Plaintiff's Bundle of Documents included the Facility Agreement in question, the said approval stated that prior exchange control approval should be sought for any changes in the terms and conditions of the facility. That no approval was obtained for the sudden change in interest rate from the authorised 7% to the 15% claimed herein; a fact admitted by the Plaintiff in its submissions.

On the allegation by the Plaintiff that there was a representation on the part of the Defendant that approval was obtained, the Defendant submitted that DW1 was cross-examined at length on this aspect in relation to the email exhibited on page 7 of the Plaintiff's Bundle of Documents and it was clear from his testimony that had the said approval been obtained, the same would have been availed to the Plaintiff as was the case with the loan facility whose approval was obtained. That to restate the submissions, there were three conditions precedent to the performance of the obligations

under the said facility and none of these conditions were satisfied; as such, no drawdown request was made relating to the said Agreement.

Reacting to the Plaintiff's submission that the loan facility should be performed as it is governed by Zambian law and not the law obtaining in Zimbabwe, the Defendant submitted that it is trite that in Zambia the doctrine of sanctity of contract is strongly upheld by the courts, that is to say, men of full age and competent understanding have the utmost liberty of contracting. That in the case in *casu,* the parties agreed as evidenced by the document on page 3 of the Plaintiff's Bundle of Documents, that the contract would be administered in accordance with the laws in Zambia but at the same time, subject to the rules and regulations of RBZ as the same regulates the conduct of the Defendant.

With regard to the Plaintiff's submission that the Defendant has been unjustly enriched by the US$150,000.00, the Defendant denied being unjustly enriched as, according to the Defendant, no drawdown was ever made.

The Defendant submitted that in sum, based on the case of *Khalid Mohamed v. The Attorney General*[4], the Plaintiff has failed to demonstrate that the condition precedent to the performance of the

obligations under the facility had been satisfied to give rise to the relief sought herein. Further, that there is no proof that the payments of US$50,000.00 and US$100,000.00 were directly linked to a particular loan facility. That for the reasons aforesaid, the Plaintiff is not entitled to any of the relief being sought.

In reply, the Plaintiff urged this Court to consider and analyse all the circumstances of the case to determine whether the parties created a binding contract immediately or postponed the binding effect of the agreement. According to the Plaintiff, if the Court examines the correspondence and conduct of the parties, it will reach the inevitable conclusion that there was a binding contract between the Plaintiff and the Defendant in April, 2015 when the Defendant sent to the Plaintiff RBZ approval to establish the lender/borrower relationship for a US$500,000.00 line of credit and requested for a payment of US$50,000.00. That the Plaintiff through its bank, Stanbic Bank Zambia transferred US$50,000.00 and US$100,000.00 into the Defendant's account with MNB Bank Limited in April and July, 2015, respectively. That the binding Agreement should be enforced and that the Defendant's claim that there was no approval by the Plaintiff's Board of Directors and RBZ is untenable. Further,

that the Defendant's officers who executed the loan agreement warranted that they were duly authorised as evidenced by the Facility Agreement exhibited on pages 1 - 4 of the Plaintiff's Bundle of Documents, at page 4 thereof.

The Plaintiff submitted further, that this Court should not allow the Defendant to retain the US$150,000.00 herein on the basis of an alleged breach of conditions precedent when the evidence on record shows that the said conditions were met, but that even assuming that some conditions were not met, the Plaintiff is still entitled to recover the US$150,000.00 paid to the Defendant as per the Supreme Court's holding in the case of *Mpashi v. Avondale Housing Project Limited*[5], where the Court stated as follows:

> *"It is in each case a question of construction whether or not the parties intended to undertake immediate obligations or whether they were suspending all liabilities until the conclusion of formalities. Have they, in other words, made the operation of their contract conditional upon the execution of a further document in which case these obligations will be suspended or have they made an immediately binding agreement though one which is later to be merged into a more formal contract. The task of the Court it to extract the intention of the parties both from the terms of their correspondence and from the circumstances surrounding and following it and the question of interpretation may thus be stated."*

The Plaintiff submitted additionally, that it was held by the Supreme Court in the case of *Mobil Oil (Zambia) Limited v. Loto*

Petroleum Distributor Limited[6], that the Court must investigate all the circumstances to see whether the documents evidence a perfect agreement. Moreover, in the English case of *Craven Ellis v. Canons Limited*[7], it was held that even though a contract is illegal, a party to that contract may be entitled to damages on *quantum meruit* basis. In further support of this submission, the Plaintiff referred to the case of *DP Services Limited v. Municipality of Kabwe*[8], where the Supreme Court, dealing with an appeal against a High Court judgment that there was no contract between the appellants and the respondents because there was no resolution appointing the appellants to do some accountancy work, agreed with the submission on behalf of the appellant that even if there was no resolution passed and even if there was no contract entered into between the appellant and the respondent Municipality of Kabwe, that did not absolve the respondent from paying the appellant on the basis of *quantum meruit.* The Supreme Court cited the *Craven Ellis v. Canons Limited* case, above, and held, *inter alia,* that even assuming that no express contract even existed, the only inference that could reasonably be drawn from all the circumstances of that case, was that there was, at any rate, an implied contract to pay for services to be rendered.

Gardner, ADCJ (as he then was), added that although the word "*quantum meruit*" had not ben used in the pleadings, this in no way debarred the party from being entitled to judgment for such a claim. The Supreme Court applied the above principle in the case of *Rating Valuation Consortium and Another v. The Lusaka City Council and Another*[9], and held that in the circumstances of that case, the respondents were estopped from taking shelter in the doctrine of illegality on the costs incurred by the appellants.

The Plaintiff urged this Court to apply the above cases to the case herein. The Plaintiff submitted that an analysis of all the circumstances in this case shows that the Defendant obtained US$150,000.00 from the Plaintiff on the basis of RBZ approval sent to the Plaintiff by the Defendant on 8th April, 2015. Secondly, that the Plaintiff's bank transferred the US$150,000.00 on the basis of RBZ approval sent to the Plaintiff by the Defendant on 8th April, 2015; thirdly, that the US$150,000.00 was not a loan or other payment from PAZI Limited to the Defendant and lastly, that the Defendant has not paid back the US$150,000.00 to the Plaintiff. That under these circumstances, the only just order to be made by this Court is

that the Defendant pays the Plaintiff the sum of US$150,000.00 plus interest and costs.

I have perused the pleadings and documentary evidence adduced by both parties and have also considered the evidence arising from cross-examination and re-examination of the witnesses. The following are my findings of fact in this case; namely, that a Facility Agreement was executed by deed between the Plaintiff and the Defendant dated 31st March, 2015 wherein the Plaintiff agreed to lend to the Defendant the sum of US$150,000.00. The agreed interest rate was 15% per annum and term of the facility ninety (90) days. Further, by letter dated 8th April, 2015, NMB Bank Limited, the Defendant's bank in Zimbabwe, wrote to the Defendant informing them about the registration of an offshore line of credit with the Plaintiff under reference number NMB/EL193/EVOLUTION2/4-2015. The Facility amount was US$500,000.00 and interest at the rate of 3 Month Libor + 7% per annum. The Facility's Governing Law was for the Republic of Zambia. However, the Agreement was also subject to the rules and regulations of RBZ. A further requirement was the approval of the Boards of Directors of PABS and the

Defendant. Additionally, the Defendant was also required to obtain the approval of RBZ.

A sum of US$150,000.00 was transferred from the Plaintiff's bank account at Stanbic Bank Zambia into the Defendant's bank account with NMB Bank Limited following instructions to that effect by the Plaintiff. An initial sum of US$50,000.00 was transferred on 9th April, 2015, followed by a further sum of US$100,000.00 on 10th July, 2015.

From the evidence on record, the fact that a total sum of US$150,000.00 was transferred from the Plaintiff's bank account at Stanbic into the Defendant's bank account at NMB Bank Limited has not been denied by the Defendant. It is the Plaintiff's contention that the Defendant breached the terms of the Agreement and hence the present action against the Defendant.

Further, the Defendant has not denied entering into an agreement with the Plaintiff but avers that contrary to the Plaintiff's claim, the Agreement was concluded in August, 2015 and not 31st March, 2015 as alleged and that the approval of RBZ was not obtained as required by the law. The Defendant has denied the allegation by the Plaintiff that the monies claimed were advanced by

the Plaintiff and claims that to the contrary, the said monies were advanced by PAZI Limited as part of the general merger funding arrangements. That the funds were remitted as a straight inter-company advance and only became an issue when the merger process stalled. Further, the Defendant denies that the loan fell due on 8th October, 2015 or that the Plaintiff effected a demand on the Defendant for payment of US$159,534.25; or that it refused or neglected to attend to payment as demanded. The Defendant denies that it has no defence to the claim or that the Plaintiff has suffered loss and damage.

It is noteworthy that the witness statement of Harry Sutherland (PW2) which was tendered and duly admitted in evidence was not traversed by the Defendant as PW2 was not subjected to any cross-examination. PW2's unchallenged evidence was to the effect that PAZI Limited has two bank accounts, one in Mauritius and one in Lusaka, Zambia with PABS. PW2 testified further, that PAZI Limited did not advance the sum of US$150,000.00 in two tranches on 9th April and 10th July, 2015 to the Evolution Group. He said this was so because, firstly, the bank statements in both accounts show no record of the transaction; secondly, there was no loan, facility or

overdraft agreement for such amount between PAZI Limited and Evolution Group; thirdly, there was no request to the PAZI Limited Board from the PABS to make a loan on its behalf; and fourthly, the annual audited accounts for PAZI Limited show no record of any such transaction, as evidenced by the documents on pages 17 – 42 of the Plaintiff's Bundle of Documents.

In my considered view, the issues for determination in this case are, firstly, whether there was a valid contract between the Plaintiff and the Defendant wherein the Plaintiff agreed to lend to the Defendant the sum of US$150,000.00; and secondly, whether or not the Plaintiff remitted the sum of US$150,000.00 to the Defendant pursuant to the said contract and whether the defendant has paid back the said sum accordance with the contract.

With regard to the first issue, the Plaintiff has argued that the Facility Agreement entered into by the parties on 31st March, 2018 is valid and binding on the parties while the Defendant has argued otherwise and stated that there was a breach of conditions precedent to the coming into effect of the same, namely obtaining the approval of its Board of Directors and approval of the RBZ.

The evidence on record, in my view, shows that the required approvals were obtained by the Defendant. Indeed, DW1 confirmed under cross-examination that the approval of RBZ was at the bottom of his email as an attachment; that the same approval was produced by the Plaintiff on pages 5 – 6 of the Plaintiff's Bundles of Documents. It follows, therefore, that the agreement, which was duly executed by the Defendant acting through its Director, a Mr. Tapfuma Nhengu who warranted that he was duly authorised to execute the same on behalf of the Defendant, as per the document produced on page 4 of the Plaintiff's Bundle of Documents, is legally binding on the Defendant. The Defendant has submitted that RBZ's approval of 8th April, 2015 related to a prior US$500,000.00 loan agreement between the Plaintiff and the Defendant but has not adduced any evidence to support this claim, while the evidence on record clearly shows that RBZ approved a line of credit of US$500,000.00 between the Plaintiff and the Defendant as evidenced by the document exhibited on pages 5 - 6 of the Plaintiff's Bundle of Documents. It is evident that the US$150,000.00 was advanced to the Defendant from the approved line of credit of US$500,000.00. In any event, it was the duty of the Defendant under the agreement to obtain the necessary approvals

from its Board of Directors and RBZ and therefore, as correctly submitted by the Plaintiff, the Defendant cannot use its own failure to obtain the necessary approvals, if at all they were not obtained, to the detriment of the Plaintiff. On the evidence before me, therefore, I find that there was a valid contract between the Plaintiff and the Defendant executed on 31st March, 2015.

Moving on to the second issue, it is not in dispute that a total sum of US$150,000.00 was transferred from the Plaintiff's account with Stanbic Bank into the Defendant's account at NMB Bank Limited in Harare, Zimbabwe. The Defendant has not disputed receiving the said money; all it is saying is that there is no proof that the payment of US$50,000.00 and US$100,000.00 was directly linked to a particular loan facility. Further, that the payment of US$150,000.00 was in relation to a transaction between PAZI Limited and the Defendant. However, DW1 admitted, under cross-examination, that the transaction between FAZI Limited and the Defendant fell through. This admission was in contradiction to DW1's testimony in his witness statement. Based on the evidence before this Court, I am left with no doubt that the Plaintiff did transfer a total sum of US$150,000.00 pursuant to the Agreement between

the Plaintiff and the Defendant of 31st March, 2015. It is also clear from the evidence before this Court that the Defendant has not paid back the US$150,000.00 which was loaned to it by the Plaintiff. I am therefore of the view that the Defendant should pay back the said sum as to order otherwise would amount to unjust enrichment of the Defendant as per the definitions above from Black's Law Dictionary and Chitty on Contracts.

Further, even if I were to find that there was no valid contract between the Plaintiff and the Defendant, or that the Defendant did not obtain the approval of its Board of Directors and RBZ for the transactions, I would still order that the Defendant pays back the money on the basis of *quantum meruit* as decided in the persuasive English case of *Craven Ellis v. Canons Limited*[7], where it was held that even though a contract is illegal, a party to that contract may be entitled to damages on *quantum meruit* basis.

Having found as above, I need to address the issue of applicable interest. Two different rates of interest have been cited in the Facility Agreement and the approval by the Reserve Bank of Zimbabwe. While the former mentions 15% per annum, the latter mentions 3 Month Libor + 7% per annum. Clearly there is a major

discrepancy in interest rates. Indeed, the Facility Agreement indicates that the Law of Zambia applies to the agreement but the same Agreement states that it is also subject to the regulations of RBZ. From the evidence before this Court, the RBZ has restrictions relating to interest rates and the rate that was approved by the Bank was 3 Month Libor at 7% per annum as per the document exhibited on pages 5 – 6 of the Plaintiff's Bundle of Documents. Further, there is a qualification on page 6 of the Plaintiff's Bundle of Documents which provides that prior exchange control approval should be sought for any changes in the terms and conditions of the Facility. In view of these considerations, I am of the view that, notwithstanding the fact that Zambian law applied to the Facility Agreement since the said Agreement was also subject to the rules and regulations of RBZ, the applicable interest should be that in the approval namely, 3 Month Libor + 7% per annum.

Therefore, judgment is entered for the Plaintiff for US$150,000.00 plus interest at 3 Month Libor + 7% per annum from the date of issue of the Writ of Summons until judgment and thereafter, at current bank lending rate as determined by the Bank of Zambia until full payment.

Costs of and incidental to this action are awarded to the Plaintiff, to be agreed or taxed in default of agreement.

Dated at Lusaka the 16th day of July, 2018.

Winnie Sithole Mwenda (Dr.)
JUDGE