

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT-00-CC-MA-0645-2011**

**THE JUDICATURE (JUDICIAL REVIEW RULES) SI 11 OF 2009
APPLICATION FOR JUDICIAL REVIEW**

- 1. STANBIC BANK OF UGANDA LTD.**
- 2. BARCLAYS BANK OF UGANDA LTD.**
- 3. CENTENARY RURAL DEVT. BANK LTD.**
- :APPLICANTS**
- 4. STANDARD CHARTERED BANK LTD.**

VERSUS

**THE ATTORNEY GENERAL :APPLICANTS
RESPONDENT**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The applicants brought this application under rules 3 (1) (a), 6 (1) and (2) of the Judicature (Judicial Review) Rules (2009), s.98 of the Civil Procedure Act and Section 33 of the Judicature Act. They sought for an order of certiorari to quash Items 25 and 28 of the Trade (Licensing) (Amendment of Schedule) Instrument (SI No.2 of 2011) which requires the applicants and other banks to pay trade licence fees under the Trade (Licensing) Act. They also sought for an order of prohibition to prevent Items 25 and 28 of the Amended Schedule from taking effect, and prohibiting the respondent or any other person from enforcing the said items against the applicants and other banks.

The grounds of the application were briefly set out in the notice of motion, but more particularly detailed in affidavits in support deposited on diverse dates in November 2011, by Brendah Nabatanzi Mpanga, the Legal Officer of the 1st applicant, Eric Lokolong, the
5 Acting Head Legal of the 2nd applicant, Peninnah Tibagwa Kasule, Company Secretary of the 3rd applicant, and Emily Gakiza, the Company Secretary of the 4th applicant. The Attorney General opposed the application in an affidavit in reply deposited on 15/11/2011 by Fred M. Ogene, Secretary to the Ministry of Trade,
10 Industry and Co-operatives.

In her affidavit dated 7/11/2011, Brendah Nabatanzi Mpanga averred that the applicants are all financial institutions licensed by the Central Bank as is provided for under the Financial Institutions Act, No. 2 of 2004 (“the FI Act”). That the Trade (Licensing) Act,
15 Chapter 101 of the Laws of Uganda (hereinafter also referred to as “the Principal Act”) prescribes licences for various businesses but on 29/12/2010, the Minister for Tourism, Trade and Industry issued the Trade (Licensing) (Amendment of Schedule) Instrument which amended Part A of the Schedule to the Principal Act by including
20 new Items, 25 and 28. That by the said amendment, activities of Bank branches and Automatic Teller Machines (ATMs) were also required to pay trade license fees, in respect of each branch and each ATM.

Ms. Nabatanzi further averred that banking business is exempted
25 from paying trade license fees by s. 8 (2) (f) of the Principal Act, because banks are separately licensed to do banking business under the FI Act, by dint of ss. 4, 10 and 12 thereof. And finally that as a result, to the extent that Items 25 and 28 of the impugned

Schedule purport to levy trade license fees on bank branches and ATMs, the instrument is *ultra vires* the Principal Act, and accordingly null and void. In their affidavits in support dated 7/11/2011, 4/11/2011 and 7/11/2011, respectively, Penninah Kasule, Emily Gakiza and Eric Lokolong agreed with Ms. Nabatanzi's deposition.

In his affidavit in reply, Fred Ogene averred that the license fees prescribed under the Trade (Licensing) Act and the Trade (Licensing) (Amendment of Schedule) Instrument of 2011 only allow particular businesses to carry on trade in a particular location, and that the licenses provided for by the FI Act are not trading licences. He further averred that the FI Act only prescribes fees for purposes of determining what a bank is and regulating such business as banking business and setting standards as to who qualifies to transact business as a financial institution. Further that the impugned instrument is intended to allow local governments get revenue and control trade and business in the country. That the license referred to in s. 8 (2) (f) of the Trade (Licensing) Act or a license similar to the trading license is not a regulatory license and that therefore Items 25 and 28 of the impugned instrument do not contravene the Trade (Licensing) Act as is alleged by the applicants. He finally asserted that the applicants here are required by law to pay the requisite fees which they are "intending to dodge and that in the interests of justice this application ought to be dismissed.

On 7/12/2011 when Mr. Barnabas Tumusingize and Mr. Masembe Kanyerezi for the applicants appeared before me to argue the application, there was no advocate in court from the Attorney General's Chambers. Neither had an affidavit in reply been filed on his behalf. I then ordered that the Attorney General do file an

affidavit in reply, which he did as is detailed above, and that counsel for each of the parties file written submissions in the application. Counsel for the applicants then filed written submissions on 9/12/2011, while the submissions on behalf of the Attorney General
5 were filed on 15/12/2011.

In their joint submissions for the applicants, M/s Sebalu & Lule Advocates, and Masembe, Makubuya, Adriko, Karugaba, Ssekatawa (MMAKS) Advocates stated that the impugned statutory instrument is *ultra vires* the provisions of s.8 (2) (f) of the Principal Act, which
10 provides that no trading license shall be required, in any event, for any trade or business for which a separate license is required by or under any written law. That the applicants are licensed under a license regime provided for under ss.10-17 of the FI Act, and they pay a license fee upon being licensed and an annual license fee
15 every year as is required by s.13 (a) of the same Act. That as a result, they fall under the category of businesses or trades exempted by s. 8 (2) (f) of the Trade (Licensing) Act because the FI Act is a written law.

Counsel for the applicants addressed court on the importance of the
20 remedy of Judicial Review, in as far as it relates to certiorari and prohibition, on authority of **John Jet Tumwebaze v. Makerere University Council, Civil Application No. 353 of 2005** and **Proline Soccer Academy Limited v. Lawrence Mulindwa & Others, HCMA No. 459/2009**. They submitted that in the latter
25 case it was held that applications for judicial review may be made on grounds such as excess of jurisdiction or when a statutory authority exceeds its jurisdiction. Further that by issuing the Statutory Instrument and adding Items 25 and 28 thereof, the

provisions of s. 8 (2) (f) of the Principal Act were contravened. And that the inclusion of the two Items was therefore *ultra vires* and illegal.

Counsel for the applicants went on to submit that the impugned part
5 of the Schedule to the Trade (Licensing) Act is in conflict with the Act itself. Relying on a passage from Halsbury's Laws of England (3rd Edition) at page 375, and the decision in **Uganda Lottery Ltd. v. Attorney General, HCT-00-CC-MC-627-2008**, they submitted that where a section of the Act is clear and unambiguous and there
10 is a conflict with the schedule thereto, the section of the Act prevails. They thus prayed that the court grants the prerogative writs of certiorari and prohibition that the applicants here sought.

In reply, counsel for the respondent submitted that although s. 8 (2) (f) of the Trade (Licensing) Act exempts certain businesses and
15 trades from the requirement of a trading licence under the Act, before they can carry on the trade or business if they are licensed under any other law, the license that is envisaged of such trade or business that is exempted must be a "*trading license or a license similar to the trading license.*" In his view, the rationale for the
20 exemption would be that the business already pays for a trade license by virtue of another law.

Counsel for the respondent then referred me to the provisions of s.33 of the Principal Act as a provision that clarifies the position of the applicants and submitted that the said provision means that a
25 person trading or doing business in any goods or substances for which a separate license is required must still obtain a license to trade in those goods or substances, even though that person has

obtained a trading license under the Trade (Licensing) Act. He then employed the example of a person that trades in restricted drugs and posited that even though such a person has obtained a license to trade in such drugs under the National Drug Policy and Authority Act, having a license issued under that Act does not exempt that person from obtaining a license under the Trade (Licensing) Act. He tried to distinguish the decision in the **Uganda Lottery** case cited by counsel for the applicants and submitted that the ratio therein did not apply to the facts of this case for there was no conflict between the Act and the Schedule thereto. He then asserted that the impugned schedule was not in conflict with but in conformity with the Principal Act.

Counsel for the respondent contended that financial institutions do not fall within the ambit of those that are exempted by s. 8 (2) (f) of the Principal Act; neither are they any of the institutions exempted by the Minister under s. 31 of the same Act. He emphasised that the licenses issued under the FI Act are fundamentally different from those issued under the Trade (Licensing) Act. He distinguished licenses issued under the former as licenses that regulate the business of financial institutions by setting standards as to who qualifies to transact business as financial institutions.

The respondent's counsel went on to argue that the *ejusdem generis* rule ought to be applied to the interpretation of s. 8 (2) (f) of the Principal Act. He then asserted that the phrase "*separate license*" in the provision ought to be understood to mean separate trading license and no other. However, counsel did not explain where that separate license should have been obtained from. He referred me to the explanation of the *ejusdem generis* rule by Lord

Campbell in **R v. Edmundson (1859) 28 LJMC 213**, as was cited in **Shah Vershi Devshi & Co. v. The Transport Licensing Board [1971] EA 289**.

5 Counsel for the respondent attempted a rationalisation of the need for financial institutions to pay the license fees being demanded under the Principal Act. To that end he submitted that there is a danger of local governments being denied of revenue and the control of trade and businesses in towns and cities if most businesses or trades are excluded from the payment of licensing fees due to the fact that they pay for licenses under different
10 statutes. He again reasoned that the Principal Act only intended to exempt those trades and businesses that pay for a license similar in nature to a trading license issued under the Principal Act, and that if the legislature had the intention of excluding the applicants here from paying for such license, it would have specifically provided so.
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He then referred me to the Petroleum Supply Act, No. 13 of 2003 which provides that upon its coming into force, the Trade (Licensing) Act would cease to apply to the issue of permits and licenses in respect of petroleum products. That in addition, the Petroleum
20 Supply Act provides in Part IV thereof that it shall be taken to have replaced the provisions of, amongst others, the Trade (Licensing) Act. He drew attention to the fact that the FI Act was a later Act to the Trade (Licensing) Act and since the former does not specifically exempt the application of the latter, it could not have been the
25 intention of the legislature to exempt financial institutions from the operation of the Trade (Licensing) Act. He therefore prayed that the application be dismissed with costs.

Certiorari and prohibition are prerogative orders that were designed to control lower courts, tribunals and administrative and statutory authorities. In their application to administrative decisions, they would only issue against statutory authorities (**R v. Inland Revenue Commissioners, Ex parte National Federation of Self Employed and Small Businesses Ltd. [1962] AC 617**).

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Certiorari is designed to prevent the excess of or the outright abuse of power by public authorities. The primary object of certiorari and prohibition is to make the machinery of government operate properly (according to law and in the public interest). However,

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private interests too often attract certiorari and prohibition (**The King v. Electricity Commissioners, Ex parte London Electricity Joint Committee [1924] 1 KB 171**).

Certiorari and prohibition often go hand in hand. They issue against

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lower courts or persons or bodies exercising judicial or quasi-judicial functions, or against statutory bodies making administrative decisions which affect the rights of citizens. Certiorari issues to quash decisions which are *ultra vires* or which are vitiated by error(s) apparent on the face of the record, or against decisions that

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are arbitrary and oppressive. Prohibition serves to prohibit the happening of some act or the taking of some decision which would be *ultra vires*. Thus while Certiorari looks at the past as a corrective remedy, prohibition looks at the future as a prohibitive remedy. Both, however, are discretionary remedies which a court will only

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grant judicially (**In Re An Application by Bukoba Gymkhana Club [1963] E.A. 473**). It thus behoves this court to consider whether there was an error in amending the impugned schedule and/or whether the Minister acted *ultra vires* his powers when he did

amend the schedule to the Act to include financial institutions, vide Items 25 and 28 of the impugned schedule.

The operative sections that were the subject of the submissions by counsel for all parties here, and which I carefully considered, are s.8
5 (2) (f) and 33 of the Trade (Licensing) Act or the Principal Act. It is a cardinal assumption in statutory interpretation that the legislature is/was competent and that the text manifests the meaning that was intended. It must be presumed that the law says what its author meant it to say. And according to Lord Halsbury, “a court of law is
10 bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes.” The literal or grammatical methods thus require a painstaking examination of the enactment’s wording.

Starting with s. 8 (2) (f) of the Trade (Licensing) Act, it will be useful
15 to set out here the whole of s. 8, verbatim:

8. Trading prohibited without a trading licence.

(1) Subject to subsection (2), no person shall trade in any goods or carry on any business specified in the Schedule to this Act unless he or she is in possession of a trading license
20 granted to him or her for that purpose under this Act.

(2) No trading license shall be required in any event for—

(a) the trade of a planter, farmer, gardener, dairyperson or agriculturist in respect of the sale of his or her own dairy or agricultural produce;
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(b) the trade of a person in respect of goods bona fide made by him or her by his or her handicraft in or on any premises where he or she normally resides, or by the handicraft of

persons normally residing with him or her or who are his or her employees or members of his or her family;

(c) the trade carried on in any market established under the Markets Act;

5 (d) the sale of tobacco, cigarettes, newspapers, books, non-intoxicating liquor or playing cards by the management of a proprietary or members club to its members in the club premises;

10 (e) any other trade which the Minister may, by statutory instrument, declare to be a trade for which no trading licence is required under this Act; or

(f) any trade or business in respect of which a separate licence is required by or under any written law.

One of the leading statements of the literal rule was made by Tindal C.J in the **Sussex Peerage Case (1844) 8 ER 1034**, when he stated that:

20 *“... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best describe the intention of the lawgiver.”*

In this case, the FI Act is a written law as is provided for by s.8 (2) (f) of the Principal Act. It provides for the licensing of banks which, according to s.3 of that Act, are defined as *“any company licensed to carry on financial institution business as its principal business.”* And by virtue of s.4 (1) of the FI Act a person shall not transact any deposit-taking or other financial institution business in Uganda

without a valid licence granted for that purpose under the Act. Section 4 (3) then goes on to provide that a financial institution shall not transact any financial institution business not specified in its licence or effect any major changes or additions to its licensed
5 business or principal activities without the approval of the Central Bank.

Financial institution business is defined in detail in s.3 (a) to (p) of the FI Act, and licenses are issued for such business under the provisions of s.10 to 13 of the Act. Once issued the license remains
10 in force till it is revoked, and it is only the Central Bank that can amend or restrict the license under the provisions of s.15 of the Act, or revoke it under s.17 thereof. Part VIII of the Act provides for supervision and in particular, s. 79 (1) provides:

15 **“79.(1)** The Central Bank may, periodically or at any time at its discretion, cause an inspection to be made, by an officer of the Central Bank or other person appointed by the Central Bank, of any financial institution and of its financial records and books of accounts on the premises of the financial institution and shall provide to that financial institution a copy
20 of the report on inspection.”

Therefore, licensing, regulation and supervision of financial institutions is clearly the responsibility of the Central Bank.

Going back to s. 8 (2) (f) of the Principal Act, I agree with counsel for the respondent that the rationale for exemption of certain trades or
25 businesses from obtaining trading licenses by s. 8 thereof is that they are already licensed under different statutes. But in addition to that it seems they require no permission or licence to trade or carry

on their businesses under the Principal Act, absent a requirement for regulation and control by the implementers of the same Act. That seems obvious from the genre of activities listed in s. 8 (a) and (b) of the Principal Act which are not carried out in public places and for which liability for infringement of any consumer's or purchaser's rights is personal to the vendor, and the term "vendor" is emphasized here. With regard to activities that fall under s. 8 (c), they are controlled or regulated by district or urban local governments and by-laws or instruments are made where licenses are issued to traders. The activities under s. 8 (d) are licensed by urban or local government authorities under the Liquor Act or other law and require no further license. They were exempted activities even under the Trading Act which came into force on 1/01/1939 and was repealed by the Principal Act.

There is a wide range of material that may be considered by courts in determining the primary meaning of statutory words and where there is ambiguity, in pointing the way to the interpretation that is to be preferred. Some are internal to the statute while others are external. Starting with the internal aids, an examination of the whole statute, or at least those parts which deal with the subject matter of the provision to be interpreted should give some indication of the overall purpose of the legislation. It may show that a particular interpretation of the provision will lead to absurdity when taken with another section of the same statute. I will therefore first consider the internal aids in order to establish the preferred interpretation of the provisions in dispute here.

The Trade (Licensing) Act which came into force on 31/12/1969 is stated to be *"An Act to amend and consolidate the law relating to*

trading and other matters connected therewith.” Section 1 of the Act provides for the interpretation of the terms used in the statute, and in s. 1 (h) “*trade*” and “*trading*” are defined as “the selling of goods for which a licence under this Act is required, in any trading premises, whether by retail or wholesale.” The same provision in 5 paragraph (f) defines the word “*sell*” with its grammatical variants and cognate expressions, to include offer for sale and to expose for sale and their grammatical variants and cognate expressions. A “*hawker*” and “*travelling wholesaler*” are also defined in s. 1 (b) and 10 (j), respectively. A hawker is defined as “a person who, whether on his or her own account or as the servant of another person, sells goods by retail other than in trading premises or in a market established under the Markets Act” while a “*travelling wholesaler*” is one who, whether on his or her own account or as the servant of 15 another persons, sells goods by wholesale other than in trading premises. For purposes of determining the preferred meaning of s. 8 (2) (f) of the Act, the word “*goods*” in these two definitions is emphasized.

What then needs to be answered before going forward is whether 20 financial institution business is “*trade*” or “*trading*,” within the meaning of the Trade (Licensing) Act. Given the definition of terms above, I begin to doubt that the intention of the legislature was to include licensing of businesses such as financial institutions by requiring them to pay for licenses as entities that “*trade*” or are 25 “*trading*,” because they do not “*sell goods*” either as retailers or wholesalers but they provide services. I am fortified in coming to that conclusion by application of the *ejusdem generis* rule which is that general words following particular ones normally apply only to such persons or things as are *ejusdem generis* (i.e. of the same

genre or class) as the particular ones. The activities that are exempted from paying license fees and obtaining licenses under s. 8(2) (a) and (b) seem to lead to the same conclusion because they are all goods that are traded in, retail or wholesale.

- 5 On the same point, there are within the Principal Act several provisions that lend credence to my findings above. S. 4 of the Act provides that:

“The Minister may, from time to time, by statutory order, declare **any particular goods or goods of any particular**
10 **class to be specified goods** for the purposes of this Act.”

{Emphasis is mine}

The interpretation of the provision above is bound to flow from the definitions given in s.1 (f), (g) and (h) of the Act which infer that such statutory order will be in respect of goods offered for or
15 exposed for sale, and their grammatical variants and cognate expressions. The statutory order must be in respect of goods sold retail or wholesale and for the purpose of “trade” or “trading” which means the selling of goods for which a license under the Act is required.

20 Another provision of the Principal Act which too infers that trading licenses under it are to be issued for traders in goods is s.5, which provides for restriction on trading by noncitizens in certain areas and “goods.” In addition, though a general trading license may be issued under s.8 to 11 of the Principal Act, which I understand to be
25 for the trade in goods not exempted by s.8, ss. 16 to 19 provide for the issuance of hawkers’ licenses, while ss. 20 to 22 provide for the

issuance of travelling wholesalers' licenses. But s.27 of the Act is most instructive for it provides as follows:

“27. Endorsement and revocation of licence.

5 (1) Any person holding a trading, hawkers or travelling wholesalers licence who is convicted of giving **short change, short measure or weight**, in addition to any penalty to which he or she may otherwise be liable, on a first conviction is liable to have the conviction endorsed on his or her licence by the court and on a second or subsequent conviction
10 whether for the same or any other offence under this Act, is liable to have his or her licence revoked by the court.”

{My emphasis}

This again infers that licenses issued under the Principal Act are for trade in “goods” because one cannot be said to have given short
15 change, measure or weight in financial institution business which is defined in s.1 of the FI Act to include, among others, acceptance of deposits, issue of deposit substitutes, lending or extending credit, consumer and mortgage credit, etc. Those being the activities of financial institutions, when would a trading license issued to a bank
20 be endorsed or revoked for giving short change, measure or weight? The provision is a complete absurdity in that context.

As an internal aid for interpretation, counsel for the respondent referred me to the provisions of s.33 of the Principle Act as clarifying the intention of the legislature when it enacted s.8 (2) (f) thereof.
25 S.33 of the Act provides as follows:

“Nothing in this Act shall be construed so as to entitle the holder of any licence granted under this Act **to sell any**

article or substance for the sale of which a separate licence is required by any written law for the time being in force.”

{Emphasis is mine}

5 In the first place, the provision above again refers to the “sale of articles and substances” and does not include the delivery of services. In addition to that, I am of the view that the interpretation that was given to the provision by the Attorney General as inferring that a business or trade that acquires a license under another law is
10 not thereby exempted from obtaining a trading licence under the Principal Act was rather flawed. Instead, the reverse is true. If, for instance, a company purports to obtain a trading license under the Trade (Licensing) Act in order to carry on financial institutions business that company will not thereby be exempted from obtaining
15 a licence under the FI Act. The license under the FI Act is the principal license that is mandatory to validate its business, not that under the Trade (Licensing) Act.

It was also not correct, as was submitted for the Attorney General, that licenses issued under the FI Act for financial institutions
20 business are not similar to, or are a different kind of license from those issued to traders under the Principal Act. Licenses issued under the FI Act are regulatory licenses and non tax revenue (NTR) is obtained from them by government from regulating financial institutions in their trade as is evident for s.13 of the FI Act. The
25 licenses so issued therefore serve exactly the same purpose as licenses issued under the Principal Act, save that the NTR is paid directly to the central government through the Central Bank and not to any local government.

Finally on the internal aids in the Principal Act, nowhere is it stated in the whole body of it that the providers of any kind of service are to pay for and obtain trading licenses. Only the impugned Schedule to the Act introduces fees for such licenses into the general
5 licensing scheme under it. This leads me to the external aids of interpretation to see whether there is any support for the propositions of the respondent here in favour of implementing the impugned items in the amended schedule against the applicants. I will begin with the Trading Act (Chapter 100 of the earlier Edition of
10 the Laws of Uganda) which was repealed and replaced by the Principal Act in 1969. I am led to that statute because the historical setting of a statute is important in facilitating the interpretation of the provisions thereof. In addition, statutes dealing with the same subject matter as the provisions in question (statutes *in pari*
15 *materia*) may be considered both as part of the context and to resolve ambiguities.

The licensing scheme under the Trading Act, which may be considered as a statute *in pari materia*, showed that the purpose thereof was to establish trading centres and prohibit trading for any
20 non-African outside any municipality, town or trading centre established in Uganda. It also restricted any persons from trading on behalf of a non-African in the prohibited areas. The whole of the statute and the Second Schedule thereto was clear on that intention for it consistently referred to stores and goods sold therein or goods
25 sold by commercial travellers, travelling wholesalers and hawkers. The 2nd Schedule was limited to licenses for general trading in stores, fees and licenses for hawkers, commercial travellers and travelling wholesalers. No licenses were prescribed for providers of services.

It was implied in s. 24 thereof that the purpose of the restriction on trade was to prevent traders from giving short change, short measure or weight. The other was to prevent the sale of suspicious goods for it was provided in s.25 of the repealed Act as follows:

5 “Every person holding a licence under this Act shall as soon as possible bring to the police any case in which he has reason to believe that any article offered to him or deposited with him is stolen property, and shall allow any police officer not below the rank of sergeant at any time to enter his premises
10 for the purpose of inspecting the article if such officer so requests.”

It is still the purpose of the current Trade (Licensing) Act to declare trading centres and restrict trade, specifically by restricting non-citizens from trading in certain areas and goods as is stated in s.5 of
15 the Act. It is also still the purpose of the Act, under s. 28 thereof, to prevent short change, short measure or weight as pointed out above, and the local and urban authorities have the capacity and mandate to do so under the provisions of the 2nd Schedule to the Local Governments Act. That leads me to the next external tool that
20 may aid the interpretation of the Principal Act.

In similar vein with statutes *in pari materia*, if the views of the legislature are later expressed in a duly enacted statute, then of course the views embodied in that statute must be interpreted and applied. This is because occasionally a later enactment declares
25 legislative intent about interpretation of an earlier enactment rather than directly amending or clarifying the earlier law. Such action can be given prospective effect because, even though it seems inartistic, it stands on its own feet as a valid enactment. For that

reason, subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory interpretation.

The Local Governments Act (1997) distinguishes the functions and services for which the central government and the urban and local governments are responsible for in the Second Schedule thereto. Part 1 thereof lays down the functions and services for which the central government is responsible. Item 4 thereof specifically states that banks, banking, promissory notes, currency and exchange control are the responsibility of the Government. Part 2 of the Fifth Schedule lays down the functions which district councils are responsible for, and Item 5 (n) puts the responsibility to issue trade licenses under them. But in item 6 of the Second Schedule it is specifically provided that the functions and services which the district councils are responsible for are:

“6. Regulating, controlling, managing, administering, promoting and licensing any of the things or services which the council is empowered or required to do, and establishing, maintaining, carrying on, controlling, managing or administering and prescribing the forms in connection therewith to fix fees or charges to be levied in that respect.”

Similarly, Part 3 of the Second Schedule to the Local Governments Act lays down the functions and services which urban councils are responsible for. In item 3 thereof it is provided that urban councils shall prohibit, restrict or regulate specified activities listed under it. The prohibition, restriction or licensing of the collection of money is mentioned in paragraph (e) thereof as *“the collection of money or goods in any public place for any charitable or other purpose.”* The

provision cannot, by any stretch of the imagination, apply to the business of banking because it would fly in the face of Item 4 of Part 1 of the same Schedule. It is also provided under Item 26 of Part 3 to the Second Schedule that the urban council is to:

5 “Regulate, control, manage, administer, promote, license any
of the things or services which the council is required or
empowered to do and establish, maintain, carry on, control,
manage or administer and prescribe the forms in connection
therewith; and to fix fees or charges to be made in respect
10 thereof.”

The functions of the urban councils are replicated in the Kampala Capital City Authority Act as the functions of the KCCA. Since the control or regulation of the business of banks is not one of those functions listed as one of the responsibilities of urban and district
15 councils, it is almost certain that they have no business collecting
license fees from financial institutions. That seems to be the sole
preserve of the central government through the Bank of Uganda.

I am of course mindful of the fact that the central government may delegate its functions to the local governments by virtue of s. 31 (1)
20 of the Local Governments Act. It is there provided that a district
council or a lower council may, on request by it, be allowed to
exercise the functions and services specified in Part I of the Second
Schedule to the Act, or if delegated to it by the Government or by
Parliament under any law. But it again appears to me that the power
25 to levy or collect licensing fees from financial institutions or banks,
in particular, has never been delegated to local governments by any
law, and I will explain.

Section 80 (1) of the Local Governments Act empowers local governments to levy taxes. By virtue of that provision local governments may levy, charge and collect fees and taxes, including rates, rents, royalties, stamp duties, registration and licensing fees
5 and the fees and taxes that are specified in the Fifth Schedule of the Act. Now the Fifth Schedule of the Act consists of the Local Governments Revenue Regulations. The revenues that can be collected by the local governments include graduated tax (now repealed), property tax and other revenue. Property tax definitely
10 does not apply to the facts at hand but other revenue is provided for in Part IV of the Regulations where Reg. 13, and paragraph (a) thereof provide: that in addition to graduated tax, rates and grants from the Government, local government revenue shall consist of “fees and fines on licences and permits in respect of any service
15 rendered or regulatory power exercised by the local council.”

To my mind, Reg. 13 of the Local Governments Revenue Regulations clarifies which licenses and permits in respect of which local and urban councils/governments have the power to demand license fees. It is only permits and licenses in respect of services
20 rendered by them or in respect of which the local government exercises regulatory power. There is no doubt that local and/or urban councils do not regulate the business of banking. That was conceded by the Attorney General in the submissions filed in this matter where it was stated that licences issued under the FI Act are
25 in the nature of regulatory licenses. Therefore the argument advanced for the Attorney General that licenses that are exempted by s. 8 (2) (f) of the Principal Act should be licenses similar to a trading licence issued under the Act cannot hold water. Local governments have no mandate to collect revenues from licenses

and permits except fees and fines on licences and permits in respect of any service rendered or regulatory power exercised by the local government council.

In addition, the words that counsel for the Attorney General proposed should be added to s. 8 (2) (f) of the Principal Act, that the license exempted thereby must be “a license similar to the trading licence” required under the Principal Act is not permissible in the interpretation of statutes. The preferred approach was stated by Lord Diplock in **Dupont Steels Ltd. v. Sirs [1980] 1 WLR 142**, where he ruled as follows:

“Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider that the consequences of doing so would be inexpedient, or even unjust or immoral.”

He went on to explain that even if the omission from the plain and unambiguous statute was inadvertent, and that if Parliament had foreseen the *casus omissus*, it would have certainly adopted a course of action other than the literal interpretation of the statute, then the plain (and contrary to Parliament's intention) interpretation should be followed. And that if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Act. The same rule must of necessity apply to the Attorney General.

A few questions may be posed here to advance the discussion above. If local and urban councils do not have the mandate to regulate financial institution business, why then would they issue

licenses to them? Would it be solely for the purpose of obtaining revenue? What criteria would they use to establish which financial institution is deserving of a license for the next financial year or not, or at all? The criteria considered by the Central Bank before it issues
5 a license to a financial institution are contained in s.11 of the FI Act. The criteria are very detailed and stringent and the Central Bank, I believe, follows them to the letter.

Compared to the long list in s.11 of the FI Act, s.11 of the Trade (Licensing) Act provides that a trading license shall be in the
10 prescribed form; be granted subject to such conditions as may be prescribed; and shall specify the premises in respect of which it is granted. If it is the concern of licensing authorities under the Trade (Licensing) Act that financial institutions will carry on their businesses in public places that are not suitable for such business,
15 thus presenting a need to prohibit, restrict and license them in carrying out such business on any street or public place in the terms of Item 3(a) of Part 3 to Schedule 2 of the Local Governments Act, then that is well taken care of by the FI Act as is explained below.

Section 11 (f) of the FI Act requires the Central Bank to consider the
20 geographic locations and branch distribution network of the proposed business. And under s.12 (4) (d), a license issued by the Central Bank clearly indicates the place or places at which the licensee is authorised to conduct business. It is for that reason that s.14 (2) of the FI Act requires that a license granted under s.12 of
25 the Act shall be kept displayed in its original form in a conspicuous place in the premises in which the financial institution carries on its lawful business, and copies of it similarly displayed in each of its branches. There appears to be no need for the local authority to

license such place again for carrying on the same business, save for the purpose of earning revenue, which as was advanced here for the Attorney General, the applicants are “intending to dodge.”

5 It is also my view that the issuance of two licenses for the same business, one by the central government and another by the local government cannot be a rational manner of improving the collection of revenue. Given the financial linkages between the central government and the local governments it appears to be a double collection that would be unfair to the licensee. Its effects may also, 10 due to the resultant increased cost of doing business, impede the expansion of the provision of banking services by private companies who are in it for profit, and ultimately the capacity to save, much to the detriment of the ordinary citizen.

Moreover, because of the disconnect between the legislative 15 intentions of licensing trade in terms of the Principal Act and the legislative intentions of licensing financial institutions business under the FI Act, certain provisions of the Principal Act seem to be absurd when applied to financial institutions. For example s.26 (1) of the Act requires every person that is granted a license under the Act 20 to keep or cause to be kept such books of account as are sufficient to show the true financial position of his or her trade at any time. And a person who contravenes the provisions of s. 26 (1) commits an offence and is liable to a fine not exceeding shs. 2000/=, or to a term of imprisonment not exceeding six months or more. But what 25 in my view seems most absurd is the provision in s. 26 (3) which states that,

5 “(3) Any licensing authority or police officer of or above the rank of assistant inspector may, if satisfied that a person holding a licence granted under this Act is not complying with subsection (1), apply to a magistrate’s court presided over by a chief magistrate or a magistrate grade I for an order that the books of account of that person shall be examined, and the court may, on being satisfied that there are reasonable grounds for suspecting that the provisions of subsection (1) are not being complied with, make an order for the examination of the books either by the person making the application or by some other fit and proper person appointed by the court.”

15 Although it is also true that by virtue of s.46 of the FI Act, financial institutions are required to keep financial ledgers and other financial records which show a complete, true and fair state of their affairs, and to explain their transactions and financial position to enable the Central Bank to determine whether they have complied or continue to comply with the Act, subjecting them to further possible inquiries under the Trade (Licensing) Act would be some kind of unnecessary double regulation. This sounds particularly absurd because the said authorities may not very well have the capacity and/or necessary expertise to establish whether financial institutions are indeed complying with the law under which they operate, i.e. the FI Act and all the regulations thereunder.

25 And what may be of more serious concern to financial institutions if the Principal Act is to be applied to them, though not addressed by counsel here, is the import of the provisions of s.11 under which trading licenses are granted. Section 11 (3) provides:

“(3) The licensing authority may refuse to grant a trading licence under this section without assigning any reason for the refusal, and may revoke any licence granted under this section if it is satisfied that any of the terms and conditions upon which the licence was granted has been contravened.”

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And by virtue of s. 11 (4) any applicant who is aggrieved by the refusal of the licensing authority to grant him or her trading licence may appeal to the Minister whose decision shall be final. This would mean that a financial institution that obtains a licence under s.12 (2) of the FI Act, which is no doubt the specific and applicable legislation for licensing such institutions, will no longer have any assurance that it will commence its business, even after the payment of the fee prescribed by the Central Bank by notice on the grant of the license, as well as the annual license fee, all under s.13 of the FI Act.

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I hold the firm and carefully considered view that the need to facilitate local governments to collect revenue should not be encouraged and protected to the extent allowing the implementation of amendments to subsidiary legislation that contravene existing laws. S.29 (b) of the Trade (Licensing) Act provides that the Minister may by statutory instrument make regulations for the classification of any trade or class of trade in relation to any license to be granted under the Act. The discretion given to the Minister appears very wide, but it is my opinion that the classification of businesses should be in line with the original intent of the statute. The trade should be as defined in s.1 (h) thereof. Hawkers, travelling wholesalers and general traders who sell goods cannot be lumped together with financial institutions which deliver

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specialised professional services and have a specific licensing regime under another law. The power to amend the Schedule to the Act given in s. 30 (3) of the Act must also be subjected to the same limitations.

5 I therefore find that Items 25 and 28 of the Trade (Licensing) (Amendment of Schedule) Instrument SI. No. 2 of 2011 *does* contravene the provisions of the Principal Act. And to that extent, the Minister of Tourism, Trade and Industry acted *ultra vires* his powers under the Act when he included the said items in the
10 amendment to the Schedule. The decision is therefore hereby quashed because the said Items are in conflict with the Principal Act as well as certain provisions of the Local Governments Act, which is a related statute, and therefore null and void.

It is understood that there is great need by the local governments to
15 collect revenues and implement their programs. But expediency should never be used as a means of circumventing the intentions of the legislature. If the legislature had deemed it fit to have financial institutions prohibited, restricted, regulated or licensed by the local governments as well as the Central Bank, then it ought to have
20 amended the general scheme under the Principal Act, as well as the schedules to the Local Governments Act in order to reflect that intention, and made some mention of in it the FI Act. Absent that, it was not proper for the Minister to purport to amend the law by putting in place a Statutory Instrument that is in conflict both with
25 the Trade (Licensing) Act and the Local Governments Act, as well as in competition with the Financial Institutions Act.

For those reasons, the respondent and his agents or servants, or any other person are hereby prohibited from implementing Items 25 and 28 of the Trade (Licensing) (Amendment of Schedule) Instrument of 2011 against the applicants and other banks. The costs of this application shall be borne by the respondent and there shall be a certificate for the applicants for two counsel.

10 **Irene Mulyagonja Kakooza**
JUDGE
21/12/2011