A DISCUSSION ON THE CURRENT POSITION ON THE ULTRA VIRES
DOCTRINE OF ULTRA VIRES UNDER THE COMPANIES ACT CHAPTER 388 OF
THE LAWS OF ZAMBIA

BY

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DECLARATION

I, SUWILANJI SIMUTENDA, DO HEREBY declare that the contents on this directed research paper are entirely based on my findings and ingenuity and I have endeavoured to acknowledge where the work herein in not mine. I further depose to the best of my knowledge that this work has never been presented in any university for academic purposes.

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ABSTRACT

The aim of this study shall be to set out the provisions of the Companies Act relating to the *ultra vires* doctrine and cases that have attempted to construe such provisions so as to determine the clear attitude towards this doctrine in this jurisdiction.

This paper endeavours to investigate and determine the effect and true standing of the *ultra vires* principle under the Companies Act, Chapter 388 of the laws of Zambia so as to ascertain whether the *ultra vires* principle still possesses any regulatory function under company application. The importance of such clarification cannot be understated as it provides a solution to many disputes that can arise both under the issue of good governance and contracts entered into by companies. This is especially important as company transactions form the fulcrum of commercial transactions in any jurisdiction. And seeing that companies can right fully be said to be at the heart of the proper functionality of the wheels of commerce then it is rightfully and importantly so that the importance of good governance and the role the *ultra vires* doctrine plays can in no way be understated nor ignored.

The paper concludes by observing that though the *ultra vires* principle is still in existence in regards to company law in Zambia, it has been greatly watered down to encompass and thus apply only to situations of internal dealings of the company and not those involving third parties.

Furthermore the paper goes onto highlight that the application of the *ultra vires* principle in Zambian courts has to a great extent been done in a manner that can be said to be in conformity with what has historically been termed the ‘classical *ultra vires*’ principle. This is so for the courts in their rulings have tended to focus on issues regarding the breach of directors’ powers.
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DEDICATION

This dissertation is dedicated to my parents, Mr and Mrs Simutenda, for all this would never have been possible without them. I would also like to thank them for all the support that they have always rendered during the course of my studies for in the absence of their guidance and support I would surely not be where I am today.
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1.0 INTRODUCTION

The *ultra vires* rule is a rule that prevents a company from doing acts which are beyond its powers, that is powers which are given to it in its articles of association. The contentious and problematic aspect of the rule is the extent to which it affects contracts made by the company\(^1\). This arises from the fact that a contract occurring from an act which is beyond the powers contained in the objects of the company shall be null and void and therefore not be enforceable against the company, even though the other contracting party did not know the contract was *ultra vires*\(^2\).

From a policy point of view, the *ultra vires* doctrine came up historically due to two main issues. The first is that it protected shareholders who invested money in a company by ensuring that the money was applied for the purposes for which they were presumably induced to invest and not to see it misappropriated in ventures they did not support nor had thought of\(^3\). Secondly, those who advanced credit to a company were entitled to rely on its creditworthiness so far as that could be discovered from, inter alia, its statement of objects and powers\(^4\). Thus the rationale behind this rule was that the powers of a company could easily be inspected at the Companies Registry and therefore the other contracting party was deemed to know the contents of the memorandum. This is known as the rule of constructive notice. An early illustration of the *ultra vires* doctrine finding judicial endorsement was in the case of Ashbury Railway and Carriage Co. v. Riche\(^5\). Here the court, in addition to finding that the contract been *ultra vires* and thus not enforceable, also went onto hold that a

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\(^2\) Fontaine v Carmathen Railway Co. (1868) L.R. 5 Eq. 316

\(^3\) Kenneth Mwenda, Legal Aspects of Banking Regulation: Common Law Perspectives From Zambia (Online) [http://www.wcl.american.edu/faculty/mwenda](http://www.wcl.american.edu/faculty/mwenda) [Accessed 10th September, 2010]

\(^4\) Kenneth Mwenda, Legal Aspects of Banking Regulation: Common Law Perspectives From Zambia

\(^5\) (1874-75) LR 7 HL 653
company cannot ratify an *ultra vires* contract after it has been made and so cause it to be valid.

Before the enactment of the Companies Act\(^6\), in 1994, the legal position in Zambia on the doctrine of *ultra vires* reflected the holding in the case of Ashbury Railway Carriage Co. v Riche\(^7\), a position that was clear in its application. Such contracts were regarded as being void *ab initio* as the company was deemed to be acting *ultra vires* its powers.

This position was upheld in Zambia in the case of Karnezos v Hermes Safaris\(^8\), where it was held, by Sakala, J., as he then was, that the oral agreement in question was *ultra vires* and void on the ground that the company had no power to enter into the contractual agreement such as the one that was at the centre of the litigation. This case was decided on the strength of the prevailing Companies Act\(^9\).

With the enactment of the Companies Act of 1994,\(^10\) the law regarding the doctrine of *ultra vires* has significantly been changed. The new Companies Act contains provisions that relate to the contracting powers of a company such as sections 22(3), 23 and 24. Section 22(3) provides that;

\[s22(3): \text{A company shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor exercise any of its powers in a manner contrary to its articles.}\]

Therefore, this section recognises the limitation that is placed on companies to enter contracts that are beyond their powers.

On the other hand, Section 23 of the Companies Act provides that;

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\(^6\) Companies Act, Chapter 388 of the Laws of Zambia

\(^7\) Ashbury Railway and Carriage Co. v. Riche (1874-75) LR 7 HL 653

\(^8\) (1978) ZR 167

\(^9\) CHAPTER 686 of the laws of Zambia

\(^10\) CHAPTER 388 of the laws of Zambia
Section 23: No act of a company, including any transfer of property to or by a company, shall be invalid by reason only that the act or transfer is contrary to its articles or this Act.

This provision is prima facie an indication of the abolishment of the *ultra vires* doctrine or be it the attempt by the draftsman of the Zambian Companies Act and his attempt to do so. This position shall thus be discussed in full detail in the determination of the actual position of the *ultra vires* rule under the current Companies Act of Zambia.

Another section of importance which provides a great indication as to the position on the *ultra vires* doctrine is section 26 of the Companies Act of Zambia. This section effectively abolishes the doctrine of constructive Notice by stating that:

“Section 26: No person dealing with a company shall be affected by, or presumed to have notice or knowledge of, the contents of a document concerning the company by reason only that the document has been lodged with the Registrar or is held by the company available for inspection.”

A look into the above sections and cases such as Freshint Ltd and two others v Kawambwa Tea Company\(^{11}\) and Zambia Bata Shoe Company v Vinmas Ltd\(^{12}\) will provide some insight into the position of the *ultra vires* doctrine under Zambian law.

This research essay shall therefore focus on analysing the provisions of the current Companies Act that relate to the doctrine of *ultra vires* and thus determine the current position on the doctrine in the Zambian jurisdiction.

This research shall also look at the doctrine of *ultra vires* in the light of recently decided cases in both the High Court and Supreme Court of Zambia and provide a conclusion as to the generally accepted position on this contentious issue.

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\(^{11}\) (1996) SCZ No. 33 of 2008

\(^{12}\) (1994) ZR 136
1.1 STATEMENT OF THE PROBLEM

The doctrine of *ultra vires* is one that has played a significant role in the development of company law. The fact that it has been used by many companies to escape liability under contracts they entered into knowing they did not have the power to enter such contracts but relying on the protection of the rule has led to a great feeling of injustice in many jurisdictions.

It is thus important for any jurisdiction to clearly set out its position, preferably in its governing statute, on the position on companies entering contracts which are in excess of the powers it can exercise under its constitution. In England, the problem of the *ultra vires* was gradually dealt with by way of law reform and finally the 2006 Companies Act.

The Cohen’s Committee of 1945 recommended that the provisions of a company’s constitution should only operate as a contract between the company and its shareholders\(^\text{13}\). This was not implemented but at the time but gave an indication as to what the desired position was. The government in response to this recommendation went on to state that to abolish the *ultra vires* doctrine would cause difficulties if this was to be done without the prior modification of the of the constructive notice principle. This, as it was stated in the governments view, was because the constructive notice rule was too important to be done away with.

The government’s position was later also voiced in The Jenkins Committee Report of 1962 where it was recommended that there was need for reform of the constructive notice rule. However the Jenkins Report did not go as far as to pass recommendation for the abolition of the *ultra vires* doctrine\(^\text{14}\). After the Jenkins report there subsequently followed Professor Prentice’s report of 1986. This report’s recommendations led to the amendment of the Companies Act of 1985 with the coming into force of the English Companies (Amendment) Act 1989. This amendment, in particular the inclusion of section 35A went onto emphasis the fact that the validity of an act done by a company would henceforth not be called into question on the ground of lack of capacity by the company whilst relying on the ground of anything in the company’s memorandum to prevent the validity of any act done by a

\(^{13}\) The Cohen Committee Cmd 6659, (1945) paragraph 12

\(^{14}\) The Jenkins Committee Cmd 1749, (1962) paragraphs 35-42
company. However this did not lead to the abolition of the doctrine and as such, it still exists for use in regards to internal purposes of the company.

However, the development of the doctrine in Zambia has not been aided by specific committees set up to deal with the matter. The changes in the Companies Act are not as straightforward as those in England so as to establish, with clarity, what the legal position currently prevails in Zambia with regard to the *ultra vires* doctrine.

The regulatory function of the Companies Act in relation to a company’s powers to act outside the ambit of its articles and the Act, as provided for in section 23 of the Companies Act, raises the question as to whether the Act adequately regulates companies in Zambia. The Companies Act, by prohibiting companies from acting contrary to provisions in their articles and those of the Companies Act, creates a seemingly contradictory position in itself by providing that no act of a company shall be invalid by reason only of its contravention of the company’s articles or the Companies Act.

The *ultra vires* doctrine regulated companies by restricting them to acts that were in tandem with the company’s constitution and the Companies Act. The provisions of the current Companies Act therefore impute an exclusion of the *ultra vires* doctrine by virtue of the provisions of section 23 as acts of the company regardless of their being contradictory to the articles of the company or the Companies Act.

Therefore, the effect on the regulatory nature of the Companies Act, as it precludes itself from rendering a company’s act invalid, has been put into question and consequently making the position of Zambian law on the doctrine of *ultra vires* an area of great discussion and vagueness. This is the focal matter of this research as it endeavours to determine the current

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15 Sec 35(1) of the English Companies Act 1985, as amended by the 1989 Companies Act

16 Supra No. 3, p. 61

17 Companies Act, s. 22(3)

18 Companies Act, s. 23
position of Zambian law on the doctrine of *ultra vires* and how this position affects the regulatory function of the Companies Act.\(^1\)

### 1.2 PURPOSE OF THE STUDY

The aim of this study shall be to set out the provisions of the Companies Act relating to the *ultra vires* doctrine and cases that have attempted to construe such provisions so as to determine the clear attitude towards this doctrine in this jurisdiction. In addition, this investigation shall attempt to determine the effect of the current Companies Act on the regulatory function of the Companies Act.

The importance of such clarification cannot be understated as it provides a solution to many disputes that can arise both under the issue of good governance and contracts entered into by companies. This is especially important as company transactions form the fulcrum of commercial transactions in any jurisdiction. And seeing that companies can right fully be said to be at the heart of the proper functionality of the wheels of commerce then it is rightfully and importantly so that the importance of good governance and the role the *ultra vires* doctrine plays can in no way be understated nor ignored.

This research shall therefore attempt to attain the following objectives;

(a) Determine the position of the Companies Act, *Chapter 388* of 1994 on the *ultra vires* doctrine and whether it adequately achieves the purpose of enactment,

(b) Consider the position as set out in leading cases involving the *ultra vires* doctrine in Zambian courts and conclude as to whether it determines the regulatory function of the Companies Act

(c) Compare and contrast the efficacy of the Zambian Companies Act with the English Companies Act 2006 in relation to the *ultra vires* doctrine so as to be able to put

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\(^1\) The importance of a favourable, legally certain environment in which companies can operate is of great importance, for they are at the centre of a countries commerce and industrial structure. Thus the importance of the clarity of the Companies Act, *Chapter 388* of the Laws of Zambia and all its provisions can therefore not be emphasised enough
forward relevant recommendations to the Companies Act, *Chapter 388* of the Laws of Zambia

(d) Overview and conclusion as to the position Zambian law

It is on the basis of the findings under the above objectives that the position on the *ultra vires* doctrine in Zambia shall be more clearly established.

1.3 **SIGNIFICANCE OF THE STUDY**

1.3.1 **THEORETICAL IMPORTANCE**

The theoretical importance of determining the position on the *ultra vires* doctrine is based on the question which enquires as to whether it indeed has been abolished or merely limited. This is so because the two positions each provide for a scenario of two extremities.

1.) A complete discarding of the principle would entail that companies shall always be bound by their acts, regardless of them being in excess of the powers prescribed under the application for incorporation. A major result of this would be that parties dealing with a company will be certain as to their contractual standing, in regards to the validity of the transactions, when conducting business agreements,

2.) However, a limitation to the doctrine would reserve the use of the doctrine to internal purposes of the company. This means that the powers of the company would be used primarily as an agreement between the company and its members as compared to the position which would prevail in the reverse case where powers of a company were in relation to third parties.

Therefore, on determination of the above questions, the question of whether the regulatory function of the Companies Act shall also be ascertained.

1.3.2 **PRACTICAL IMPORTANCE**

The practical importance of this research lies in the availability of a definite position on the *ultra vires* doctrine in Zambia, especially given the vagueness of the law on this matter. Case
law has made strides in attempting to clear up the confusion but has not made express pronouncement as to the position of the law on the matter.

The lack of a definite pronouncement on the doctrine results in the lack of certainty in the law, thus denigrating from a crucial aspect of a good legal system that the law has to be certain. This research also provides a check into whether the Companies Act adequately regulates the actions of companies in a manner as would be expected of company law legislation.

1.4 METHODOLOGY

The major method that shall be adopted in data collection will be that of desk research. In situations of necessity this method shall be supplemented by interviews with various officials from the legal sector and institutions such as the Law Association of Zambia, The Zambia Institute of Advanced Legal Education and the Attorney General’s Chambers of the Republic of Zambia. The data for this research will be sourced from text books, Statutes, the internet, journal articles, command papers, and relevant case law.
CHAPTER 2

HISTORY, DEVELOPMENT AND EFFECT OF THE ULTRA VIRES DOCTRINE

2.1 HISTORY AND DEVELOPMENT OF THE ULTRA VIRES DOCTRINE

To be able to logically and intellectually scrutinise the current law as it stands in regards to company law, in particular, the ultra vires doctrine in Zambia, it is paramount that an efficient grasp is comprehended of the history of the ultra vires rule in as much an entirety as is possible from the English perspective. This is so because Zambia, like the many numerous other Commonwealth jurisdictions inherited the doctrine from English law. This not only helps highlight the areas in which the Zambian stance as to the doctrine fail to achieve the intended aims of the amendment to the Companies Act of pre 1994\(^{20}\) but it also, through the analysis of the progressive development of the rule, will be a guiding instrument for reform suggestions of the application of the ultra vires doctrine as it currently stands under the Companies Act (1994) of Zambia.

For the most part it is evidently clear that companies are governed by law for they too are in essence creatures of the law itself. One law of immense importance in relation to companies is that of contract\(^{21}\) for this determines exactly how the company deals with other companies or individuals and further more how members of a particular company will also interact and deal with each other. It therefore follows that in the wake of statutory companies booming at a time of great economic explosion\(^{22}\), which gave birth to the inevitable and very realistic risk of substantial intrusion of private rights plus concerns regarding potential

\(^{20}\) This can be deduced from the commentary that was given by Mr James Graham, a foreign consultant that was hired to lead the drafting of the Zambia Companies Act of 1994.


\(^{22}\) We cannot afford to forget to mention nor underestimate the impact of the South Sea Bubble companies on the development of this area of law. Charter companies, were basically formed of groupings of merchants to whom a Royal Charter was given, had been employed to carry out trading activities. The resultant expansion in commercial opportunities that came of this cannot be ignored for it is more likely than not that they put pressure on entrepreneurs of that age to develop commercial vehicles not reliant on charters for charters were difficult to obtain.
damage to the economy that these companies could inflict\textsuperscript{23}, Parliament was made to react by placing contractual restraints upon these newly formed statutory companies. The reasoning behind the legislature acting in this manner is one that can be said to be two fold. Firstly, it helped Parliament keep control over the process of forming of companies and secondly, due to a knock on effect of the first factor of Parliament having control over company formation, it also resulted in the restricted availability of a low-cost incorporation form which subsisted until the passing of the Joint Stock Companies Act 1844\textsuperscript{24}, as shown below. Parliament achieved this restraint by it implementing upon the already existing contractual nature of the company a further requirement that a newly incorporated company had to state its objects in its memorandum of association\textsuperscript{25}. In as much as this helped to limit the company’s activity, it also ensured that the newly incorporated company adhered to its pre-incorporation contract thus rest assuring investors that the company would be managed in a manner that they indirectly approved of by them having subscribed to it when it was being formed. A result of this was that if a incorporated statutory company so happened to contravene its contractual capacity i.e. its objects, it could be challenged and have sanctions imposed on it by its investors\textsuperscript{26}.

It was not until the introduction of the Joint Stock Companies Act 1856 that the ultra vires rule came to have actual application to a joint stock company\textsuperscript{27}. Joint Stock Companies were companies that had been formed by complying with registration procedures laid down by statute\textsuperscript{28}. This is so because before 1856, the contractual capacity that a joint stock company enjoyed was to a great extent, like that of a business partnership. As such due to this partnership status, any contractual act or transaction would be valid provided that the


\textsuperscript{24} P.J. Omar, Powers, Purposes and Objects: The Protracted Demise of the Ultra vires Rule, Vol. 16. 1 2004 at page 93

\textsuperscript{25} P. J. Omar, Powers, Purposes and Objects: The Protracted Demise of the Ultra vires Rule. Page 93

\textsuperscript{26} P.J. Omar, Powers, Purposes and Objects: The Protracted Demise of the Ultra vires Rule. Page 92

\textsuperscript{27} The Act replaced the deed of settlement with new constitutional documents called the memorandum and the articles of association. Within the memorandum of association was to be found the ‘objects’ clause and the purpose of this was to effectively state and define the contractual of the company.

\textsuperscript{28} S Griffin, The Rise and Fall of the Ultra vires Rule in Corporate Law (1998) 2 MJLS S. Page 6
members of the company ratified it by a unanimous move of consent. Thus the 1856 Joint Stock Act was actually aimed at altering the previously mentioned partnership like relationship, a move seen as being a necessity following the enactment of the Limited Liability Act of 1855. This act permitted joint stock companies to be incorporated on the basis that the members of these companies would be protected by the doctrine of limited liability. This however undermined the position of prospective company creditors as their position in regards to their investment being secure was rendered insecure because the outcome of the introduction of limited liability meant that members of a company were able to avoid their personal liability by claiming it as corporate debts. Thus the legislature in a move to protect creditors, and also to secure the investment interests of existing and future shareholders, decided that it was only right to regulate corporate capacity. In doing so Parliament placed itself in a position to be able to limit potential activities of the companies thus formed, in any way that it deemed right\(^{29}\). This was done under the 1856 Act were it was specified that a company should include within its memorandum of association an objects clause, a move birthing the courts with a means for them to be able to ensure that the companies conformed to the limitations the Legislature would place upon them. This object clause was intended to define the contractual capacity of the company\(^{30}\), therefore satisfying the assumption that objects and purposes are useful in the corporate context and that they serve as an economic rationale for the identification of investment opportunities\(^{31}\). Nonetheless, the 1856 Acts failure to specifically state as to whether the alteration of the objects of a company could or could not be altered left an ambiguous void which in all essence could have been given an interpretation which depending on the reasoning of the parties could fall on either side of the fence\(^{32}\). Though Parliament attempted at rectifying this by the passing of the consolidating legislation of the 1862 Companies Act by adding that the


\(^{30}\) As pointed out by Cains, L.C. in *Ashbury Railway Carriage and Iron Co. v. Riche (1875)* L.R. 7 H.L. 653, 668, the memorandum of association of a company is its charter and defines the limitation of its powers.

\(^{31}\) H. Rajak, Judicial Control: Corporations and The Decline of *Ultra vires*, 26 Cambrian L. Rev. 9 1995 at page94

\(^{32}\) S Griffin, *The Rise and Fall of the Ultra vires Rule in Corporate Law* (1998) 2 MJLS 5 at page 6, where he contends that members of a company could construe the objects clause as it being cable of alteration if all the members of the company consented to this.
object clause could indeed be altered in only two specific instances\textsuperscript{33}, it did not cover the resultant effect of allowing a company to included in its memorandum objects that covered every imaginable object that the company saw fit to have included. This was left to the court to rectify and in Ashbury Railway Carriage and Iron Co v Riche\textsuperscript{34} it did just that. In Ashbury, what the House of Lords was being asked to do was to effectively pick between two contending interpretations of the 1862 Act. The first of these was that stating that companies should be deemed to possess all the natural powers of a natural person unless these powers had been expressly taken away or effectively restricted\textsuperscript{35}. The second proposition was that only those matters which had been stated expressly or impliedly authorised could be taken as making up the basis of the company’s operational capacity. In its holding the House of Lords choose to apply the latter interpretation of the 1862 Act. The other consequence of this decision was that the company was denied the ability to include a wide array of business purposes within its objects. Furthermore the notable reliance by the House of Lords on the \textit{ejusdem generis} rule meant that extensive objects clauses would be construed, not literally, but they would instead be given the effect of the company’s main incorporation object. This is what is termed as the substratum rule of the company. While this consolidation of the 1862 Act was progress in the development of the \textit{ultra vires} doctrine in its own right, it still did not cover the instance where the object or objects of the company could not strictly so achieved. This issue was demonstrated in Re German Date Coffee Co.\textsuperscript{36} where despite the fact that the company was running a thriving date coffee business it was nonetheless wound up by the court because of the single fact that it could not achieve its stated object.

\textsuperscript{33} In accordance with \textbf{section 12 of the 1862 Act}, the two exceptions provided for a company’s ability to (a) alter its objects clause to effect a change in a company's name and (b) alter the objects clause to effect a reorganisation of share capital.

\textsuperscript{34} (1875) LR 7 HL

\textsuperscript{35} This move would have in all essence done away with the \textit{ultra vires} doctrine for if a company had been vested with this capacity, it could hence not have the excuse of turning around and saying that whatever act it had been involved in had been \textit{ultra vires}

\textsuperscript{36} (1882) 20 Ch D 169, CA
2.2 DEPARTURE FROM THE RULING IN ASHBURY

The resulting effect of the ruling in Ashbury was that it led to company’s drafting their objects clauses with a much higher level of care in an attempt to circumvent the *ultra vires* doctrine. This led to the development of a practice whereby a wealth of objects was specified and included in the memorandum, a practice that came to be known as the ‘exhaustive list syndrome’. In order to give each object or power independence of the other, the advisors of the company would often draft an object clause that expressly stated that each object was to be treated independently and that this would in no way be attached to what would be construed as the main object.

By the factual short comings of the strict application of the *ultra vires* doctrine, it became evident that while creditors and shareholders in a company were theoretically protected by the doctrine, this approach was not very conducive to commercial practice. Therefore as a result, while still accepting the validity of the *ultra vires* doctrine, the courts following the ruling in Ashbury, were to go on to soften and relax their approach in the strictness of the application of the doctrine. The first main authoritative example of this attitude by the courts was in A-G v. Great Eastern Railway Company. In its ruling the court went onto accept the consideration that a company could enter into transactions which were fairly regarded as being incidental or in fact consequential to the objects stated in the objects clause. Thus it came as no surprise when the court in Cotman v Brougham, in the light of these developments, went onto venture away from the substratum and the *ejusdem generis* rule when it accepted that the company’s memorandum on the basis that if it had been approved by the registrar of companies, the House Lords had no option but to be obliged to accept its validity. The result of this was the acceptance of a set of objects which were not restrictively read as referring to a ‘main’ object which meant that all the objects stated would have to be

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37 Cotman v. Brougham [1918]AC 514


39 (1880) 5App Cas 473 H.L

40 [1918]AC 514
taken as being of equal importance. Decisions such as these subsequently lead to a clouded distinction between the effect of powers and specified objects thus defeating the true intention of the ultra vires doctrine. For instance it came to be that a variety of 'objects', so called, many of which by their very nature where incapable of standing as independent objects and being pursued on their own as the company's sole venture, begun being included as such. This went on to lead to the situation where there was a confusion between the concept of corporate capacity and that which dealt with the issue of the lawful exercise of corporate powers.

This confusion was however rather forcefully dispelled and consequently resolved by the courts in the Rolled Steel Products Ltd v British Steel Corporation ruling. This was achieved when Slade LJ in Rolled Steel Products Ltd, destroyed all the suggestion of there being an interwoven and inseparable link between the doctrine of ultra vires and matters related to the abuse of corporate powers. In this case his lordship went onto state:

"The basic rule is that a company incorporated under the Companies Act has the capacity to do those acts which fall within its objects as set out in its memorandum ... or are reasonably incidental to the attainment of those objects. Ultimately, therefore, the question whether a particular transaction is within or outside its capacity must depend on the true construction of the memorandum. Nevertheless, if a particular act is of a category which on the true construction of the company's memorandum is capable of being performed as reasonably incidental to the attainment or pursuit of its objects it will not be rendered ultra vires the company merely because in a particular instance its directors in performing the act in its name are in truth doing so for the purposes other than those set out in its memorandum. Subject to any

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41 This scope of thought concerning the contractual capacity that a company allowed was further broadened in Bell Houses Ltd v City Wall Properties Ltd [1966] 2 QBD 656. In this case the registrar of companies' approved an objects clause that authorised the company to be able to carry on any business which if performed by the company in conjunction with any of the other businesses which had been so specified in the objects clause, in the opinion of the directors, would be of advantage to the business.

42 This is so for the ultra vires doctrine proper was designed to protect against itself so as for it to safeguard the interest of its members and creditors and not for it to be invoked by a party (the company) so as for it to escape a transaction which it deemed not to be as profitable as it had first thought.

43 Re Horsley and Weight Limited [1982] Ch 442

44 Re Lee Behrens and Co Ltd [1932] 2 Ch 46

45 [1985] 3 All ER 52 at page 85
express restrictions on the relevant power which may be contained in the memorandum, the state of mind or knowledge of the persons dealing with it is irrelevant in considering questions of corporate capacity.”

Thus apart from the subsequent conflict that immerged in the form of drafting techniques that companies succumbed to employ and the resultant responses that they received from the courts because of this, the retreat from Ashbury further went onto represent a qualification on the use of the ultra vires doctrine in regards to issues of capacity and there being a need not to include the mere exercise of powers by directors as being ultra vires, even if such acts had resulted in a wrongful or mistaken act. In short, because of there being a lack of a clear distinct separation between objects and powers, these two categories often led to the characterisation of activities not immediately perceived as securing the profitability of the company to be viewed as not being necessary for the company and as such they would go onto be deemed as being ultra vires.

Though the courts later interpreted the ultra vires doctrine narrowly to cover only the question of capacity by leaving issues that were in effect the excessive use of authority or the illegal exercise of powers by directors to be decided to the ordinary law governing directors, this period goes onto show the unsatisfactory state of the ultra vires doctrine that was to doom it to a slow and sometimes painful demise.

2.3 REFORM OF THE ULTRA VIRES DOCTRINE

The doctrine of ultra vires in company law was formed for two primary purposes which were 1) the protection and benefit of the current and prospective shareholders and 2) the protection of the company’s creditors. The resultant effect however of the severity of the strict application of the rule as developed in Ashbury left an underlying desire for the need for reform of the doctrine. This was however a process slow to reach its current position today.

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47 This position undermines issues such as the giving of charitable gifts, political donations and philanthropic gestures.
48 Per Lord Cairns in Ashbury Railway Carriage & Iron Co. v Riche [1907] 1 Ch. 81 (C.A.)
Reforms to the *ultra vires* doctrine where first made in light of recommendations made by the Cohen Committee in 1945\(^49\). The two main recommendations that were advanced by this committee where:

a) Implementing measures to enable companies to alter their objects clause and

b) Giving the company powers of a natural person

The effect of company being able to alter its objects clause was that greater flexibility was vested upon the company where the venturing into future transactions was concerned. However this recommendation overlooked one important aspect in relation to the *ultra vires* doctrine in the sense that it failed in protecting third parties and their contractual relations in certain situations in regards to the doctrine. For instance this would be evident where a company having not carried out necessary reforms of its objects clause to give it the requisite capacity to perform a particular act, was to enter into a contract with a third party with the very act being at the core of the contract for the subsequent contract would in the end be *ultra vires* the company\(^50\). As a result, even though this one recommendation was implemented by Parliament in the 1948 Company Act, it achieved little in the way of reforming the effect of the *ultra vires* doctrine.

In its second recommendation, the Cohen Committee suggested that companies must be given the powers of a natural person. Arguably if this recommendation had been implemented, its effect would have gone onto abolish the doctrines of *ultra vires* as a whole in terms of dealings with third parties\(^51\). Furthermore it was recommended by the Cohen Committee that the objects clause was to be banished to the position of merely forming a constituent part of a company’s articles of association to be used merely as a tool to balance powers between the shareholders and the company directors\(^52\).

What is surprising though is that there was no mention of doing away with the doctrine of ‘constructive notice’ by the Cohen Committee. This was to be done by the Jenkins

\(^{49}\) Cmd 6659 at paragraph 12

\(^{50}\) S. Griffin, The Rise and Fall of the *Ultra vires* Rule in Corporate Law. *Page 17*

\(^{51}\) Cmd 6659 at paragraph 12

Committee\textsuperscript{53}. In this command paper, the Jenkins Committee went onto recommended that the constructive notice rule be abandoned by way of introduction of rules which would protect third parties that dealt with the company in good faith. If this had been implemented the resultant effect of it would have been the subjecting of liability of third parties in transactions with the company to actual knowledge of the contents of the memorandum. The only exception to this would be the instance where the third party was found to ‘honestly and reasonably’ have failed to appreciate the memorandum prevented the company from transacting with his person\textsuperscript{54}.

Unfortunately no action apart from that allowing the alteration of the company’s objects clause was taken in regards the recommendations that were advanced by both the Cohen Committee and the Jenkins Committee. The subsequent change that followed was advanced by way of the United Kingdom having to implement the First Directive on Company Law\textsuperscript{55} when it joined the European Union\textsuperscript{56}. When this reform was undertaken by virtue of the European Union Directive\textsuperscript{57} what was meant to be achieved was the doing away of the doctrine of \textit{ultra vires} in regards to any acts entered into by a company with a third party regardless as to whether they were within the objects of the company so specified or not except where the acts of the company had exceeded the powers which had been conferred on the organs that performed the act\textsuperscript{58} for if this is the instance, by way of Article 9, that

\begin{footnotesize}
\begin{enumerate}
\item Report of The Company Law Committee (1962) Cmnd 1749 at paragraph 48
\item Report of The Company Law Committee (1962) Cmnd 1749 at paragraph 42
\item Directive 68/151, OJL65/8
\item This was achieved by the ratifying and implementation Article 9(1) of Directive 68/151, OJL65/8 through the implementation of section 9(2) of the European Communities Act of 1972 which later morphed into section 35 of the Companies Act 1985, save with some amendments. Article 9(1) of the directive provided that: 'in favour of a person dealing with a company in good faith any transaction decided on by the directors is deemed to be one within the capacity of the company to enter into and the power of the directors to bind the company is deemed to be free of any limitation under the memorandum or articles.'
\item First Company Directive 68/151, OJL65/8
\item Article 2 of the First Directive defined the meaning of 'organs of the company' by providing that the term should include: 'persons who either as a body constituted pursuant to law or as members of any such body are authorised to represent the company in dealings with third parties (and in legal proceedings) or take part in the administration, supervision or control of the company.'
\end{enumerate}
\end{footnotesize}
transaction may be set aside where a third party is found to have had actual knowledge of the fact that the transaction fell outside the objects of a company.

This implementation and transportation of the purported reform of the *ultra vires* doctrine into the United Kingdom's domestic law was however highly defective\(^{59}\) and unsatisfactory\(^{60}\) because much of the essence at the core of the directive was lost in the transition which lead to the enactment of section 35 of the Companies Act 1985\(^{61}\). The intention of section 35 of the Companies Act was one which clearly sought to abolish the doctrine of *ultra vires* in relation to dealings of third parties and the company. Unfortunately the doctrine continued to haunt business community, and it was a result of this that prompted the Department of Trade and Industry in December 1985 to appoint Professor Dan Prentice\(^{62}\) to examine the legal and commercial implications of abolishing the doctrine of *ultra vires*. In its submission and the subsequently enactment of these submissions by the Prentice Committee, the doctrine of *ultra vires* was to go onto be effectively abolished, and preserved only for the internal purposes of the company\(^{63}\).

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\(^{61}\) Section 35(2) provided that: "A party to a transaction so decided on is not bound to inquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and is presumed to have acted in good faith unless the contrary is proved."


\(^{63}\) This is evident from sections 31, 33, 39 and 40 of the current Companies Act of the United Kingdom
CHAPTER 3

THE EFFECT OF THE COMPANIES ACT ON THE DOCTRINE OF ULTRA VIRES AND THE REGULATION OF COMPANY CONDUCT

3.0 INTRODUCTION

The Companies Act Chapter 388 was enacted in 1994 and has had an immense effect as much as it has brought confusion on the notion of corporate capacity of companies. This chapter shall consider inter alia, the effect the Companies Act has had on the ultra vires.

3.1 EFFECT ON ULTRA VIRES DOCTRINE

The enactment of the Companies Act, Chapter 388 of the Laws of Zambia has led to a cacophony of questions relating to the current position of Zambian Law on the ultra vires doctrine proper.

An examination as to the current position of the law will have to rest on the evaluation of the effect of sections 21, 22, 23 and 24 of the 1994 Companies Act of Zambia. These sections provide for the company’s capacity and thus construction of these sections should give a clearer picture as to the current position of the law as regards the ultra vires doctrine, in effect establishing the corporate capacity of a company under the law.

3.1.1 Section 21

“21. Subject to this Act, the incorporation of a company shall have the same effect as a contract under seal between the company and its members from time to time and between those members themselves, in which they agree to form a company whose business will be conducted in accordance with the application for incorporation, the certificate of share capital from time to time, the articles of the company from time to time, and this Act.”
This section applies to the *ultra vires* doctrine in that it provides that business of a company should be done in accordance with information contained in the application for incorporation herein and thus illustrates where a company's restrictions shall be contained. This section provides that the application for incorporation, certificate for incorporation, Articles and the Companies Act\(^{64}\) shall be the sources of restrictions into the conduct of the company. However it should be noted that as compared to the old Companies Act, the mention of the application for incorporation is not in relation to the objects of the company but rather the provision in paragraph 3 of the incorporation form which states whether the Articles shall have restrictions of the business the company shall carry out.

Therefore without this provision the objects as stated in the application for incorporation shall not unlike under the old Act, preclude the company from acting outside them. Therefore this section simply illustrates the fact and importance of Articles and the Act in the regulation of the conduct of a company.

An act of the company shall therefore be *ultra vires* where it falls outside the prescribed units in the Act and the Articles as compared to the previous position requiring an act to over step the specified limits of the objects clause in order for the doctrine of *ultra vires* to be invoked.

**3.1.2 Section 22**

“22. (1) A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual. Capacity and powers of a company

(2) A company shall have the capacity to carry on its business and exercise its powers in any jurisdiction outside Zambia to the extent that the laws of Zambia and of that jurisdiction permit.

\(^{64}\) Chapter 388 of the Laws of Zambia
(3) A company shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor exercise any of its powers in a manner contrary to its articles.”

The importance of having to follow the limitations that a Company Act has prescribed is emphasised within this provision which gives a company its powers and capacity. The Act gives a company powers, rights and privileges that an individual natural person has subject to certain limitations of the Act and those limitations that are inherent to a company’s corporate nature. Section 22(3) adds to such limitations by further providing that a company shall not carry on business restricted by its articles.

It is clear from this section that were previously a company would derive its power and capacity from its objects clause contained within its memorandum of association, the Companies Act has gone onto alter this position so that the source of a company’s capacity is from the Act itself and these powers shall be defined by the articles of association. This further illustrates that the ultra vires doctrine is now hinged on the reading of the Companies Act and the articles of association of the company as compared to the position before were it was based on the reading that which was contained in the company’s objects clause. The corporate capacity of a company is now derived from the Companies Act and its articles of association.

3.1.3 Section 23

“23. No act of a company, including any transfer of property to or by a company, shall be invalid by reason only that the act or transfer is contrary to its articles or this Act.”

65 It is evident from historical progression of the ultra vires principle, as shown in chapter 2, that this was not the position of the ultra vires principle until much later on in its development.

66 Ashbury Railway Carriage & Iron Co Limited v. Riche (1875) LR 7 HL 653 (HL)
Having looked at the source of a company’s corporate capacity, the provisions of section 23 should be read in light of the fact that this section was introduced to vitiate the effects of the *ultra vires* doctrine on third parties dealing with a company.

This section is not in nature permissive but rather it only validates acts of a company that have exceeded the company’s authority. This means that the section does not allow a company to exceed its corporate capacity but rather provides that such acts will not be rendered invalid.

Therefore a company shall be bound by any contract that is entered into with a third party even though it had exceeded its authority.

However the proviso that even acts that contravene the Acts shall be valid raises a lot of questions as to whether all that has been achieved is merely to remedy the mischief created by the *ultra vires* doctrine. This is because any third party should be aware that a company should be aware that a company should not have power to enter such a contract. The mischief was that companies entered into contracts with third parties which led to the very third parties losing out by virtue of their unwitting lack of knowledge of the capacity of a company.

This seems to be an unwelcome extension of the remedy for third parties as illegal contracts would now be made valid. The courts in Zambia seem to have had reservations towards applying the *ultra vires* doctrine because of its sometimes inequitable results towards a third party. This can be illustrated in the holding of judge Sakala, as he then was in the case of J. P Karnezos v Hermes Safaris Limited where he stated,

> "Applying the law as I find it, I have to regrettably hold and I so hold that the oral agreement entered into between the plaintiff and the defendant company was *ultra vires* and void on the ground that the company had no power to purchase the burnt maize...I wish only to observe that the facts of this case are a clear example of the hardship that the doctrine of ultra vires may cause to unsuspecting third party dealing with a large company. It is in cases of this nature that I entirely agree with the suggestion of the Jenkins Committee (Cmnd, 1949-1962) recommending the virtual abolition of the doctrine and

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67 Section 23 Companies Act, Chapter 388 of the Laws of Zambia

protection to third parties who might have acted reasonably in the circumstances. I hope that any future changes to the Companies Act will take into account the hardships caused by the doctrine of ultra vires and make provisions to modify it."

Section 23 on the other hand does not completely exclude the ultra vires doctrine as it provides that acts shall not be rendered invalid by reason only that they are contrary to articles or the Act.

This indicates that the doctrine of ultra vires has not completely been discarded but merely limited to such extents as to not allow an unknowing or bona fide third party from suffering the consequences of the harshness of the ultra vires doctrine.

3.1.4 Section 24

"24. No person dealing with a company shall be affected by, or presumed to have notice or knowledge of, the contents of a document concerning the company by reason only that the document has been lodged with the Registrar or is held by the company available for inspection."

This section in Chapter 388 effectively removes the doctrine of constructive notice from the ambit of the provisions of the said Act. The doctrine of constructive notice refers to the inference that any third parties dealing with the company shall be deemed to have notice of the capacity of the company to enter into contracts if that company has lodged its memorandum of association and articles with the Registrar of Companies. This doctrine was based on the premise that once a company lodged its memorandum association and articles all parties dealing with that company would be deemed to have access to the lodged documents, as they would be deemed to be public documents, and would thus not be able to claim that they had no notice of the company’s incapacity to enter into the relevant contract.

The introduction of section 24 thus removes the presumption that by reason only that the documents relating to the company’s capacity have been lodged with the Registrar, a third

\[69\] Section 24 of Chapter 388
party is deemed to have knowledge of the capacity of the company. This has had an immense effect on the operation of *ultra vires* doctrine as the doctrine of constructive notice played a huge role in determining contracts invalid by reason of their being *ultra vires* the companies capacity. This is because any third party entering into a contract with the company would have to have actual notice of a company’s capacity in order for it to avoid a contract as the presumption of constructive notice would not suffice.

An illustration of the role played by the doctrine of constructive notice in the operation of the *ultra vires* doctrine is found in the case of Re Jon Beauforte (London) Limited\(^{70}\). In this case a company, which was authorised by its memorandum of association to carry on the business of costumiers and gown-makers, embarked on the business of making veneered panels and erected a factory for this purpose. The company later went into liquidation. Among the proofs of debt was one for coke supplied to the factory. Roxburg J held that:

> “I need not consider what the position might have been if the fuel merchants had not had clear notice that the business which the company was carrying on and for which the fuel was required was that of veneered panel manufacturers. The correspondence shows that they had notice of that and, as they had constructive notice of the contents of the memorandum of association, they had notice that the transaction was *ultra vires* the company. Their proof was rightly rejected.”\(^{71}\)

This case shows how a third party with constructive notice would be precluded from making a claim under a contract which was entered into by a company acting *ultra vires* its authority. However, under the proviso of section 24, a third party is not deemed to have constructive notice of a company’s capacity to enter into a contract by reason only that its documents have been lodged with the Registrar. Therefore it can be inferred from this section that a third party could still be deemed to have constructive notice where something more, other than the lodgement of the company’s documents, has been done to suggest that the third party has knowledge of the company’s capacity to contract.

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\(^{70}\) [1953] 1 All E.R. 634

\(^{71}\) Re Jon Beauforte (London) Limited [1953] 1 All E.R. 634
Therefore an examination of this section, it would be trite to come to the conclusion that
the doctrine of constructive notice has not been abolished by CAP 388 but has been
severely restricted only to instances requiring more than the lodgement of a company’s
documents with the Registrar. Consequently the restrictions placed on the doctrine of
constructive notice have made a massive contribution to the watering down of the
operation of the doctrine of *ultra vires*.

### 3.2 JUDICIAL INTERPRETATION

Since the enactment of the Companies Act the courts in Zambia have the opportunity to
set the true position of the law as regards the doctrine of *ultra vires*. This discussion shall
examine some of those cases that have come before the courts in order to establish and
there import to the doctrine of *ultra vires*.

The first such case is Bata Shoe Co. Ltd v. Vinmas\(^72\) where the managing director of the
appellant company instructed one of his subordinates, one Mr. Mbewe to advertise some
of the company's houses for sale. Mr. Mbewe issued the advertisements. The managing
director then left the country but while he was away Mr. Mbewe went ahead and sold one
of the company houses to a prospective buyer. Upon his return, the managing director was
surprised to find that the house had been sold and told Mr. Mbewe that he was not
authorised to sell the house as that power rested in the Board of Directors. Mr. Mbewe
consequently resigned. The appellant company attempted to overturn the contract of sale
but the trial court dismissed the action and on appeal it was held that the company’s
authorised agents bound the company to comply with the contract and such liability cannot
be avoided.

Another case in which the Supreme Court was called on to make a determination on the
document of *ultra vires* is that of National Airports Corporation v. Zimba and Konie\(^73\). In that
case the appellant company was desirous of employing a Managing Director. The short listed

\(^72\) (1994) S.J. 35 (S.C.)

\(^73\) [2000] ZR 154
candidates were interviewed and it appears that during such exercise the sort of remuneration package expected and that to be offered were discussed. The position was offered to the first respondent in a letter dated 6th August 1996, written on behalf of the appellant by the second respondent who was at the time the Chairman of the Board of Directors of the appellant company. Consequently, the first appellant was offered a two year contract to run from 1st September 1996, to 30th August 1998. The first respondent worked for four months and a few days until 14th January 1997, when his contract was terminated quite summarily. The court held that an outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority and standing or type of transaction.

In the case of Freshint Limited and Others v. Kawambwa Tea Company\textsuperscript{74} the second plaintiff was a director in both Freshint and Kawambwa Tea Company and he negotiated a loan from the third plaintiff on behalf of the defendant. The second Plaintiff guaranteed this loan. The loan was not repaid by the defendant company and when it went into receivership its receivers acknowledged the loan but refused to repay it. The second Plaintiff repaid this loan and later claimed the sum from the defendant. The Supreme Court of Zambia held that it was not satisfied that the second Plaintiff acted with authority from the company and his acts were therefore \textit{ultra vires} and not binding on the company.

From the above cases it would seem that the courts have not really been called upon to determine the \textit{ultra vires} doctrine in its classical sense. According to the prominent academic, Professor K. Mwenda the cases discussed above are an illustration of the fact that the \textit{ultra vires} doctrine has not been abolished and continues to apply to companies in Zambia\textsuperscript{75}. This discussion shall respectfully depart from this view. This is based on the premise that in all of the above decisions by the Zambian courts the issue of a company's capacity to enter into contracts has not been raised with regard to the classical \textit{ultra vires}. In other words there seems to be no reported authority in which the Zambian courts have had to determine the validity of a contract on the basis of the company not having had authority to enter such a contract. The authority referred to in this instance is the authority that is bestowed upon a

\textsuperscript{74} [2008] S.J. No. 26

\textsuperscript{75} K. Mwenda, Legal Aspects of Banking Regulation: Common Law Perspectives From Zambia (Online)
company in its application for incorporation, its articles and the Companies Act as provided for in section 21 of the said Act. It would therefore seem that the position on the classical *ultra vires* doctrine in Zambia has not yet been judicially determined. This position can be supported by the position advanced by Griffin\(^{76}\) that,

"...Eve J confused the issue of contractual capacity with matters relevant to the determination of an abuse of directors' powers. The transaction may have been considered voidable as a result of a breach of directors' powers but should not have been declared *ultra vires*. Unfortunately, the rationale of the decision in Re Lee Behrens became widely accepted as applicable to the determination of an *ultra vires* transaction. The confusion between the nature of an *ultra vires* transaction and an abuse of corporate powers was to be commonly repeated in subsequent cases."

Professor K. Mwenda further goes onto support this position in his article\(^{77}\) where he goes onto state that,

"The ultra vires rule, it must be stressed, is a rule concerned with the capacity of the company. This rule imposes limitations on the acts and things which a company is regarded in law as capable of doing..... in other words the doctrine restricts the powers of the company to matters covered by its stated objects"

The position of the law on the *ultra vires* doctrine will therefore have to be derived from a reading of sections 21, 22, 23 and 24 of the Companies Act Chapter 388 of The Laws. This chapter of the discussion has laboured to interpret the above provisions in relation to what extent the *ultra vires* doctrine is available and a conclusion can be drawn to the effect that the classical doctrine of *ultra vires* has not been abolished but merely watered down to the extent that for the doctrine to be invoked, there has to be more than just a company acting outside its prescribed authority in its articles and the Act, which authority is presumed to be known by virtue of the act of lodging its documents with the Registrar.

\(^{76}\) S. Griffin, *The Rise and Fall of the Ultra vires Rule in Corporate Law*.Page 13

\(^{77}\) Kenneth Mwenda, Legal Aspects of Banking Regulation: Common Law Perspective From Zambia at page 24
3.3 EFFECT ON REGULATORY NATURE

In its attempts to water down the effects of the unwanted side effects of the *ultra vires* doctrine, that is on the innocent third party, the question does arise as to whether the changes in Chapter 388 of the Laws of Zambia have created a greater problem by greatly reducing the regulatory nature of the Companies Act in relation to behaviour of companies.

While it is appreciated that third parties should not be pressured to know the capacity of a company by virtue of its lodging of documents with the registrar, the question arises whether it was necessary to extend and to add acts that were contrary to the Act in section 23\(^\text{78}\).

This question arises because an act that is contrary to the Act is and should be illegal. It therefore stands that what section 23 does is have the effect of validating acts done by the company that would otherwise be illegal. Such contracts entered at variance with the Act would necessarily be invalid as they go against trite common law principles that a contract is vitiates by illegality.

It is trying to reconcile such effects with the need to protect third parties that makes this provision unwarranted. In its attempts to avoid the unwanted effects of the ultra vires doctrine section 23 inadvertently had a derogating effect on intention of a Companies Act to properly regulate the administration of companies.

\(^{78}\) Chapter 388 of the Laws of Zambia
CHAPTER 4


4.1 INTRODUCTION

Having considered the position relating to the doctrine of *ultra vires* in the previous chapter, this discussion shall now draw a comparison between those provisions and their corresponding provisions in the United Kingdom’s Companies Act of 2006 (‘UK Act’). Such a comparison is relevant to this discussion in the sense that it provides a clearer picture in the short comings of the Zambian Companies Act in relation to the doctrine of *ultra vires*.

The first comparison shall be that of section 21 of the Companies Act of Zambia and section 17 of the UK Act. These sections relate to what forms a constitution of a company.

Section 17 of the UK Act provides that:

> “Unless the context otherwise requires, reference in the Companies Acts to be a company’s constitution include-
> a) The company’s articles, and
> b) Any resolutions and agreements to which Chapter 3 applies”

In contrast to the provisions of Chapter 388, it seems the UK Act provides that the constitution of a company shall be the company’s articles and any resolutions and agreements which are ancillary to the said articles. Chapter 388 as shown above impliedly provides that a company’s constitution shall include the application for incorporation, the articles and the Company’s Act. From this comparison, it is clear that UK Act has significantly narrowed what shall determine the capacity and powers of a company to only the contents of a company’s articles.

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79 Section 21 of the Companies Act, *CHAPTER 388*
An interesting similarity between the laws in the above comparison is that both jurisdictions have effectively removed the objects clause from the components forming the company constitution. This has a direct bearing on the classical *ultra vires* doctrine in that the objects clause of a company previously played the operative role in any considerations of whether an act was deemed *ultra vires* the authority of a company. The objects of a company have thus become obsolete to the concept of *ultra vires* under these Acts unless the articles specifically provide for them to have a restrictive effect.

Such a position is buttressed by the provisions of section 22(3) of Chapter 388 and Section 31 of the UK Act. The latter section provides that;

1) Unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted.

2) Where a company amends its articles so as to add, remove or alter a statement of the company’s objects –
   a) It must give notice to the registrar
   b) On receipt of the notice, the registrar shall register it, and
   c) The amendment is not effective until entry of that notice of that notice on the register.

3) Any such amendment does not affect any rights or obligations of the company or render defective any legal proceedings by or against it.

It is clear from this section that the objects of a company have ceased to hold the importance that was previously attached to them in relation to the *ultra vires* doctrine. Therefore unless a company makes a deliberate effort to restrict its objects, the objects shall have no bearing on what that company can do. It is thus safe to conclude that under both Chapter 388 and the UK Act, the objects of a company are not prima facie used in the determination of a question as to whether an act is *ultra vires* the company.

Sections 23 of Chapter 388 and section 39 of the UK Act relate to the validity of the acts of the company. Section of the UK Act provides that;
"The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution."

The relevance of a comparison between the above stated sections is to establish the extent to which the provisions apply in relation to acts of a company. The importance lies in the fact that under Chapter 38880 the acts referred to as not being invalid are those acts which are contrary to the articles and most interestingly, the Act. This forms a large distinction between these two provisions. In effect the UK Act shall not render valid an act that is contrary to its provisions but only to those relating to the company’s articles which prima facie are the constitution of the company. The Zambian provision however extends to acts contrary to Chapter 388 in an attempt to further limit the application of the *ultra vires* doctrine. Such an extension was unnecessary as it does not cure any previous mischief but creates the mischief of rendering illegal contracts valid.

Sections 24 of Chapter 388 and section 40 of the UK Act of 2006 both relate to the limitation on the operation of the doctrine of constructive notice. The doctrine which is discussed above81 played an important role in the determination of a company’s acts being *ultra vires* the company or not. Section 40 of the UK Act of 2006 provides that;

1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company’s constitution.

2) For this purpose –

a) a person ‘deals with’ a company if he is a party to any transaction or other act to which the company is a party,

b) a person dealing with a company –

i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

ii) is presumed to have acted in good faith unless the contrary is proved, and

80 Section 23 of the Laws of Zambia

81 This is discussed in chapter 3 above
iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company’s constitution.

Section 40 of the UK Act thus goes onto provide safeguards for those third parties that deal with a company in good faith. Even though the concept of good faith is not defined in the UK Act it provides a level of protection to third parties who are acting in compliance with standards of decency and honest\(^2\). The Zambian position on the other hand only provides such protection to third parties in as far as the doctrine of constructive notice shall be excluded by reason only that a company has lodged its documents with the Registrar. The difference lies in the fact that the position under the UK Act provides a more extensive protection to third parties in that aside from the doctrine of constructive notice being excluded by reason only that the documents have been lodged in with the registrar the third party shall also be protected when acting in good faith. Under Chapter 388 however the protection of third parties from the effects of the doctrine of constructive notice only goes as far as not being presumed to have notice by virtue of the lodgement of documents and thus any extenuating circumstances, regardless of whether the third party is acting in good faith will invoke the doctrine of constructive notice.

4.2 CONCLUSION

Having discussed the relevant provisions in both the UK Act and Chapter 388, it is clear that both Acts have significantly watered down the application of the doctrine of *ultra vires*. Both Acts have gone as far as changing the nature restrictions regulating a company’s conduct which is illustrated by the changes in relation to the operation of the objects clause. Chapter 388 however does seem to have fallen short of the achieving a harmony between the limitation of the *ultra vires* doctrine, protection of third parties and regulation of a company’s acts. This is illustrated in the thought inadvertent provision for making valid, acts which are contrary to Chapter 388. Therefore the *ultra vires* doctrine is alive and well in both these jurisdictions but has had to endure significant limitations to its operation.

\(^2\) K. Mwenda, Legal Aspects of Banking Regulation: Common Law Perspectives From Zambia (Online) Page 33
CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The *ultra vires* doctrine as it has developed in the sphere of company law has been in relation to a company’s capacity to do any acts. The *ultra vires* doctrine is invoked in the instances where a company acts outside its powers as prescribed in its constitution. In the past contracts entered by a company which were beyond its powers would render such contracts void *ab initio* and thus neither party to the contract could claim under it.

The harshness of the doctrine of *ultra vires* doctrine as it then was led to the need to mitigate its rather unconscionable nature. Cases highlighted above have indicated that the courts were reluctant to apply the doctrine of *ultra vires* and this led to, in the case of the UK to numerous committees being set up to find solutions to the problems so created by doctrine *ultra vires*.83

Such an attitude towards the doctrine of *ultra vires* eventually found legislative consent which culminated in Acts such as the Companies Act, *Chapter 388* of the Laws of Zambia, enacted in 1994 and the UK Companies Act of 2006 which have severely limited the application of the doctrine of *ultra vires*.

In order to achieve this end the sections 21, 22, 23 and 24 of *Chapter 388* of the Laws of Zambia have by and large altered the extent of the application of the doctrine of *ultra vires* in this jurisdiction. Section 21, by implication sets out what shall form the constitution of a company and in a very distinct departure from the previous Act the objects and memorandum of association of a company have effectively been done away with and replaced by the articles, the application for incorporation and the Companies Act itself. The objects have

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primarily been rendered obsolete as there are only effective where the articles have expressly termed them to be so.

Section 22 relates to the inherent capacity of a company to do any act, which by implication gives companies’ unlimited capacity, subject only to the restrictions provided for by its articles and the inherent limitations on a company placed on it by its corporate nature. This section therefore gives companies power to enter into any transaction provided it is not limited by its articles.

An act of a company that is in breach of its articles shall not however by reason only of such breach be rendered invalid. This is provided for in section 23 of Chapter 388, a section which illustrates the severe limitation to the application of the ultra vires doctrine. Section 23 however should not be construed that it allows for a company to act outside its articles, but rather that only renders valid such acts so as to avoid the doctrine of ultra vires being invoked.

Section 24 alters the position of the law as regards the doctrine of constructive notice. This section also places a limitation on the doctrine of ultra vires in that third parties are not presumed have knowledge of the company’s capacity by reason only that the company has made its articles a public document by way having submitted the same with the Registrar of Companies.

As a result of these changes in the law the ultra vires doctrine can therefore be said to be available in this jurisdiction even though its application has been severely narrowed. The courts in Zambia seem to only have dealt with cases relating to directors acting outside their authority, a different kind of ultra vires altogether.
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