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TITLE: FINANCIAL FREEDOM IN MOBILE MONEY: THE ROLE OF THE CENTRAL BANK IN ZIMBABWE

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DECLARATION

I Chipo Nduna do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously in its entirety or in part, been submitted to any university for a degree, works of others or referred to are accordingly acknowledged.

Signed Chipo Nduna

Date 7 April 2020

This research paper has been submitted for exam with my approval as University supervisor.

Signed

Date 19 April 2020

DEDICATION

This is a dedication to my entire family, for rallying behind me, without you it would have been a futile exercise. Particular mention to my husband Simba Nduna for pushing me hard when I felt like giving up; for believing in my dream and for all the emotional and financial support. To my daughters Nyaradzo and Rufaro and sons Simba E and Tinashe, you were there behind me all the way. Nyari, what an awesome flat mate. Rufaro, Tinashe and Simba E you were like senior prefects always checking how far I was. That gave me a sense not to give up and know why I started on this tough journey so late in life.

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E-float

E-money

E-wallet

Eco-cash

Financial regulation

M-Pesa

Mobile money

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TABLE OF CONTENTS

FINANCIAL FREEDOM IN MOBILE MONEY: THE ROLE OF THE CENTRAL BANK IN ZIMBABWE

CHAPTER 1

1.1 INTRODUCTION

This paper analyses how the Zimbabwean economic history has led to the perception and attitude of the population towards the financial industry. It has been blighted by extremes to the extent that in 2008 the Zimbabwe economy had one of the highest hyperinflation rate in the world.[1] Pettinger sums up the hyperinflation journey of Zimbabwe as having begun in the 1990s shortly after the disastrous land reform.[2] This is where private farms were grabbed from landowners and re-allocated to mostly peasant farmers who had no technical know-how in farming. It was also a time when the country was involved in an unbudgeted and unsolicited second Congo civil war necessitating that the Government increase salaries to cater for soldiers and other officials assigned to the Congo.[3] Earlier on the government had buckled under pressure from former war liberators (war veterans) and paid out unbudgeted bonuses.[4]

Besides the economic downturn the above were unbudgeted expenditures.[5] The dire economic situation was also exacerbated by the diminished foreign currency earnings from tobacco, which had traditionally been the biggest foreign currency earner.[6] As the economic crisis worsened, the Central Bank of Zimbabwe resorted to printing money as a short-term solution to government

[1] Pettinger T 'Hyper Inflation in Zimbabwe' available at http://www.economichelp.org (accessed 1 September 2018).

[2] Pettinger T 'Hyper Inflation in Zimbabwe' available at http://www.economichelp.org (accessed 1 September 2018).

[3] Stoddart T '*Analysis of the Zimbabwean Hyperinflation Crisis: A search for Policy Solutions'* (unpublished thesis, The Pennyslavania State University, (2010) 1-52*:* available at http://www.honors.libraries.psu.edu (accessed 7 September 2018).

[4] Stoddart T (2010) 13.

[5] Jain A, Bhandan S & Kushwein A 'An analysis of Hyperinflation in Zimbabwe' (2016) 4 *International Journal Research in Humanities, Arts and Literature* 14.

[6] Stoddart T (2010) 13.

expenditure and to finance higher debt.[7] The government also sought to resolve this by fixing the exchange rate of the Zimbabwean Dollar and having price controls.[8] All this led to shortages of basic commodities and hyperinflation.[9] In 2008 the economic woes peaked. This resulted in a wipe out of the wealth of the citizenry; all sectors of the once thriving manufacturing industry closed. The financial sector was adversely affected. Banks closed by the day, unemployment stood at 80% and emigration increased from 6% in 2005 to 9.9% in 2010.[10] Virtually no economic sphere was spared. In the banking and insurance sectors, citizens lost their life savings and insurance policies lost all value. There was a total economic meltdown, with the economy grinding to a halt. The alternative currency, called the Bearer Cheque was introduced as the paper equivalent of the Zimbabwean dollar had a denomination note of up to 100 trillion dollars.[11] The inflation rate was at 231million percent in July 2008 and some say it arguably went up to as high as 89.9sextillion percent.[12] That is a time when Zimbabwe had arguably the poorest millionaires in the whole world.

The political landscape changed, and the economy got revived with the advent of a Unity Government and the introduction of the use of the United States Dollar (USD).[13] However when the USD was introduced into circulation the denomination were only notes, the lowest being one USD but there were no coins to cater for the cents. The problem which arose is that in daily transactions when the customer was using cash and was supposed to be given say 90 cents change in coins, there were no USD coins in circulation. This was then at a time when the Zimbabwean currency was no longer in use.

[7] Pettinger T 'Hyper Inflation in Zimbabwe' available at *http://www.economichelp.org* (accessed 1 September 2018).
[8] Stoddart T (2010) 14.
[9] Pettinger T 'Hyper Inflation in Zimbabwe' available at *http://www.economichelp.org* (accessed 1 September 2018).
[10] Jain A, Bhadhan S & Kushwah A (2016) 4.
[11] Noko J 'Dollarisation: The case of Zimbabwe' (2011) 31 *Cato Journal* 339 348.
[12] Makochekanwa A 'Zimbabwe to introduce Zimbabwe Bond Notes: Reactions and Perceptions of economic agents within the first days after announcement' (2016) *Munich Personal RePEc Archive* 14.
[13] Noko J (2011) 348. Zimbabwe African National Union -Patriotic Front (Zanu PF) agreed to an uneasy inclusive government (after widely rumoured ascension that they had lost the elections) with the two main opposition Movement for Democratic Change (MDC), the one led by Morgan Tsvangirai and the other by Arthur Mutambara.

As a result, supermarkets had to devise a way of giving change for USD dollars purchases in the equivalent of goods.[14] For example a customer will be given a pen worth 50cents and sweets worth 40cents to make up the 90 cents change. There was a public outcry against this practice to the Central Bank. In order to pacify public discontent, the Central Bank decided to print and mint its own currency, “bond notes and bond coins” to be used as change and these were officially pegged on an equivalent of exchange rate of one to one with the USD.[15]

In the collective memory of the general members of the public and recalling the economic meltdown of 2008, this innovation was a clear risk. The reaction was a run of withdrawals of USD savings from individual and corporate accounts leading to shortage of cash in the banks overnight. Those with USD shunned from depositing their money in the resuscitated banks and kept their money in their homes fearing a repeat of history.[16]

In 2004 the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) issued licenses to operate as mobile network operators (MNOs), namely, Econet Wireless Zimbabwe (Econet), Telecel Zimbabwe (Telecel) and NetOne. NetOne is government operated. Econet and Telecel are privately owned. Econet is the most successful of all and is widely distributed across the whole of Zimbabwe.

Earlier the MNOs had introduced services of sending money, remittances, via mobile phones, but this system was relatively new and unfamiliar to users or customers. The term users and customers will be used interchangeably in this paper. However, it became very popular overnight when the country was gripped by cash shortages. Overnight it became a “pseudo currency”. Econet had earlier introduced EcoCash, mobile money.[17] Because of its country-wide coverage,

[14] Noko J (2011) 352.
[15] Makochekanwa A (2016) 14.
[16] Makochekanwa A (2016) 4.
[17] ‘Econet Wireless Zimbabwe’ available at *http://www.econet.co.zw* (accessed 10 May 2018).Mobile money is an electronic wallet service via a mobile phone. It allows the user to store, send or receive money using their mobile phone. This is a safe and easy electronic payment alternative to bank accounts.

it became and is widely used. Mobile money can be used by the rural poor who ordinarily would not qualify to open a bank account as they lacked the requisite credentials such as proof of income required to open a bank account.[18] However for participation in mobile money transaction all one needs to operate and participate is a registered mobile phone and identity document. This will be discussed at length in the later analysis. The problem at hand is the inclusiveness of the unbanked population. The requirements to own a mobile phone and having it registered are less stringent than opening an account at a banking institution, which requires a pays slip, identity document and proof of residence. The requirement of a pay slip in Zimbabwe where there is 80% unemployment and where for those employed are in the informal sector is unattainable.[19]

The Government issued a directive abolishing the use of multi-currency in Zimbabwe. This was sanctioned through the Reserve Bank of Zimbabwe (Legal Tender) Regulations, Statutory Instrument 142 of 2019. The United States dollar is now only officially used when paying for import duty. The Real Time Gross Settlement 'RTGS' or the Zimbabwe Dollar is the only currency in use in Zimbabwe. Foreign currency is only used for outside travel or purchases outside the country. As a result of that directive, the USD and even the RTGS vanished from the streets and banks onto the black market. The consumers were left with no choice but to use mobile money as it is the only 'currency' available. As discussed in Chapter 3, once there was a technical glitch at Econet Wireless, after the abolishment, the whole country was on lock-down in terms of financial transactions.

1.2. PROBLEM STATEMENT/SIGNIFICANCE OF PROBLEM

[18] Ndhovu I & Ndhovu M 'Mobile Banking the future to rural financial inclusion: Case study of Zimbabwe' (2013) 9 *IOSR Journal of Humanities and Social Science* 70. "unbanked" persons are individuals who do not qualify and meet the requirements at banks to be able to open bank accounts with banks, most of them lack pay slips, as they are unemployed or are engaged in informal trading, have no proof of source of funds or have no identity documents, which are prerequisite in opening a bank account.

[19] Ndhovu I & Ndhovu M (2013).

The use of mobile money is so extensive, to the extent that it has been turned into a form of currency. A person with money in their bank account or a person without a bank account loads it onto their mobile phone number and it is called mobile money or "e-money". The mobile payments can be made through a short message service (SMS), enabling phone remittances to any person with a mobile phone, with or without a bank account.[20] The most popular mobile money, which is widely used because of its presence countrywide is EcoCash provided by Econet Wireless.[21] Telecel and NetOne have similar products but their network coverage especially in the rural areas is thin on the ground yet that this is where the majority of the population live. EcoCash is used in conjunction with Steward Bank, a trustee bank.[22] EcoCash is used for every transaction from buying groceries, paying for utilities such as remittances as well as taxi rides to and from work even buying vegetables from roadside vendors. The mobile phone can be used as a savings tool, as Econet has launched a product called EcoSave.[23] Any person, who has received money via the mobile phone, be it through remittances from within the country or from outside or selling of wares can leave the money in the mobile location for future purposes. The result is that there has been an inclusion of the 'unbankable' or the 'unbanked', as one does not need a bank account to register. A person who has never had a bank account, who has not been vetted by the bank's system, now has 'a moving bank' in the form of a mobile phone.[24]

In the banking system, in-order for a person to open a bank account he or she needs to satisfy the "Know Your Customer" (KYC) requirements for Anti Money Laundering and anti-terrorist financing purposes.[25] These include an identity card, proof of residence and a pay slip or source of funds. However, mobile money cascades quickly from persons with bank accounts into the mobile phones of other persons who are qualified by the mere possession of a mobile phone. The

[20] Lowry C 'What's in your Mobile Wallets? An analysis of Trends in Mobile Payments and regulation' (2016) 2 *Federal Communication Law Journal* 354.
[21] 'Econet Wireless Zimbabwe' available at *http://www.econet.co.zw* (accessed 10 May 2018).
[22] Econet Wireless Zimbabwe'available at *http://www.econet.co.zw* (accessed 10 May 2018).
[23] 'Econet Wireless Zimbabwe' available at *http://www.econet.co.zw* (accessed 10 May 2018).
[24] 'Econet Wireless Zimbabwe' available at http://www.econet.co.zw (accessed 18 August 2020).
[25] Fonte E '2017 US Regulatory Overview of Mobile Wallets and Mobile Payments' (2017) 17 *Wake Forest Journal of Business and Intellectual Property Law* 552 559.

usage of mobile money is not unique to Zimbabwe. In September 2008, 25% of unbanked Kenyans were using M-Pesa, which is similar to EcoCash in Zimbabwe, and by late 2009 the percentage of such users had increased to 50%.[26] As a result, even vendors, informal traders and rural women who had never had a bank account but owned a mobile phone, have a mobile money account.[27]

There is need to understand how a person participates as a user of this product. A person with a mobile phone, registers their number with the MNOs and Econet alone has 5million subscribers, which is 53% of the adult population of Zimbabwe.[28] Once that happens a user is able to send money and transact with any mobile phone user, even if such a phone user is not on the same network. One only needs "e-money or e-wallet' money in their account and with that transactions become accessible with any mobile service user.[29]

Mobile money can be used in different ways such as micro-payments made to merchants, utility bill payments, business to business transfers (B2B), person to person transfers (P2P), business to person transfers (B2P) and long distance remittances.[30] Once the payee has received the money they can decide to save it in their mobile phone, use it for other transactions or redeem it as cash at agents located all over the country. The cash agents or merchants have what is called an "e-float" which is an agreed balance on their account. They are selected and registered by the MNOs and range from grocery owners, service stations or even spaza operators. The agents' premises are branded with the blue logo of Econet, which is instantaneously recognisable to the general populace, and they have an agent number clearly marked. This will be elaborated on in the later chapters.

[26] Jongho K 'Ubiquitous Money and Walking Banks: Environment, Technology and Competition in Mobile Banking' (2008) 8 *Richmond Journal of Global Law and Business* 2 30.
[27] Ndhovu I & Ndhovu M (2013).
[28] 'Econet Wireless Zimbabwe' available at *http://www.econet.co.zw* (accessed 10 May 2018).
[29] 'Econet Wireless Zimbabwe' available at http://www.econet.co.zw (accessed 10 May 2018).
[30] Chitungo S K and Monongo S 'Extending the Technology Acceptance Model to Mobile Banking Adoption in Rural Zimbabwe' (2013) 3 *Journal of Business Administration and Education* 51.

In 2015 Econet alone had transacted USD200 billion through this system.[31] The then Minister of Finance Patrick Chinamasa, in his budget speech for the year, said that by May 2018 Zimbabweans had transacted USD97 billion of which 96% of these were cashless, which also includes mobile money and the use of swipe machines.[32] All a person needs to redeem their funds is a mobile phone and a Personal Identification Number (PIN). The above transaction shows how quickly money is moved from the financial sector into the telecommunication sector.[33] The user of mobile money has been included in transactions of money, by merely having a mobile phone although they fall outside the traditional banking industry of mortar and brick banks. The problem is that a part of the population has been included which is not regulated.

The other problem is that the mobile phone operator is regulated under the telecommunications industry legislation, Postal and Telecommunications Act (Cap 12:05). The MNOs are not banks in terms of the Banking Act Cap 24:20. Econet, which is one of the MNOs on its website boasts of 5million subscribers, which as pointed out earlier, translates to 53% of the adult population.[34] They pride themselves on offering micro-savings and services to the unbanked and banked alike. In 2015 alone $200billion worth of transactions came through Econet's systems which attests to the widespread usage of its cashless system.[35] Thus, EcoCash, is a pseudo currency not sanctioned by legislation. That this is shown by that even in advertisement of goods suppliers quote three "prices" namely USD, Zimbabwe Bond Note or RTGS and EcoCash amount.

The Reserve Bank of Zimbabwe (referred as the Central Bank) is the regulator in the banking industry but limits itself to institutions accepting deposits from members of the public. This excludes MNOs as they do not fall under the definition of financial institutions. Application of the Banking Act excludes MNOs and neither are they included under the classes of business as

[31] Econet Wireless Zimbabwe available at *http://www.econet.co.zw (*accessed 10 May 2018).
[32] Langa V 'Zanu PF MPs revolt over cash shortages' The Newsday 10 May 2018 available at *http://ww.newsday.co.zw* (accessed 15 June 2018).
[33] Jack W & Suri J 'Mobile Money: The Economics of M-Pesa' (2011) 16721 *NBER Working Paper* 1 6, 11.
[34] 'Ecocash' 'Econet Wireless Zimbabwe' available at *http://www.econet.co.zw* (accessed 5 May 2018).
[35] 'Ecocash' 'Econet Wireless Zimbabwe' available at *http://www.econet.co.zw* (accessed 10 May 2018).

they are not mentioned on the listed institutions.[36] The Central Bank has control over the trustee banks, like Steward Bank, where the MNO holds its funds but the transactions within the MNOs falls outside their mandate. It therefore means that the unbanked population is not covered under the Banking Act. The unbanked are also not protected under the Deposit Protection Corporation Act Cap 24: 29.[37] It therefore means that the unbanked and the banked alike are excluded from the deposit protection in so far as they are transacting under the MNOs as they are not "institutions" in terms of that Act.

The problems are (1) the Central Bank and its systems have no control over the new emergent "bankers" under the MNOs. The transactions under mobile money transfers are not regulated under the Central Bank. The legislation in place is insufficient to enable the Central Bank to regulate these transactions. (2) The purpose of Know Your customer "KYC" is not satisfied because the MNOs do not require the same stringent requirements as the financial institutions. The "unbankable" that have been included, how are they provided for in the Banking Industry? (3) If there is hyperinflation that resulted in systematic failure as happened in 2008, who is responsible for reimbursing these mobile phone holders their money as they are not protected under the Depositors Protection Act? (4) In order to deal with the problem can the legislation in place be extended to regulate the transactions of the MNOs?

1.3. RESEARCH QUESTIONS

There is extensive usage of mobile money in the financial market in Zimbabwe to the extent that it is used as an equivalent to cash due to persistent cash shortages, the purpose of the study is to find out whether the Central Bank has authority over the mobile money transactions as well as

[36] Section 3 and section 6 of the Banking Act Chapter 24:20.

[37] Section 40 of the Deposit Protection Act Chapter 24: 29 " contributory institution" means banking institution, building society or other organisation which is a contributory institution in terms of Part IV and whose status has not been suspended or revoked in terms of section 27." and "banking business" means business of accepting deposits or withdrawals or repayable on demand or after a fixed period or after notice and employment of those deposits, in whole or in part, by lending or any other means for the account and at the risk of the person accepting the deposit.".

whether such transactions are provided for in the regulatory framework in comparison with Kenya regulations?

1.3.1 Does the role of the Central Bank in the Banking Act Chapter 24:20 cover the activities of the mobile money transactions and such activities covered under such Act?

1.3.2. Are mobile network operators included in the definition of institutions in terms of the definition section 1 of the Banking Act Chapter 24:20?

1.3.3. If the laws in place are not adequate what needs to be done in order to deal with this “mischief” regarding inclusion?

1.3.4. Is there need for new legislation concentrating on mobile money transactions alone?

1.3.5. Can the legislature amend existing legislation to cover the activities under mobile money?

1.3.6. Can the existing legislation, the Deposit Protection Corporation Act Chapter 24:29 extend its protection to cover consumer protection of mobile money users or is there need for new legislation?

1.4. POTENTIAL SOLUTION TO THE PROBLEM

I submit that the main solution is to introduce new legislation or amend existing legislation to cater for the extended role of the Central Bank. Consumer protection must be paramount in the relevant legislation. It must be clear in such new or amended legislation how to deal with mobile money transaction and how best the consumer can be protected from the risk of system failures and losses. There is need to learn from other jurisdictions on how best they have dealt with similar problems. A comparative study can be carried out and solutions considered from other countries like Kenya where the use of mobile money is wide spread. Other examples from Africa can also be considered. The SADC Protocols, relevant on the issue or the Africa Union Protocols are sources to be considered in formatting safe guidelines. The other solution is to consider incorporating the model laws of the United Nations Commission on International Trade Law

(UNCITRAL) on electronic commerce and current practices in the use of electronic communications.[38]

Overall there is need to address the following points in order to come up with solutions; (1) A definition of what mobile money is. (2) How mobile money operates. (3) Analysis of the legislation governing mobile network operators in Zimbabwe, Kenya and elsewhere. (4) Critical analysis as to whether the use of mobile money is governed by the existing legislation. (5) Consideration as to whether the legislation governing financial institutions is adequate to cover transactions under mobile money usage and the MNOs. (6) In terms of the existing legislation, an analysis as to whether the Central Bank has authority over financial transactions provided by MNOs. (7) A critical analysis of current consumer protection particularly as to whether it covers mobile money transactions. (8) To address the identified legislative *lacunae*, conduct a comparative study with Kenyan law (where mobile money is ubiquitious) and international available legislation and identify what can be adopted in the Zimbabwe legal framework.

1.5. ORIGINALITY OF THE ANSWER/ LITARATURE SURVEY

Whilst a lot has been written about mobile money, most writings or research have concentrated on the benefits to the unbanked, the financial freedom to the rural poor, to women and its success as a form of remittances. Not much has been written involving a critical analysis on the applicable regulatory framework. Many have written on financial freedom in the form of mobile banking but have not analysed the impact of the use of mobile money. Most have also not researched on whether mobile money is covered by the existing legislation in countries where mobile money usage is practised and whether consumer protection regulations, presently extends to mobile money users.

Maurer was close in the analysis of the use of exchange of cash via mobile phones and the risk associated with it, but did not examine the regulatory framework.[39] He however gave a very

[38] Castellani LG 'The Role of UNCITRAL Texts in promoting a harmonized legal framework for Cross-border Mobile Payments' (2013) 8 *Washington Journal of Law, Technology and Arts* 266 267.

detailed analysis of the risk associated with the use of mobile phones as a means of financial transactions to the consumer. Gerald Munyoro and others raised the issue of the need for regulations to deal with mobile money transfers but in their papers, emphasis is more on employment creation than on the regulatory framework.[40] Chitungo and others present a deep analysis of mobile money, how it works and the legislation in place but they have concentrated more on how mobile money has been adopted by the rural dwellers without addressing the regulatory gap created by such adoption.[41] Ndhlovu and Ndhlovu have extensively researched on mobile money but more on how the financial inclusion has benefited the rural dwellers.[42] Dermish, Kneading, Leishman and Mas in their research provided detailed statistics indicating that globally about 2.6 billion people are excluded from access to financial services and yet more have mobile phones.[43] They raised a pertinent issue concerning challenges to regulators on the issue of financial inclusion of mobile phone users. They went further to give a detailed overview and guidelines to be used by regulators to determine regulatory gaps, how best to deal with such gaps and the inclusion of KYC. Their sterling research has thus assisted somewhat on how to deal with the present legislative gap arising in the Zimbabwe situation.

Marumbwa also wrote extensively on how mobile money is used in Zimbabwe.[44] He also highlighted in his research that mobile money network providers are governed under the Telecommunication industry, yet the use of money is governed by the Central Bank as well as all the activities of the financial institutions. He went further to analyse how the use of mobile money has impacted on the socio-economic development of the population through mobile commerce. I submit that he failed to analyse how the regulatory framework has been impacted as mobile money is governed under different regulatory regimes.

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[39] Maurer B 'Regulation as retrospective ethnography mobile money and the rights of cash' (2012) 27 *Banking and Finance Law Review* 300 302.

[40] Munyoro G, Kutesera P, Tanhara JR, Mhere C & Mazuvawanda B 'The Significance of Mobile Money Transfer Facility to Zimbabwe Economy: A case study of EcoCash' (2017) 5 *International Journal of Research in Business Management* 1.

[41] Chitungo S & Munongo S 'Extending the Technology Acceptance Model to Mobile Banking Adoption in Rural Zimbabwe' (2013) 3 *Journal of Business Administration and Education* 51 53.

[42] Ndhovu I & Ndhovu M (2013).

[43] Dermish A, Kneiding C, Leishman P & Mas I 'Branchless and Mobile Solutions for the Poor: A survey of the Literature' (2011) 6 *Innovations* 81- 89.

[44] Marumbwa J 'Exploring the Moderating Effects of Socio-Demographic Variables on Consumer Acceptance and the Use of Mobile Money Transfer Services (MMTs) in Southern Zimbabwe' (2014) 4 *American Journal of Industrial and Business Management* 71 72.

The next authors presented an analytic paper on how mobile money has benefited the rural poor by the financial inclusion of the unbanked.[45] It has also resulted in the alleviation of poverty from rural areas. This, the research proceeds, has led to the promotion of local savings, as mobile money has a saving component, and this in turn has led to the development of rural businesses. Chitokwindo and others omitted to analyse the regulatory impact thereof. Hughes and Lonie's paper are very much in line with this research paper but their work is restricted mostly to Kenya.[46] They highlighted the regulatory hurdle which is encountered by the inclusion of a customer into the financial world merely because of ownership of a mobile phone. They also highlighted the fundamental differences between the way banks and telecommunication service providers operate. They also showed how such collusion between the two industries through mobile money has created problems. They went further to suggest solutions but using the Kenyan situation. What their paper highlighted is the collusion of the two sectors. There is therefore need to examine the Zimbabwe regulatory framework in this regard.

Morawcynski and Mas did an excellent job in so far as the mobile money use in Kenya is concerned.[47] They laid out how mobile money functions and how it has been a success in Kenya. They also discussed the advantages and flexibility of using mobile money as opposed to traditional financial institutions. A noted shortcoming, the paper pointed is the problem that mobile money is not prudentially regulated by the Central Bank of Kenya. The regulatory problem highlighted is that mobile money and financial institutions resort or operate under different regulatory domains. These in a way are the problems which this paper seeks to address. However, the regulatory framework of Kenya differs from that of Zimbabwe and as such has to be analysed on its own. The other difference with the Zimbabwe situation vis-a-vis Kenya, is that mobile money is also quoted as a form of 'currency' when selling goods. The paper also did not discuss consumer protection.[48]

[45] Chitokwindo S, Mago S & Hofisi C 'Financial Inclusion in Zimbabwe: A contextual overview' (2014) 5 *Mediterranean Journal of Social Sciences* 415.

[46] Hughes N & Lonie S 'M-Pesa: Mobile Money for the "Unbanked" Turning Cell phones into 24-Hour Tellers in Kenya' 2007 *Innovations* 1.

[47] Mas I & Morawacynski O 'Designing Mobile Money Services Lessons from M-Pesa' 2009 *Innovations Technology, Governance MIT Press Journal* 77 78.

[48] Mas I & Morawacynski O (2009).

Jack and Suri looked at the use of mobile money and its advantages as a savings tool and its potential economic impact on households.[49] They gave a detailed analysis of how mobile money works. They have also analysed the different facets of advantages to the users especially those persons who had been financially excluded from the financial market. Mobile phone, as they pointed out, has led to financial inclusion and an improvement of lifestyles of the ordinary citizenry. They raised a pertinent regulatory aspect, namely that since the launch of M-PESA, a mobile money instrument in Kenya, SafariCom, the MNOs in Kenya, has been adamant that M-PESA, is not a bank, and therefore should not be regulated by the Central Bank of Kenya.[50] The paper, however, did not discuss the regulatory framework in respect of mobile money. Lowry gave a blanket overview of legislation regarding mobile money in Africa.[51] She offers guidelines on how to set up legislation for mobile money. She also gave a detailed synopsis of mobile money and the related risks which the legislator must consider. She concluded by advising that there is need for consistency towards regulatory approaches in dealing with mobile money transactions.[52] Jobodwana came close to an analysis of regulatory review but his paper was general for Africa and specific to South African legislation.[53] Though this article is not specific to Zimbabwe, it will be very beneficial as a reference point on issues raised on the Zimbabwe situation. Lawack also wrote about regulatory framework but was using South Africa as a case study.[54] She gave a general overview of how mobile money works and goes further to analyse the regulatory framework in place in South Africa. She then examined the risk posed using mobile money. She finishes off her paper by analysing the regulatory risks and challenges presented by electronic banking. She looked at mobile banking for the banking industry as well as mobile banking without singling out mobile money only. There is therefore need to look at the regulatory framework with regards to mobile money specifically with regard to Zimbabwe.

1.6. OUTLINE OF CHAPTERS

[49] Jack W & Suri T 'Mobile Money: The Economics of M-Pesa' (2011) 16721 *NBER Working Paper* 1.
[50] Jack W & Suri T (2011) 7.
[51] Lowry C 'Whats in your Mobile Wallet? An Analysis of Trends in Mobile Payments and Regulation' (2016) 2 *Federal Communications Law Journal* 353.
[52] Lowry C (2016) 377.
[53] Jobodwana NZ 'E-Commerce and Mobile Commerce in South Africa: Regulatory Challenges' (2009) 4 *Journal of International Commercial Law and Technology* 287.
[54] Lawack AV 'Mobile Money, Financial Inclusion and Financial Integrity: The South African Case' (2013) 8 *Washington Journal of Law, Technology and Arts* 318.

Chapter 1: INTRODUCTION

The dissertation is divided into five Chapters. Chapter one, the introductory chapter, outlines the purpose of the study and the background of the problem. It gives a general overview of the chapters to follow and the discussions thereof.

Chapter 2: MOBILE MONEY TRANSACTIONS

This Chapter examines the mechanics of mobile money. The chapter will examine the operation of mobile money, what it entails and how the transactions are effected. It will also go further to give a detailed analysis of the possibility of inclusion of a person without a bank account in the transaction. Further the chapter examines the various players involved in mobile money transactions and their different roles and the benefit to the users.

Chapter 3: THE ROLE OF THE CENTRAL BANK AND CONSUMER PROTECTION IN MOBILE MONEY IN ZIMBABWE

The chapter outlines and discusses the Zimbabwe situation and the regulatory provisions available. It analyses the role of the Central Bank in financial transactions. The chapter also discusses the MNOs and their operations and the control of mobile money by legislation. Further the chapter discusses who has the ultimate regulatory responsibility for the MNOs and further by the nature of their duties and definition of the MNOs, whether they fall under the Banking Act or the Telecommunications Act. The chapter will analyse the legislation in place and whether such legislation is adequate to cover mobile money. There is also an analysis of who a customer is in the Banking industry. It will further discuss the institutions and legislation available to protect the banking consumers. The Chapter will discuss who the consumers of mobile money are. It will further discuss whether the consumers or the mobile money users are protected in terms of the existing legislation. The Chapter also examines consumer protection in the event of any losses and who is responsible for mobile money consumers.

Chapter 4: COMPARISON OF LEGISLATION IN KENYA

This chapter outlines the national legislation in comparison with other similar jurisdictions in Africa, as it is in that continent that the use of mobile money is wide spread. The Chapter analyses how similar issues have been dealt with in African jurisdictions. The Chapter examines a comparative study of Kenya legislation where M-PESA has been a success. The chapter will analyse the similarities and the differences with Zimbabwe. Ultimately the chapter analyses what can be taken from the various jurisdictions and the reasons for the adoption of similar aspects in Zimbabwe legislation. It will also look at whether the issue of mobile money has been taken in a negative or positive way and lessons learnt from its usage. Consideration must also be given to regional and international protocols and how aspects thereof can be usefully borrowed or grafted into the Zimbabwean legislative enactments.

Chapter 5: OVERVIEW OF LEGISLATION OF MOBILE MONEY

Chapter outlines and discusses the Zimbabwean legislation in comparison with the Kenya legislation, other African legislation and regional instruments. It will explore whether there is need for the legislature to come up with new legislation or amend the existing legislation considering the identified shortcomings and the growing trends in the problem analysis. The Chapter concludes with recommendations taken out from the problems and the analysis throughout the paper.

Chapter 6: CONCLUSION AND RECOMMENDATIONS

This concludes and make findings of the whole study. It gives a conclusion of all the chapters in summary referring back to the previous chapters. The Chapter concludes with the recommendations of the appropriate, ideal Zimbabwe regulatory landscape given the use of mobile money.

1.7. METHODOLOGY TO SOLVE PROBLEM

The research is based on desktop study. It is based on qualitative method. The research is based on the primary source, which are: the various legislation in use, the protocols, model laws and other international laws. The research is based on conducting research on case law, journal, books and articles on the internet on the same topic. Most of the research material will be accessed from legislation, available literature and University’s library. Zimbabwean legislation and literature will be used. Kenya has been singled out as a comparative study mainly because that is where mobile money usage has been a success story.

CHAPTER TWO

MOBILE MONEY TRANSACTIONS

2.1 INTRODUCTION

The first chapter gave an overview of the introduction of mobile money in Zimbabwe, the financial background and history, and how mobile money took root in Zimbabwe. The public gained more trust with mobile money than the banking system, which had previously collapsed in the hyperinflation period and mobile money came as a relief. It is inclusive towards persons with only a mobile phone and this led to the inclusion of unbanked persons. However, with it has also been ushered regulatory challenges in the applicability of existing legislation to this new mode of money transactions.

In the past, before the introduction of mobile money there were clear regulatory provisions categorized and industry specific. There was a clear demarcation of industries, namely, telecommunication and banking industry. The two industries were distinguishable. The introduction of mobile money has left a regulatory gap in the sense that the mobile money is not regulated by the Banks Act.

In order to be able to understand this lacuna, the chapter analyses the mobile money transactions in detail and gives an understanding of what mobile money is. The Chapter starts with the definition of mobile money and how mobile money works and later it goes on to examine how the payment transaction operates. Furthermore it discusses the different players in the field and lastly, the policy environment applicable to the operation of mobile money.

2.2 DEFINITION OF MOBILE MONEY

There has been a whole array of definitions of what mobile money is and different understandings and definitions are proffered from the different sources. The terms "e-money" and "mobile money" are used interchangeably in this study. Mobile money is defined as micro payments, the notion of "very small payments which may vary with purchasing power" and it is described as electronic payments or micro payments which are transactions below the value of USD$12.[55] In terms of information and communication technology it is defined as an electronic transaction, of data message and electronic communication and such communication is via a mobile device.[56] Mobile money is defined as "money transmission" or "transfer of funds" via a mobile phone.[57] Some have described mobile money as a tool that allows individuals to make financial transactions using mobile device technology.[58] Mobile payments 'm-payments', in the broader world of electronic payments 'e-payments', broadly cover e-payments initiated and authorised through other electronic channels for example the internet, card-based payments, mobile payments made via mobile devices like a mobile phone.[59] On the other hand the European Union Directive defines e-money as –

> "monetary value, as represented by a claim on the issuer which is -
>
> Stored on an electronic device;
>
> 1. Issued on receipt of funds an amount of not less value than in monetary value offered; and
>
> 2. Accepted as a means of payment by undertaking other than issuer.".[60]
>
> "E-money or mobile money to sum it up, is stored value instrument that -
>
> 1. Is issued on receipt of funds;
>
> 2. Consists of electronically recorded value stored on a device, a server, card or mobile phone;
>
> 3. May be accepted as a means of payment by parties other than the issuer; and
>
> 4. Is convertible back into cash."[61]

[55] Castellani LG (2013) 266 267.
[56] Castellani LG (2013) 266, 267.
[57] Lowry C (2016).
[58] Jack W and Suri T (2011) 11.
[59] Porteous D 'The enabling Environment for Mobile Banking in Africa. Report Commissioned by Department for International Development (DFID)' 2006 *Bankable Frontier Associates* 1.
[60] Porteus D (2006) 6.

E-money is distinguished from credit cards because of the concept of convertibility, in that and that the issuer is a telecommunications company and it can be easily converted into cash.[62] The Economic Community for Africa (ECA) and International Development Research Center (IDRC) in 2001 adopted the definition of e-commerce as follows:

> "Electronic commerce is about doing business electronically. It is based on the processing and transmission of data, including text, sound and video. It encompasses many diverse activities including electronic trading of goods and services, online delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, online sourcing, public procurement, direct consumer marketing and after-sales services."[63]

To sum up, mobile payments is the transfer of funds between two parties using a mobile phone.[64]

Some authors have described mobile money through how it is transacted. As such mobile money transactions are divided into two main forms of mobile payments- (1) proximity mobile payments and (2) remote mobile payments.[65] Proximity mobile payments occurs at a point-of-sale where customers use a phone with a built-in near field communication (NFC) technology to make a purchase at a NFC point of sale terminal (POS terminal).[66] However remote mobile payments, do not require NFC technology or POS terminal, instead customers use phones equipped with short messaging services "SMS" that is texting messaging or wireless application protocol "WAP", to make payments at any time, at any place, either to individuals, businesses or merchants.".[67]

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[61] Greenacre J and Buckley RP 'Using Trusts to Protect Mobile Money Customers' 2014 *Singapore Journal of Legal Studies* 59.
[62] Greenacre J and Buckley RP (2014) 59.
[63] Jobodwana NZ (2009) 287.
[64] Taggart TRM and Freese DW 'Regulation of Mobile Payments' (2010) 127 *The Banking Law Journal* 485.
[65] Taggart TRM and Freese DW (2010) 485.
[66] Taggart TRM and Freese DW (2010) 486.
[67] Taggart TRM and Freese DW (2010) 486.

Mobile money denotes a form of electronic money and refers to services that connect consumers financially through mobile phones. Mobile money allows for any mobile phone subscriber, whether banked or unbanked, to deposit value into their mobile account, send value to another mobile subscriber and allow the recipient to turn that value into cash or store it.[68] Whereas the term "mobile payments" refers to the provision of payment services through the use of mobile phones by electronic funds transfer between customer's own accounts, transfer to a third party (beneficiary).[69] The phrase also refers to two parties contracting financial value using mobile device in return for goods and services.[70] It therefore means that mobile money is a tool that allows individuals to make financial transactions using mobile phone technology.[71]

Another definition given is that mobile money or e-money is stored value instrument that -

1. Is issued on receipt of funds;

2. Consists of electronically recorded value stored on device for example a server, card or mobile phone;

3. May be accepted as a means of payment by parties other than issuer; and

4. Is convertible back into cash.[72]

From all the definitions given above mobile money is distinguished from airtime, retail gifts or credit cards because of its concept of convertibility.[73] An e-money issuer can be in the form of payment service provider, credit issuer or Telecommunications Company.

To sum it up mobile money is based on 'non-bank" e-money issuer, who are labelled as "providers", e-money systems, cash and e-money exchanged at "agents" of the provider for

[68] Lawack-Davies V 'Legal and Regulatory Framework of Mobile Payments in South Africa: A Trade Off' (2014) 24 *South Africa Mercantile Law Journal* 77.
[69] Lawack-Davies V (2014).
[70] Lawack-Davies V (2014).
[71] Jack W and Suri T (2011).
[72] Greenacre J and Buckley RP 'Using Trusts to Protect Mobile Money Customers' 2014 *Singapore Journal of Legal Studies* 59.
[73] Greenacre J and Buckley RP (2014) 59.

example shops, petrol stations or retail outlets and payments between e-money customers, through mobile phones.[74] Mobile payment is the operating system of low-value of electronic account held by mobile operators accessed from subscribers' mobile phone through a subscriber identification module "SIM" card, resident application.[75] This then grants subscribers access to accounts into which they can deposit and transfer money to and from other mobile payments accounts.

Donovan summed up mobile money as transactions existing at the intersection of finance and telecommunication and that that it has various stakeholders and players from different fields in competition.[76] Thus mobile money is a technology that allows people to receive, store and spend money using a mobile phone.[77]

2.3 OPERATION OF MOBILE PAYMENT

The manufacturers of mobile handsets install NFC chips inside them and then wireless carrier providers enable these phones to transmit financial account information and transaction data across networks.[78] Mobile application developers, then create applications for mobile phones and customers to use to make payments. Mobile payments can be done through SMS as pointed earlier.[79] The mobile phone user accesses this function by registering their mobile number at a registered authorised dealer or retail agent. The user gets an individual electronic money account managed by the MNO and funds deposited by the user are deposited at a pooled account in a regulated bank.[80] The value is backed by a highly liquid deposit at a commercial bank. Customers can then use mobile phones to transfer money to both registered and non-registered users, check their balances, pay bills, purchase mobile phone credit, and transfer credit to other

[74] Greenacre J and Buckley RP (2014) 59, 60.
[75] Harris K H and Terbel A 'Mobile Banking Can the Unbanked Bank on it?' (2012) 16 *Journal of Poverty Law and Policy* 160.
[76] Donovan K 'Mobile money for financial inclusion' Chapter 4 *Information and Communications for Development* 60 61.
[77] WorldRemit available at www.worldremit.com (accessed 29 October 2019).
[78] Taggart TRM and Freese DW (2010) 487.
[79] Lowry Carolyn 'What is your mobile wallets?' 2016 *Federal Communication Law Journal* 354.
[80] Mas I and Morawacynski O (2009) 77.

users, or redeem for cash.[81] The value which the users have on their accounts is e-money. Charges are deducted from users' account and levied when e-money is sent or when cash is withdrawn.[82]

2.4 PAYMENT TRANSACTION OPERATION

Mobile payments can be made through (1) voice access; (2) Short messages "sms" or (3) wireless application protocol 'WAP", which is a gateway to the internet.[83] The value can be paid from a prepaid balance or by adding the payment to a mobile phone bill. Users can also use access channels through (1) an existing bank account; (2) payment cards; or (3) pay through prepaid value stored on the mobile phone.

Mbalekwa has listed the four steps of how the transaction is done as follows;

"(1) The customer provides the merchant with a telephone number or rings the merchant;

(2) The merchant forwards payment and customer information to payment service provider, who is a mobile phone network provider;

(3) The service provider presents payment information to payer for confirmation using a PIN number or a one-time password, records transaction;

(4) The customer can then communicate with a payment provider or merchant by SMS; and

(5) Paid amount can then be collected by direct debit from payer's account and credited to beneficiaries' account."[84]

[81] Taggart TRM and Freese D (2010) 486.
[82] Jack W and Suri T (2011) 16.
[83] Mbalekwa S: 'The Legal and Regulatory Aspects of International Remittances within the SADC Region' (2011) available on *www.core.ac.uk/download/pdf* (accessed 16 May 2019).
[84] Mbalekwa S (2011) 79.

The MNO accepts deposits of cash from customers who use their mobile network sim card for example Econet in Zimbabwe with the sim-card registered as an EcoCash user.[85] The registration is simple, in that it requires an official form of identification document, identity card or passport but no other validation is required as is the case when opening a bank account.[86] In exchange of cash deposits, Econet or the MNO, issues a commodity known as e-money and this is measured in the same units as money held in an account under the user's name.[87] The e-money can be transferred from one customer to another using short message system SMS technology preloaded on a unique SIM card, and sold back to Econet (MNO) in exchange for money, with no charge for depositing money but a sliding tariff levied on withdrawals.[88] A customer can use basic cheap mobile phone to send value to someone. Mobile operators control both channels; they are the gate-keepers in deploying mobile money.[89] To enable the purchase and sale of e-money in Zimbabwe Econet the MNO needs agents across the breath of the country. In Kenya at present there are 40 000 agents operating under Safaricom.[90] In Zimbabwe under Econet there are agents strewn through-out the whole country. These agents operate with an e-float.[91] E-float is the amount of money held in the account of an agent. The agents have different levels.

2.4.1 Levels of agent groups are divided into three groups as follows;

1. Head Office, is a member of the agent group who deals directly with (MNO) Ecocash or M-Pesa for Kenya;

Subsidiary agents owned by head office, manages cash and e-float balances through transactions with head office; and both head office and agents can transact with EcoCash or M- Pesa users.[92]

2.4.2. Aggregator model

[85] Jack W and Suri T (2011) 17.
[86] Jack W and Suri T (2011).
[87] Jack W and Suri T (2011).
[88] Jack W and Suri T (2011) .
[89] Donovan K Chapter 4.
[90] Safaricom 'Experience M-Pesa' available at www.safaricom.co.ke/personal/m-pesa/----- (accessed 23 October 2018).
[91] Econet Wireless Zimbabwe.
[92] Jack W and Suri T (2011) 1.

This is similar to the first model but the aggregator acts as a head office and deals directly with Safaricom for Kenya or Econet for Zimbabwe and manages cash and e-float balances of agents and each M-Pesa or EcoCash agent is required to have a bank account.

3. Bank branch "super-agent" performs as an agent for agents and bank branch. They can trade cash and e-float with all (M-Pesa) or EcoCash agents. This differs with regular and aggregate models, as the bank does not trade e-float directly with M-Pesa or EcoCash customers.

Bank account holders can transfer funds into their mobile money accounts. MNOs hold their funds in banks in trust accounts, this is discussed at length in the subsequent Chapter. Banks have no special reserve requirements for M-Pesa or EcoCash trust accounts, like they have for current accounts in terms of the regulatory policy of the Central Bank. Therefore Safaricom or EcoNet is not under any obligation to give notice to withdraw cash.[93]

Mobile money spans two different and distinct industries with distinct business models; telecom and payment fees are based on fees collected per transaction whereas banking is float based with money earned through holding deposits.[94]

It is incumbent on the agents and customers to sign up for services in sufficient quantities in order to be viable. Effort is geared towards building a strong agent network and to maintain cash liquidity to be viable as the transactions are mainly built on trust. The key goal is winning and retaining the trust of customers including the poor and uneducated in new technology. Commercial viability requires trade-off between higher costs to recoup investment at lower costs and to reach scale and build mass market.[95]

[93] Jack W and Suri J (2011).
[94] Donovan K Chapter 4.
[95] Mas and Radcliffe (2010).

The International Finance Corporation “IFC” identified the following factors that hinders growth of mobile money- (1) Regulations; (2) competition with other instruments of financial access; and (3) user perception and skills.[96]

As pointed out earlier, agents are responsible for processing cash-in and cash-out transactions, in the form of customers depositing and withdrawing money in and out of the mobile money account and registration of new customers.[97] Customers and users will be used interchangeably in this paper. The ability of agents to register customers promotes financial inclusion and greater coverage of agents, in areas not covered by the traditional financial institutions for example in the rural and low-income areas.[98]

2.4.3 From Agent to M-Pesa or EcoCash user

From e-float the money cascades to the M-Pesa or EcoCash user, the one with a sim card registered at the MNO as a user. The e-money is transacted in different forms. E-Commerce categorises mobile money under four main areas of activity namely:

1. business-to-business; 2. business-to-government “B2G”, 3. business-to-customer “B2C” and 4. consumer-to-consumer “C2C”.[99]

Mobile devices can be used to make various types of payments cascading from the agents to the customer. Mobile payments are made through web browser of a mobile device through text message via mobile application, through point-of-sale or near field communication transaction.[100]

The payments can also be made through text messaging transactions on a mobile phone. Consumers with text messaging enabled phone, transmit payment to merchants or other person via text message with details on payee and payment amount. The recipient then goes to an agent

96 Donovan K Chapter 4.

97 Henderson W ‘Thinking Telecoms Series’ (2018) *Mobile Money Regulation* available at www.gsma.com/mobile (accessed 25 October, 2018).

98 Henderson W (2014).

99 Jobodwana NZ (2009) 287.

100 Lowry C (2016) 360.

and redeems the e-money value into cash or stores it in the phone as a savings for future use or use it to pay utility bills.[101] This form of text messaging payments and remittances is very popular with the large unbanked population grouping living in remote areas as well as the banked population. This is also very popular for remittances from breadwinners in urban areas to families in the rural areas. In Zimbabwe Ecocash is also available for remittances from South Africa to families back home in Zimbabwe.[102]

This way of transmitting money enables transmission across wide distances within a short space of time. In some instances, people purchase "air-time" or balance in the phone, send this credit to another user, and the receiver then sells the "airtime" or balance to an agent for cash, goods, or services; and this is transfer of purchasing power.[103]

Mobile wallet is categorised as services that enables payment at a physical point of sale via mobile device; "digital wallet" payment services that provides;

(1) Smart phone application for making financial transaction at a point of sale;

(2) Desktop application for making credit, debit or automated clearing house (ACH) purchase online;

(3) P2P transfers, mobile payment "account to account" transfers made directly between senders and receivers' bank account.[104]

When the value is loaded onto and stored in a mobile phone account, the holder can then use it for different transactions which can be for grocery shopping, paying utility bills or remitting it to some other user. The service is a fusion stretching from the financial service, which is the

[101] Lowry C (2016) 361.
[102] Econet Wireless Zimbabwe.
[103] Ndlovu M and Ndlovu I 'Mobile Banking the Future to Rural Financial Inclusion' (2017) 9 *IOSR Journal of Humanities and Social Science* 70 75.
[104] Fonte E '2017 US Regulatory Overview of Mobile Wallets and Mobile Payments' (2017) 17 *Wake Forest Journal of Business and Intellectual Property Law* 552- 559.

maintenance of the financial transaction to the telecommunication services, responsible for the transmission of the transaction message to move value to and from accounts.

As pointed out earlier, the mobile payments process is a simple scheme. The MNO transfers a value from the account of a payer to the account of the payee and both accounts can be maintained by the same operator. Payment can take place in favor of a beneficiary holding an account with another MNO, in the same country or in a different country. The role of the transaction of the second MNO needs to be taken into consideration and most of all, the operations governing competition of the different MNOs including cross border operators needs to be regulated.[105]

2.5 THE REASON FOR THE SUCCESS OF MOBILE MONEY

About 2.6 billion people worldwide use smart phones and mobile devices that are internet enabled and this number is expected to increase to 6.1 billion by 2020.[106] Mobile payments have been projected to an annual growth rate of 172% increase which is from less than \$100 billion in 2014 to \$800 billion in 2019.[107] More than 3 out of 4 African adults lack a bank account of a financial product with a formal banking entity.[108] As a result, Africa has more mobile money accounts than the number of traditional bank accounts as mobile money has become a solution for many in the unbanked or underbanked population. Kendall differentiates "unbanked" as households that don't have a bank account at an insured financial institution and "underbanked" as those with a bank account but also deal in the "nonbank" financial service providers.[109] The latter option, she argues, is an attractive option to those without access to the traditional banking products. The banks also have stringent requirements and high bank charges which are not present on mobile money transactions as they are charged per transaction.

105 Castellani LG (2013).
106 Lowry C "What's in your mobile Wallet? An analysis of Trends in Mobile Payments and Regulation" 2016 *Federal Communications Law Journal* 353 378.
107 Lowry C (2016).
108 Kendall J; Schiff R; Smadja E "Sub-Saharan Africa: A major Potential Revenue Opportunity for Digital Payments" (2013) available on *www.ssrn.com* (accessed 11 May 2019).
109 Kendall J; Schiff R and Smadja E (2013).

The success of mobile money has also been attributed to the fact that there has generally been adoption and endorsement by government entities and major retailers.[110] The swiftness of the transaction has also enabled popularity especially in remote rural areas where banks do not have branches. This has for long been a barrier to traditional formal financial systems and it has led to exclusion and a barrier to many households and small firms especially in the developing world from banking sector.[111] There are advantages of using the mobile money system, as follows -

(1) inherent characteristics of the service makes it cheaper compared to banks;

(2) it benefits from widespread usage and network effects; and

(3) it benefits from purposeful innovative applications either by developers or by people's uses of mobile money transfer options.[112]

The fact that inexpensive phones can be used for the transactions encourages its usage and the service can easily be extended to the poor and barely illiterate. It is also less visible than cash so it is preferable in terms of security. Mobile money increases privacy and autonomy and that works in favour of women in a patriarchal society.[113] Women can have savings without seeking permission of their husbands as would be the case in the formal banking sector when opening a bank account. In times of financial crisis, mobile money is preferred than assets as cows which are difficult to convert into cash.

The fact that the transaction is cheap, targeting lower income demographics and educational characteristics, as well as being faster and more reliable, has also led to extended adoption.[114] In the past about 70% of the adult population were excluded from the traditional banking system and these mainly consisted of the poor and rural folk.[115] This was due to the prohibitive

[110] Lowry C (2016).
[111] Donovan K Chapter 4 'Mobile Money for Financial Inclusion' 2012 *Information and communications for Development* 61 62.
[112] Donovan K (2012) 63.
[113] Donovan K (2012) 63.
[114] Jack W and Suri T (2011).
[115] Logan S 'Regulating Mobile Money to Support Scale up' 2017 *International Growth Centre* 1 8.

distances from financial service points, high cost of maintenance, transaction fees and cost of account maintenance.[116] Mobile money users can therefore deposit, withdraw or transfer funds on mobile phones without financial institutions thereby reducing costs of account maintenance.[117] This has resulted in broad based access to financial service, though it has necessitated broader economic growth and financial inclusion it has brought with it regulatory mishaps.[118] The macroeconomic level, which is grass-roots level economics, has impacted on money supply and inflation with implications on the Central Bank regulations and its conduct on monetary policy.[119] The service of "m-banking" defined as financial services performed on a mobile phone is not defined as banking services by the regulator, depending on the legislation in most countries.[120] It has also been successful because of multi-use as both mobile money transfers and payments and as alluded to earlier, is used in international remittances.[121]

As pointed out earlier, mobile money has come as a reprieve to the rural poor who are far from the traditional banks of mortar and brick. The cost of travelling to banks is prohibitive and with it the strict banking hours. Between 2009 and 2011, only 15% to 21% of households in the rural areas utilised the banking system, accounting for 20% of households in Sub Saharan Africa.[122] Therefore this has resulted in the exponential use of growth of mobile money as an alternative to banking.

As pointed out earlier the agents are the traders already operating businesses in the locality who are nominated to operate on behalf of MNOs. The agent pays in advance for any mobile money they purchase and MNO holds the money in a commercial bank account.[123] Mobile money has

116 Logan S (2017).
117 Logan S (2017).
118 Logan S (2017).
119 Jack W and Suri T (2011).
120 Lawack-Davies V "Legal and Regulatory Framework of Mobile Payments in South Africa: Trade Off" (2012) 24 *South Africa Mercantile Law Journal* 77 92.
121 Lawack-Davies V (2012).
122 Dupas P; Green S; Keats A and Robinson J: "Challenges in Banking the Rural Poor: Evidence from Kenya's Western Province *National Bureau of Economic Research Working Paper 17851:* available at *http://www.nbere.org/papers/w17851.(*accessed 23 October 2018).
123 Jack W and Suri T (2011).

accommodated the unbanked customers, unconnected, semi-literate, and undocumented to physical and financial security.[124]

In brief MNOs are diverting outside their core business to the fast moving transactions of mobile money, whereas banks are stuck in their conservative, traditional and slow moving ways.[125] The velocity of money has increased to a mere delivery of an (SMS). Mobile money comes as an alternative of how money transfer is to happen in an emerging market, where there is poor infrastructure, very few people have bank accounts, and moving cash is risky, expensive and slow.[126] Telecom network operators adapted mobile technology to financial services to provide a fast, secure and low cost service. This however is outside their regulatory mandate; as their mandate is to provide telecommunication and not financial services.

There are fundamental differences between the way banks and telecommunications operate. Mobile network operators are young entrepreneurial companies, associated with rapid growth, high profits and huge volumes. Banks are mature organisations, well established, takes a cautious approach, have fewer transactions with high margins.[127] There has been an overlap of financial services and the regulatory regime is lagging in mobile money. There is need to protect consumers against risk, which is provided for to the consumer in the mainstream financial service.

Mobile money has resulted in broader economic growth, financial inclusion, resilience, poverty reduction and the government has also benefited by the broadening of its tax base.[128] The role of government is to offer a flexible regulatory framework. The next chapter analyses the use of mobile money in Zimbabwe and analyses the regulatory framework of the telecom industry, the

[124] Hughes N and Lonie S "M-Pesa: Mobile Money for the "Unbanked" Turning Cellphones into 24 Hour Tellers in Kenya 2007 *Innovations/Winter and Spring* 1-19.
[125] Hughes N and Lonie S (2007) 64.
[126] Hughes N and Lonie S (2007).
[127] Hughes N and Lonie S (2007).
[128] Logan S (2017).

financial industry and the protection of the depositor both in the financial sector and the telecom sector.

2.6 PROBLEMS RELATED TO MOBILE MONEY

The problem that has arisen is that mobile money services are growing faster than what the regulatory regime can cope with. Some quarters have raised sentiments to the effect that regulation can be a barrier to growth in that there are uncertainties over customer adoption and lack of specifics on regulatory issues, such as considering the remote customer due diligence requirements and access to payments.[129] There are also uncertainties in mobile money and is at different developmental stages. It also depends at the policy environment and how open it is to non-banking. Mobile money is new, fast evolving and sits at the overlap of several regulatory domains; those of banking, telcommunication, payment system supervisors and anti-money laundering agencies.[130] The overlaps create a risk of coordination failure where legislation, regulatory approaches are inconsistent or contradictory. There is need for market development between policy makers, regulators and industry players to help define obstacles and map the response to risk.[131] These problems are going to be used as a backdrop to analysing the legislation in place in Zimbabwe and Kenya on a comparative basis in the next Chapters.

The MNO provides multiple levels of authentication of account holder by physical possession of the phone and by entering a personal identification number (PIN). There must exist policy safeguard regarding liability on allocation of funds to the wrong person.[132] Strict liability for loss of funds on consumers is harsh, it's better if strict rules apply to professionals transferring higher amounts. MNO are equivalent to operators or "sending bank" and thus must be held accountable

[129] Porteous D 'The Enabling Environment for Mobile Banking in Africa' 2006 *Report Commissioned by the Department for International Development* available at www.bankablefrontier.com (accessed 16 May 2019).
[130] Porteous D (2006).
[131] Porteous D (2006).
[132] Castellani L G (2013).

to determine authentication and should be held liable for any wrong payment.[133] The banking system in terms of its regulations does not allow for revocation of payment order unless bank receives revocation before payment is executed, which is impossible to implement in mobile money because of the speed of electronic transactions.[134] These are the issues to be discussed in detail in the next Chapter.

2.7 CONCLUSION

Mobile money is a result of the collision of two worlds of technology and banking. There is need for a review of existing legislation to regulate mobile money transactions, to ensure consumer protection from fraud and unauthorised transactions as they lack the same protection as applied in formal financial services.[135] There is also the danger of data breach which can expose consumers' details. In reviewing the legislation it must be borne in mind that the legal and regulatory framework for mobile money must be comprehensive and effective. It must however allow for innovation and development of new products as an additional layer of regulations cramps innovation and leads to consumer confusion.[136] The need of how to strike a balance between these two competing necessities will be discussed at length in the next chapter.

Finally in this Chapter there have been discussions of how mobile payment works, the operation of mobile money and the players in the mobile money market. The chapter also analysed the reason for its success and the policy environment of mobile money transaction. In the next Chapter an analysis of the evolution of mobile money in Zimbabwe, the role of the Central Bank, MNOs and consumer protection in mobile money transactions will be undertaken.

[133] Castellani LG (2013).
[134] Castellani LG (2013).
[135] Lowry C (2016).
[136] Lowry C "What's in your mobile wallet? An analysis of Trends in Mobile Payments and regulation" 2016 *Federal Communications law Journal* 353 378.

CHAPTER 3

THE ROLE OF THE CENTRAL BANK AND CONSUMER PROTECTION IN MOBILE MONEY IN ZIMBABWE

3.1 INTRODUCTION

In this Chapter an examination is carried out of the legal and regulatory framework in place in Zimbabwe in the financial service sector and the role of the Central Bank and Telecommunication industry in relation to mobile banking. An analysis of the provisions of the legislation guiding the functions of MNOs in relation to mobile money forms part of this study. The Chapter also examines the competing factors affecting the use of mobile money and the ambit of the provisions guiding the financial sector. Subsequently an explanation of the deposit protection in place is done to determine the type of customers provided for in the legislation and an interpretation of the relevant legislation with reference to advantages and disadvantages of such practice. A conclusion is then made whether the use and users of mobile money are covered in the legislation governing mobile money transactions in place in Zimbabwe. It also highlights the regulatory gaps and areas of improvement and suggests an approach which enhances development of mobile money regulatory framework.

3.2 FINANCIAL HISTORY OF ZIMBABWE AND THE EMERGENCE OF MOBILE MONEY

The recent history of the financial sector in Zimbabwe was best captured in the case of *NMB Bank Ltd v David Capsopoulos and Lindsay Joan Dent Capsopoulos.*[137] This case sums up that the period 2000 to 2009 the economy of Zimbabwe was in turmoil. There was hyperinflation and the Zimbabwe Dollar was in free-fall against international currencies.[138] The official rate hovered between 250 Zimbabwe Dollar to 1USD but later sky-rocketed to billions even trillions of Zimbabwe Dollar against international currencies.[139] The situation stabilised when there was

[137] *NMB Bank Ltd v David Capsopoulus and Lindsay Joan Dent Capsopoulus* [2017] ZASCA 94 at paragraph 6.
[138] Jain A, S Bhandani & Kusheh A (2016).
[139] Noko J 'Dollarisation: The case of Zimbabwe' (2011) 31 *Cato Journal* 339 365.

an adoption of the USD in 2009 under the Government of National Unity.[140] In 2008, there was a cash shortage in Zimbabwe, which persists to the present day. To circumvent this problem, the Minister of Finance encouraged electronic transactions.[141] From there on the economy went down. The USD became scarce, and as highlighted in the earlier Chapter in 2.3, there were persistent shortages of smaller denomination coins of less than 1USD.[142] The situation escalated when the government reintroduced its own currency to cater for the coin shortage.[143] Due to fear of past systemic risk in the financial sector, consumers withheld their cash which was already in short supply. The consumers has lost confidence in the banking system and the Central bank monetary policy because of the unpredictability of the regulatory environment which terribly affected the banking and financial sector in Zimbabwe.

Recently the government issued Statutory Instrument 142 of 2019 on the 24th of June 2019, abolishing the use of USD as a currency and other foreign currencies. All the transactions must now be in Zimbabwe Dollar or Real Time Gross Settlement. The RTGS is the official tender in terms of the Central Bank (CB) rules. The problem is that the banks lack liquidity and the only viable form of payment left is through the EcoCash transaction, which is discussed at length later in this Chapter. The other problem faced by the country is excessive electricity load shedding, to the extent that Econet issued a statement that it had become too expensive for the Company to continually use generators as an alternative to supplies from the power grid. As a result, they scheduled when to switch on their systems to serve customers.

At one point there was a technical fault at Econet because of power outage. As a result there were no EcoCash transactions in the country which the majority of the population is reliant on.[144] This is illustrative of how mobile money has increasingly become central in the financial sector.

[140] Noko J (2011) 348.
[141] Langa V (2018).
[142] Noko J 352.
[143] Noko J 352. People were forced to buy small items to cover for the value of the change.
[144] Tshuma A 'Econet glitch leaves subscribers stranded @andile_tshuma' available at *http:www.chronicle.co.zw/just-in-thousands-stranded-as-econet-glitches-halt-ecocash-transactions-calls/http:*

Zimbabwe is a developing country with a population of 14million people, the majority of population stay in the rural areas. Furthermore, most of the rural areas are inaccessible because of the poor state of roads due to the poor maintenance. High unemployment in the towns has pushed the young and middle-aged to the rural areas. Econet coverage is country wide and hence has established a high subscriber base and with its aggressive marketing strategy, it has reached 6 million subscribers, with close to 200 million transactions monthly.[145] With the shortage of cash in banks, EcoCash is the "currency" of choice by default. Zimbabwe has three other service providers, Telecell and Netone, but their market share is insignificant which is why this study, the concentration is only Econet Wireless Company as it has the majority users.[146] An analysis of the operations of Econet's mobile money will now be done.

3.3 THE MOBILE MONEY TRANSACTION

In Zimbabwe as pointed out earlier the mobile money landscape is dominated by Econet Wireless Limited Company, a telecommunication service provider and it is linked to Steward Bank. The MNO holds the funds for mobile money in a trust account as per a directive from the CB. This link will be discussed in detail at the section dealing with trust. Econet has country wide coverage stretching to remote areas and the charges are affordable even to the unemployed or in the informal sector. The mobile money provided by Econet is called EcoCash. It has different layers of operations cascading to the end users of EcoCash, members of the public. From the bank, the money for mobile money goes to the super agent called EcoCash merchant by Econet, who are the first level from the MNO to the users.

3.3.1 EcoCash merchant

The funds for mobile money of the MNO are kept in a trust account with the Bank. From the account at the bank the funds cascades to the EcoCash merchant and these are linked to the

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www.chronicle.co.zw/just-in-thousands-stranded-as-econet-glitches-halt-ecocash-transactions-calls/ (accessed 29 August 2019).

145 Marumbwa J at 74.
146 Econet Wireless Zimbabwe.

Banks. The EcoCash merchant is any organisation that receives payments for goods or services through EcoCash platform.[147] The Ecocash merchants operate a merchant wallet or e-float which holds the funds exclusively for EcoCash. This is separate from its business account. These are mostly operated by corporates, supermarkets or any other big organisation commissioned by Econet. The transactions are usually over the counter. The advantage in the operation of a merchant wallet is that, there is no need for Point of Sale Machines as transactions are done through SMS. The additional benefit is that there is better security to both the Merchants and their customers as there is no need of carrying large amounts with the attendant risks. Merchants can exchange value with other merchants also through SMS. Down the hierarchy from the EcoCash Merchant is the EcoCash agents.[148]

3.3.2 EcoCash agents

EcoCash agents are strewn countrywide. The agents are approved by Econet, given a registration number clearly marked and branded with the Econet logo. These are in the form of grocery shops, service stations, bars or even spaza shops. They are the link to most of the population, the users or customers. They offer over the counter transactions to EcoCash users. There funds are called e-float and the funds held in accounts called e-wallets. They get their funds from the EcoCash merchants. They can cash out from their e-wallets from where they hold their funds for operations from the EcoCash merchants or through (SMS) transactions.[149] Besides transacting with the users they also register new users on the system after the production of an identity document and allocate them a number. There is an option to register the number as an EcoCash user accessed by a PIN number unique to that number. Money in an EcoCash account is called e-wallet or mobile wallet.

3.3.3 Ecocash transactions

As pointed out earlier in this chapter, Econet is the most progressive products which are relevant to society needs, it is also accessible countrywide. Econet offers a number of products under

[147] Econet Wireless Zimbabwe website.
[148] Econet Wireless Zimbabwe.
[149] Econet website.

EcoCash, namely: EcoSchool, EcoSure, EcoFarmer, EcoSave and Econet Premium.[150] Funds can be allocated in the EcoCash account in each product for different purposes. For instance EcoSchool is used for school fees and buying books while EcoFarmer is used for buying farm produce and receiving payments from buyers. EcoCash is well marketed, service driven and offers solutions to problems and is reliable.[151] It is instantaneous and is used for remittance countrywide. There is also available, a facility for remittance from South Africa.

Money is transferred to persons with or without bank accounts and it covers all networks, meaning an EcoCash user can send to a Telecell or Teleone user, the other two cellular providers. EcoCash is used in several ways, to pay creditors, electricity, internet and any other payments like rentals and salaries for employees. One can also purchase airtime, and this can be converted into cash.[152]

By 2015, USD200 billion had been transacted through the EcoCash system.[153] Some of the benefits is that it encourages ease of doing business in a cash strapped country, where banks have no cash and Automated Teller Machines are standing as ghost machines. Mobile wallet has a savings feature named EcoSave. People have moved from the notion that “my mattress is my bank” when savings were being kept in homes to “my phone is my bank”.[154] There is a feature provided on EcoCash to opt to allocate some of the money into a savings “wallet”, separate from the ordinary wallet where transactions are carried out. There are no charges levied on the savings. This gives women freedom especially rural women, to be in control of their financial affairs. This is a progressive development considering the patriarchal nature of society in Zimbabwe, especially in the rural areas where dominance by men is rife. Now women folk can do menial

[150] Econet Wireless Zimbabwe.
[151] Econet Wireless Zimbabwe.
[152] Econet Wireless Zimbabwe.
[153] Econet Wireless Company.
[154] Econet Wireless Company.

labour and are paid directly into their phones.[155] To sum up through EcoSave one's phone number is the savings account and with EcoCash, one's phone number is one's wallet.[156]

An examination will now be carried out of the legislation available in the financial sector and whether it covers the use of mobile money. The financial service sector in Zimbabwe is governed by several Acts of Parliament. The legislation and the provisions thereof are discussed at length the preceding sections. Further on is an analysis of the legislation regulating the financial and the telecommunication sector in Zimbabwe and whether such legislation covers mobile money transactions.

3.4 RELEVANT LEGISLATION IN ZIMBABWE

3.4.1 The Reserve Bank of Zimbabwe Act[157]

The Reserve Bank of Zimbabwe Act, [Chapter 22:15] hereinafter referred to as the Reserve Bank Act, establishes and governs the functions of the Central Bank of Zimbabwe. The Central Bank is known as the Reserve Bank in Zimbabwe. Section 4 of that Act provides that the Central Bank is a body corporate capable of suing and being sued making it a legal *persona*.[158] The fact that it is in existence because of a statute, means that all its activities are guided by the specific legislation and any act or omission must be in line with the legislation. Anything outside the legislation is *ultra vires* the law.

In the preamble, of the Reserve Bank Act on its functions, it is stated that the Reserve Bank, "----------is to provide for the supervision of banking institutions; ------------". In the definition

[155] Ndlovu M and Ndlovu I (2013).
[156] Econet Wireless Zimbabwe.
[157] Reserve Bank of Zimbabwe Act, [Chapter 22:15] hereinafter referred to as the Reserve Bank Act.
[158] Section 4 "Reserve Bank is in existence as a body corporate capable of suing and being sued in its own name, performing all Acts that body corporate may by law perform."

section “banking institutions” is defined as “commercial bank, accepting house, discount house or any finance house.”.[159] By specifying the institutions defined as banking institutions it automatically excludes those institutions which are not mentioned. The providers of telecommunication services and specifically the mobile network operators (MNOs) are therefore excluded as banking institutions under the Act.

This is further buttressed in the application section, section 3. It provides that “this Act shall also apply to building societies registered under the Building Societies Act, [Chapter 24:02] and post office savings bank registered under the Post Office Savings Bank Act [Chapter 24:10].”. This goes to show that the MNOs are not covered in terms of the Reserve Bank Act.

(a) The functions of the Central Bank

Section 6 provides for the functions of the Central Bank. Its main function is the regulation of the monetary system in Zimbabwe. It is responsible for maintaining the stability of the Zimbabwean dollar and proper functionality of the financial system. It is also mandated, under subsection 6(1)(b), “to supervise *banking institutions* (own emphasis) and to promote the smooth operation of the payment system.”. This is a problem considering that the “banking institutions” in terms of the definition section excludes MNOs.

It remains a legal issue as to whether the Central Bank can extend its mandate to cover the activities of MNOs which fall outside the mandate or powers given to it by its enabling legislation. Under section 6(1) (g), the Central Bank’s functions *inter alia* are; “to act as banker and financial adviser to, and fiscal agent of, the State”. The functions of interest are found in section 6.[160] The Central Bank has been described in that aspect as the lender of last resort. In

[159] Section 1 definition of “banking institution” means a commercial bank, accepting house, discount house or finance house registered or required to be registered in terms of the Banking Act, [Chapter 24:20].

[160] Section 6 of the Reserve Bank Act. 6. Functions of the Bank (1) Functions of Bank shall be (a) Regulate Zimbabwe monetary system; (b) to achieve and maintain the stability of Zimbabwean Dollar; (c) to foster liquidity, solvency, stability and proper functioning of Zimbabwe’s financial system; (e) to supervise banking institutions

terms of the functions of the Central Bank, the MNOs activities do not fall under its mandate as they are neither banking institutions nor building societies nor post office savings banks.

(b) Powers of the Bank

Section 7 of the Reserve Bank Act provides for the powers of the Central Bank. The powers of the Central Bank are listed as mainly to print money, accept money from customers, grant loans, buy and sell securities, buy and sell precious metals, buy foreign currency and be the bank of the State. The powers do not affect the activities of the MNOs and the mobile money activities. It therefore means that the Central Bank, in terms of section 7 of the Reserve Bank Act has no powers to interfere with the activities of MNOs. Its authority is limited to controlling and monitoring the provisions of the "banking institutions" which are governed by the Banking Act.

3.4.2 Banking Act[161]

The other Act governing the banking sector is the Banking Act, [Chapter 24:20]. In the preamble it is mentioned that the Act cater for registration, supervision and regulation of persons conducting banking business and financial activities in Zimbabwe. In the definition section 1, "bank" means a commercial bank or accepting house." "Banking institution" includes "a Company registered or required to be registered in terms of this Act, to conduct any class of banking business in Zimbabwe." "Banking business" means "a company that is registered or required to be registered in terms of this Act, to conduct any class of business in Zimbabwe".[162] On application section 3, the Act excludes Post Office Savings Bank, Building Societies; Cooperatives or any companies registered through Companies and Cooperatives Acts.

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and to promote the smooth operation of the payment system; (f) subject to Part VII, to formulate and execute the monetary policy of Zimbabwe; (g) to act as banker and financial adviser to, and fiscal agent of , the State;….".

[161] Banking Act, [Chapter 24:20] hereinafter referred to as the Banking Act.

[162] "banking business" means the business of accepting deposits, withdrawals repayable on demand or after a fixed period or after notice and the employment of those deposits, in whole or in part, by lending or any other means for the account and at the risk of the person accepting the deposits.".

The banking business is summed up in section 5. A banking institution must be registered as such and it must be registered in that class. The classes of banking institutions are listed in section 6, which excludes the MNOs.[163] Banking activities are listed in section 7.[164] These banking activities must be specified in a registered certificate but such banking activities specified in this section do not include any of the activities of the MNOs and specifically dealing with mobile money transactions as detailed in Chapter 1. The activities are synonymous with the traditional banking businesses, as well as receiving deposit. All these activities are not applicable to mobile money transactions. The banking sector and mobile money transaction customers need protection from loss of funds. There is legislation for protection of customers against losing money from banking institutions.

3.5 CONSUMER PROTECTION

Zimbabwe went through a hyperinflation period in the 2008 era as pointed out earlier. There was systematic risk in a way that banks fell one after the other like dominoes. Banks closed *en masse* and customers lost their hard-earned cash and savings. For those banks that remained "open" the savings were wiped out through hyperinflation overnight. The banking sector was in ruins.[165]

Later when the Banks were resuscitated the government set up a Deposit Protection Scheme to cushion customers who lose savings when banks close. This was brought about by the enactment of the Deposit Protection Corporation Act, [Chapter 24:29], hereinafter referred to as the Deposit Protection Act. The Deposit Protection Act in the preamble sets out that such Act is there to establish compensation for depositors in the event of financial institutions becoming insolvent. This Act ambit covers "appropriate registering agency" which are defined to include banking institutions, building societies, and contributory institutions. "Contributory institutions" mean

[163] Section 6 of the Banking Act, [Chapter 24:20] Classes of banking institutions
6.(1) The classes of banking business in which a banking institution may be registered are- (1) business of commercial bank, accepting house, discount house, finance house and micro finance banking.
[164] Section 7 of the Banking Act provides that banking activities includes the following; receiving deposits, extending credit, buying and selling instruments, and providing money transmission services.
[165] *NMB Bank Ltd v Capsopolous David and Capsopolous Lindsay Joan Dent* [2017] ZASCA 94.

banking institutions, building societies or other organisations which are contributing to the Deposit Protection Scheme. All these definitions do not include the functions of the MNOs. They are excluded from the definitions of institutions which are covered by the Deposit Protection Corporation Act. The functions of the Corporation are set out in section 5, which includes the administering of the Fund, levy contributions, payment of compensation to depositors in the event of insolvency and to monitor business activities. All these functions are not relevant functions to MNOs, considering how mobile money works as detailed in Chapter 2.

Further in section 40 stipulates that persons who have deposited with an insolvent contributory institution may apply for compensation. The wording excludes any other persons from claiming compensation. Transactions under MNOs as indicated earlier are by way of an SMS. They are instantaneous and if a sender sends to the wrong recipient, one cannot claim in terms of the Deposit Protection Corporation Act. The money value passes hands fast, not by way of deposits or withdrawals as offered by the traditional banks but by SMS message. There is however a National Payment Systems Act which covers the transactions in mobile money.

3.6 THE NATIONAL PAYMENT SYSTEMS ACT[166]

The National Payment Systems Act, [Chapter 24:23] provides for the recognition, operation, regulation and supervision of systems for clearing payment instructions between financial institutions. The amendment to this Act was hailed as having solved the problem of the exclusion of transactions under mobile money. In a newspaper article it was reported that the Central Bank, in order to prevent 5million mobile money subscribers from losing money should mobile network operator MNO collapse, it had amended the Act, to cater for such eventualities.[167] The MNOs rapid growth has become a threat to the traditional banking system, it was further reported. The Postal Telecommunication Regulatory Authority of Zimbabwe reported that money

[166] National Payment Systems Act, [Chapter 24:23] hereinafter referred to as the Payment Systems Act.
[167] Ndebele H 'RBZ moves to protect mobile money users' *The Independent* 29 March 2018 available at www.theindependent.co.zw/2018/03/29/rbz (accessed 9 April 2018).

subscriptions increased by 42,5% to 4.7million up from 3.3million in 2016.[168] Mobile money has been the preferred alternative for making payments during a liquidity crisis.

As mobile money increasingly became a threat to normal banking channels, the Act was amended to provide for systematic failures or collapse of MNOs. MNOs were instructed to open trust accounts with banks in order to spread risk. By so doing, the Central Bank would distinguish the funds of the MNOs from that of customers, for customer protection. Nonetheless it is prudent to analyse the Act in order to reach a conclusion as to whether the amendment now includes the activities of the MNOs.

3.6.1 Analysis of the provisions of the Payment Systems Act.

As indicated earlier the Act, in the preamble, provides for the "recognition, operation, regulation and supervision of systems for clearing instructions between *financial institutions----"*(own emphasis). In terms of the definition section of the Act, "financial institutions" are "banking institutions registered in terms of the Banking Act or any other institution lawfully engaging in banking activities in terms of section 7(1)(a), (d) and (f) of the Banking Act.". As discussed under the Banking Act, MNOs are not registered under the Banking Act. However, section 7(1)(a), (d) and (f) of the Banking Act, caters for any other institution *inter alia* "providing money transmission service" but goes further and provides that such institution must have a "registration certificate".

In section 7(1) "the banking activities are specified in a *registration certificate* are -

(d) providing money transmission services; ".

MNOs are included as they provide for money transmission but do not have a "registration certificate" in terms of the provisions of section 7(1) which provides that providers under the Banking Act must be registered under the Act. The definition section provides that "registration

[168] Makochekanwa A (2016).

certificate" means "a registration certificate issued in terms of section 10 of the Banking Act.". In section 10 stipulate "that a registration certificate is issued upon registering a banking institution in terms of section 8.". The requirements of registration are in section 8. The classes of banking institutions are itimised in section 6 which includes, commercial banks, accepting houses, discount houses, finance houses and micro-finance. In all these provisions MNOs are not included neither specifically nor by their business nature.

I submit that the amendments were not sufficiently and appropriately done. Other than the inclusion of MNOs at the definition section, the Act should have been amended to include all their activities in the Act. MNOs do not require a "registration certificate" in terms of section 7. Their operations fall under the Telecommunication Act. The link with a bank does not make their activities satisfy the requirements of a "financial institution" in terms of the Act. MNOs mobile money transactions are *ultra vires* the activities of a bank under the Banking Act. As pointed out earlier in Chapter two, the transactions of mobile money fall outside the activities of a banking institution. The amendments are inadequate to include mobile money transactions. MNOs are registered under the telecommunication legislation.

3.7 THE POSTAL AND TELECOMMUNICATION ACT[169]

The MNOs are governed by the Postal and Telecommunications Act, [Chapter 12:05] (Telecommunication Act). The licensing is mandated to the Post and Telecommunications Authority, not the Central Bank.[170] In its preamble, the Telecommunication Act sets out that the purpose of the Act is to set up an Authority to provide for functions and management, licensing and regulation of cellular telecommunication. The definition relevant to this study is that of "cellular telecommunication service" which means a service transmitted by means of a cellular telecommunication system. In section 4, the functions of the Authority are among other

[169] Postal and Telecommunications Act, [Chapter 12:05] hereinafter referred to as the Telecommunication Act.
[170] *Telecontract (Pvt) Ltd vs Postal and Telecommunications Regulatory Authority of Zimbabwe and Ministry of Information Communication, Technology, Postal and Courier Services and Ministry of Transport Communication and Infrastructure Development* HH269-17 HC.

functions; to ensure provision of enough domestic and international telecommunication.[171] The provisions of the Act only cater for general mobile transactions not mobile money transactions. It therefore follows that mobile money transactions are not covered in the Act.

3.8 THE ZIMBABWE MOBILE MONEY

It has been realised that usage of mobile money is pervasive in Zimbabwe. The economic situation and the shortage of cash in Zimbabwe has aided the spontaneous growth of the mobile money to the extent that it is another form of "currency". In addition the attempt to regulate in the Payment System Act to be inadequate. The reintroduction of the Zimbabwean Dollar, has made the economic situation worse such that EcoCash is now considered a "currency" by traders. As noted, the existing legal frameworks are insufficient to address all legal issues pertaining to mobile money. Furthermore there are consumers who need protection against loss of funds in mobile money transactions who are not included under the Deposit Protection Act.

3.9 AMENDMENT OF BANKING ACT[172]

The Amendment of Banking Act, [Chapter 12:15] amended the Banking Act, the Reserve Bank Act and the Deposit Protection Corporation Act effective from 2015. The Act provides for the definition of the meaning of "financial institution" to include all other banks, building societies but excludes the MNOs, as these are not itimised as financial institutions. However, there is an inclusion of a definition of a "mobile banking":

[171] Section 4: Functions and powers of the Authority. (1)------, the functions of the Authority shall be- to ensure provision of sufficient domestic and international telecommunication and postal services; promote development of postal and telecommunication systems; to exercise license and regulatory functions; allocation and of use of satellite orbits and radio frequency; to promote the interests of consumers and purchasers; to maintain and promote effective competition; to maintain and promote effective competition between persons; to monitor tariffs charged by cellular telecommunication; to promote and encourage expansion; establish and control a national telecommunication; to promote and control of international transit service by providing telecommunication.

[172] Amendment of Banking Act, [Chapter 12:15] hereinafter referred to as the Banking Amendment Act.

“"Mobile banking" means an arrangement that allows a customer of- (a) a banking institution; or (b) a licensee under the Postal and Telecommunications Act [Chapter 12:05]; or (c) any other operator of a wireless communication system; to access any financial service activities through a mobile device, whether the arrangement is operated by the banking institution, licensee or operator concerned or by an independent operator;”.

However mobile banking is a different sphere from mobile money, therefore it does not cover the area of our study. This is where the MNOs have been included in these relevant Acts to link their activities to banking transactions. Though there has been an inclusion on this definition, throughout the Act there is constant reference to banking institutions and banking activities were the MNOs are excluded as discussed earlier. In section 28E the Act provides for the requirements of opening a bank account. It provides as follows;

“28E Disclosure of certain information to customers of banking institutions

(1) Upon opening a new account for a person, a banking institution shall provide the person in writing with a written statement of - (a) all its charges for maintaining the account and allowing the person access to the funds in the account; and (b) the interest it will pay on the funds in the account, and the interest the person will have to pay on any overdraft; and (c) such other particulars as may be prescribed or as the Registrar may specify in a direction referred to in section 81(2)(d).”.

Due to the nature of the transactions of the MNOs which are different from that of a banking institution, the operations of the MNOs are excluded. As pointed out in Chapter Two, all that is required to transact in mobile money is a mobile phone and an identification document in order to be allocated a mobile number.[i] Thus, the inclusion of MNOs in the definition section of the Amendment of Banking Act, as providers of mobile money transactions is not sufficient to include them. In the interpretation of a statute, the intention of the legislature must be imminent throughout the reading of the legislation.

3.10 INTERPRETATION OF STATUTES

In the interpretation of statutes, the literal rule gives credence to the intention of the legislature. The secondary aids of interpretation in finding the intention of the legislature one must consider -

1. The long title of the legislature;
2. The headings to chapters and the sections; and
3. The text in the official language.[173]

In the case of *Paulos Dlamini and EM Kubushu* the Judge was seized with the issue whether prescription had run in a matter.[174] The Judge held that "in the interpretation of statutes, words must be given their ordinary grammatical meaning and it is primary rule in the construction of statutes that the language of legislation should be read in its ordinary sense."[175] In the leading case of *Union Government v Mack and Farrar's Estate,* the court had to determine whether a still birth child is a "person" for inquest purposes.[176] The court held that the intention of the legislature must be deduced from the particular words or phrases used in the legislation.[177] The ordinary grammatical meaning must be adhered to. One also needs to look at the ambit and purpose of the Act. Du Plessis was quoted as having summed it up as the "hermeneutical circle" where every part of the text must be understood in terms of the whole and in part with the whole text.[178] It means therefore that one part must not be read in isolation but *in toto* in resonance with the whole Act.

The inclusion of the definition of "mobile money" and that of service providers such as the MNOs, licensed under the Telecom Act, as well as in the Payments System Act, without inclusion in any of the other parts of the Act, is not enough to include MNOs as financial

[173] Chapter 5 'How legislation is interpreted' available at www.learning.ufs.ac.za/ULL214-Official/Resources accessed on 29 August 2019.

[174] *Paulos Dlamini and EM Kubushu* 2957/2003.

[175] *Paulos Dlamini and EM Kubushu* at 18.

[176] *Union Government v Mack and Farrar's Estate* 1917 AD 731.

[177] *Union Government v Mack and Farrar's Estate* at 739.

[178] Chapter 5 'How legislation is interpreted'.

institutions. The language in the Payment System Act still excludes MNOs as service providers in many other ways. The vetting of its customers differs significantly with that of the users of mobile money.

3.10.1 Regulatory environment

Setting up a regulatory environment is a precondition to setting up a legal environment supportive of mobile payment and banking service.[179] It is not proper for transactions to be conducted, which have become the *de facto* backbone of the banking sector, which are *ultra vires* the existing laws.

There is need to create an enabling legislative environment of the legal status of electronic communication and set out rules on payments. There are international standards prepared by the UN Commission on International Trade Law (UNCITRAL). These are reviews on electronic commerce and current practices in the use of electronic communications. Castellani reckons that the use of electronic means is so pervasive and impossible to think of renouncing it.[180] That thought is correct considering the electronic digital that is in today a living reality. There is increased mobility of electronic devices and with that new opportunities have been created.[181] Legislation can be borrowed from the UNICTRAL model laws or from the United Nations Electronic Communications Convention, 1966 (UNECC).

There is realisation that mobile communication is a subset of electronic transactions which are not yet fully consolidated hence the need for enabling legislation. The main problem facing legislators in Zimbabwe is the lack of appreciation that there is need for regulating the mobile

[179] Castellani LG (2012).
[180] Castellani LG (2012).
[181] Castellani LG (2012) 267.

payments and more so that there is exchange across borders as well.[182] As pointed out earlier, the transactions of mobile money are not adequately regulated.

3.10.2 The current legal framework

As pointed out earlier when analysing the legislation in Zimbabwe it has been evident that none of the legislation covers the transactions dealing with mobile money. The legal framework does not provide the Reserve Bank (CB) with powers to regulate mobile money transactions. The existing legislation can be amended to cater for inclusions. As noted above the Reserve Bank Act excludes any organisation which is not in the business of accepting deposits, which automatically excludes all the MNOs.

As pointed out in Chapter 2 the mobile money transaction is carried out through mobile payments. The European Union covers these transactions in the European Union Payment Services Directives, which apply to mobile payments or remittances. The general rule is that the payment service provider is liable for non-execution of defective execution of payment orders and even where incorrect information is given, the payment provider is obliged to make reasonable effort to cover wrongfully transferred funds.[183]

In the case of *Engels v Allied Manufacturers (Pty) Ltd*, it was held that the rules of construction of Acts of Parliament, must be construed in terms of the intention of the legislature expressed in the Acts themselves.[184] For this reason it is safe to conclude that the analysed legislation in Zimbabwe do not regulate mobile money transactions.

3.11 THE REGULATORY LANDSCAPE IN ZIMBABWE

[182] Castellani LG (2012).
[183] Article 74(2) of the European Union Payment Services Directive.
[184] *Engels v Allied Manufacturers (Pty) Ltd* 1993 (4) SA 45 (Nm HC).

3.11.1 The role of the Central Bank on the operations of the providers of mobile money

In Zimbabwe, the Central Bank mandated all MNOs to open bank accounts with financial institutions for the mobile money funds with an intention to control mobile money transactions. This is insufficient as the Central Bank still has no control over MNOs. As pointed out earlier the EcoCash merchant is the only one in the hierarchy linked directly to the Bank. The users of mobile money are linked to the agents at the grass roots, who themselves do not need a bank account to operate.

In the case of *John Mafungei Chikura N.O Deposit Protection Corporation vs Peter Chikumba and Others* it was held that only companies issued with a banking licence by the Reserve Bank apply the provisions of the Banking Act.[185] The operations of such a business are governed by the Banking Act, including liquidation. Section 57 of the Banking Act requires the Central Bank to appoint the Deposit Protection Unit as the liquidator.

Judge of Appeal Ziyambi held that a company with a banking license must be governed by the Banking Act.[186] The Court ruled that the appointment by the Master of a liquidator in terms of the Companies Act before the Banking licence has been revoked made the license issued invalid. The appointment must have been in terms of the Banking Act not the Companies' Act and Insolvency Act. Hence if a company has a licence in terms of Banking Act, the Reserve Bank or the Central Bank is required to appoint a liquidator in terms of the Deposit Protection Corporation Act. This shows the connection between the Central Bank and the Deposit Protection Corporation.[187] Thus the exclusion of any other companies includes the exclusion of MNOs which are registered and governed under the Telecommunication Act.

[185] *John Mafungei Chikura N.O Deposit Protection Corporation (Liquidator) vs Peter Chikumba and Others* HC 12448/16 (HH91-18).
[186] *Reserve Bank of Zimbabwe vs Sibanda and Another* SC 20-07.
[187] *Al Shams Global BVI Limited vs Chikura and Another* HH316-16 HC6644/15 [2016] 2.

In the case of Zimbabwe there is need for extensive consequential amendments on all the Acts which have been discussed above to include mobile money. Proper amendments must be done in order to give regulatory authority to the Central Bank and power to deal with transactions of mobile money provided by MNOs. At present once the money leaves the bank, the Central Bank does not have authority over transactions carried out by MNOs. Technology companies do not fall under the Act, the Act must be amended to cater for the mobile money transactions.[188] The Central Bank authority is limited to "financial institutions" as per definition in the Banking Act as well as the Reserve Bank Act. The next section examines the risks applicable to customers' funds and regulatory gaps.

3.12 REGULATORY AND POLICY ISSUES

The field of mobile payments and mobile banking is new and fast evolving and sits at the overlap of several regulatory domains.[189] The activities of banking, telecommunication, payment system supervisors and anti-money laundering agencies are included in mobile money. The overlap raises risk of coordination failure, where legislation or regulatory approaches are inconsistent or contradictory.[190] There is need for market development between policy makers, regulators and industry players as this in turn helps to define obstacles and map out response risk.[191]

Mobile money as well as mobile banking is changing the ecosystem of the banking industry.[192] Lowry Carolyn has argued that mobile money is in its infancy, and should not be overly regulated.[193] I tend to agree with this approach yet mobile money must not be allowed to grow without legislation. There must be constant monitoring. This is difficult, as mobile money straddles two different sectors, finance and telecommunication. In order to develop mobile money, regulations must be incremental and proportional to encourage inclusiveness and aid

[188] Lowry C at 354.
[189] Portueus D (2006) at 5.
[190] Portueus D (2006).
[191] Lowry C (2016).
[192] Peres I (2015) at 5.
[193] Lowry C (2016).

minimising fraud and risk to users.[194] Dovan attributes the success of Kenya's mobile money to the absence of formal regulations in favour of liason between government and industry.[195] For adequate regulations there is need for collaboration between industry, government and civil society. The regulations must allow the participation of agents outside bank branches to handle financial transactions and be allowed to develop anti-money laundering and know-your-customer requirements.[196] This enables market development between policy makers, regulators and industry players.[197] In a way it also assists with protection of customers especially those outside the financial sector.

There is need for regulation of the mobile money, to allow for protection from losses but such regulation must not be as stringent as the financial sector. This facilitates the inclusiveness of the "unbanked" rural population which would otherwise be stifled by over-regulation. Also there is need for consistent regulatory approach to transactions regardless of mode to avoid confusion due to the fact the transaction is conducted via a new technology thus meaning that regulations must not apply.[198] Mobile money transverses through a number of industries, and triggers an array of laws; financial service laws, mobile phone or device laws, through to privacy or data security laws as well as consumer protection.[199]

The regulation gap must be addressed to also cater for fraud and misuse of funds which is likely in such transactions.[200] Mobile money use has attracted users with limited education and experience with financial services, therefore most are vulnerable.[201] Also as agents take on

[194] Donovan K (2012) at 15.
[195] Donovan K (2012).
[196] Donovan K (2012).
[197] Porteous D (2006).
[198] Lowry C (2016) at 377.
[199] Fonte E (2017) at 567.
[200] Buckley RP (2014).
[201] Dermish A, Kneading C, Leishman P and Mas I (2011).

larger e-floats the consequences of misuse of customer's funds are higher in terms of scale of loss for individual customers and the economy as a whole.[202]

There have been three risks assigned to customer's funds, namely;

1. Insolvency of the provider, as the customer's funds are not held under trust;

2. Illiquidity, where instead of keeping customers funds in e-money system or "float" to provide constant flow of funds, a provider can divert funds to operational expenses; or

3. Operational risk can occur where funds are exposed to provider's internal activities like fraud, theft or misuse, negligence or poor administration.[203]

Risk can be minimised by trust law as it limits liability. This will be discussed at length later, but this is were MNOs keep funds for mobile money in a separate account from their business accounts. It is also necessary to ensure constant access to funds, the funds must be prudentially regulated. The customer's funds must be protected as well as have recourse to a fund similar to the Deposit Protection Fund for customers under the banking sector.

There is thus a gap in the laws in mobile money and it must be considered whether it is enough to amend existing laws or have a separate legislation. Since mobile money is at a cross roads between telecommunication and financial services and as argued above the Zimbabwe legislation has failed to cater for mobile money, it is recommended that a separate stand alone piece of legislation be enacted. Financial legislation must have a provision to oblige financial institutions to report suspicious money laundering activities.[204] This may, however be difficult in mobile money transactions. It can be very difficult because of the lack of information collected at inception of the use of mobile money. South Africa's legal and regulatory framework has included mobile money by the inclusion of e-banking to extent to mobile banking.[205] This aspect is discussed in detail in the next chapter, where a comparative analysis of legislation of other countries will be done.

[202] Peres I (2015).
[203] Greenacre J and Buckley RP (2014).
[204] Goldby M (2013) 403.
[205] Lawack VA (2013).

However, legislation should be structured in terms of services offered not along traditional institutional lines like the present scenario.[206] The legislation must be accommodating of the rural people and "unbanked" that do not meet the requirements of the financial sector but are in the majority in Zimbabwe. Legislation must have aspects to protect, train, support and accommodate the needs of the "unbanked" and semi-literate customers who have been included via mobile money. They are consumers in need of protection.

3.12 CONCLUSIONS

It has been shown that Zimbabwe has several pieces of legislation in place and amendments thereto that have been done in an effort to cater for mobile money transactions. It is evident that the legislation is inadequate to cover transactions and activities of MNOs insofar as mobile money transactions are concerned. There is need for a major overhaul of legislation to cater for these transactions. Since the legislation are many and sub-sector driven and that there is a lot of consequential amendments needed, it is advisable to have separate legislation just dealing with mobile money transactions. This suggestion is made bearing in mind how the mobile money transaction is done as set out in Chapter 2 and the peculiar customer base, that is mostly the "unbanked".

In the next Chapter an extensive study of the Kenyan legislation is carried out, in comparison with the Zimbabwean legislation already discussed. Kenya is singled out because that is where mobile money has been successful and is widely used. Comparisons with other relevant legislation such as Tanzania and South Africa will be mentioned in passing

[206] Lawack VA (2013).

CHAPTER 4

COMPARISON OF LEGISLATION IN KENYA

4.1 INTRODUCTION

This Chapter is based on an analysis of the history of the introduction of M-Pesa in Kenya, as well as an evaluation of the impact and the benefits of mobile money especially the promotion of financial inclusion in Kenya. It also evaluates the successes of mobile money and the barriers and obstacles hindering its development. It identifies the stages taken to achieve the regulatory environment in Kenya. Further, in passing, a comparison is carried out with other jurisdictions. It finally identifies the emerging issues the industry faces because of the inclusion of mobile money in the financial industry.

4.1.1 An analysis of the history of the introduction of M-Pesa in Kenya.

As discussed in the earlier chapter it is best to examine the factors that have contributed to the emergence of mobile money in Kenya. Vodacom, a company from United Kingdom had the intention to open a mobile money operation in Kenya. After encountering challenges in launching on its own, it partnered with an already existing MNO, Safaricom, a leading nationwide mobile network operator in Kenya.[207] Vodacom also partnered with Equity Bank to launch M-Pesa, which means "mobile-money" in Kiswahili.[208]

M-Pesa was launched in March 2007 by Safaricom and its target group was the unbanked.[209] Its main aim on inception, was to grow an affordable, convenient remittance service.[210] This was based on the use of an identity document to open an M-Pesa account. The advantage is that Kenya has an established identity document structure. The existing mobile network users had been using identity documents for allocation of a mobile number. This made it easier for

[207] Burns S "Mobile Money and Financial Development: The case of M-Pesa in Kenya" 2015 *Ursinans College: American Institute for Economic Research* available at www.issm.com/abstract accessed 13 September 2019.
[208] Harris KK. & Terkel A (2012).
[209] Hughes N & Lonie S (2007).
[210] Harris KK. & Terkel A (2012).

Safaricom to launch M-Pesa, a product in the mobile network user in 2007. M-Pesa is a Kishwahili for "money" hence mobile- money.[211] M-Pesa, as alluded to earlier, operates through a mobile technology network it therefore reached those with bank accounts, but the majority had no bank accounts. This study is concentrating on the unbanked. The entry requirements are not as those required for opening bank accounts. An identity document and a mobile phone are the only requirements needed to register for M-Pesa as discussed in detail in Chapter 2. After the launch of the M-Pesa there were spinoffs from the launched product.

4.1.2 An evaluation of the impact and the benefits of mobile money especially the promotion of financial inclusion in Kenya.

As pointed out earlier M-Pesa was launched in 2007. By September 2008 25% of the Kenyan population were using M-Pesa and by late 2009 the percentage had risen to 50% with the majority being the unbanked.[212] By May 2010, 9.5 million were using M-Pesa which is over 45% of the adult population in Kenya, which translated to twice the number of Kenyans with bank accounts.[213] That adult population relies on mobile money to pay for services, transfer money and purchase goods. Due to the popularity of M-Pesa, Safaricom introduced more products than their initial goal of remittances.

In 2011 M-Pesa had developed cross-border operations, with 20 million users and transferring $500 million a month by 2012.[214] [215] By 2015 M-Pesa accounts stood at 26.2 million which is two thirds of the Kenyan population.[216] The latest statistics available are for the period between July and September 2016 showing a value of $10 billion of mobile money transactions in deposits and withdrawals.[217] There were 31 million subscriptions of which 20.7 million used the

[211] Jack W & Suri T (2011).
[212] Harris KK. & Terkel A (2012) at 65.
[213] Harris KK. & Terkel A (2012) at 65.
[214] Donovan K (2012).
[215] Greenacre J & Buckely RP. (2014).
[216] Burns S (2015).
[217] Donkin C "M-Pesa continues to dominate Kenyan Markets" (2017) available at www.mobileworldlive.com/money/analysis-money/(accessed 25 September 2019).

M-Pesa, which translates to 66% users.[218] The transactions were mainly corporate payments, person-to-person (P2P) and money transfers and the agents increased by 25%.[219] There are preconditions and demographics which have led to the success of mobile money which is discussed in detail below.

4.1.3 An evaluation of the successes of mobile money and the barriers hindering development.

As pointed out earlier the goal of Safaricom when launching M-Pesa was to facilitate remittances. The demographics of Zimbabwe and Kenya are similar as it is that in most cases the breadwinner, usually the man, leaves the wife and family in the rural area and goes to work in towns and cities. The breadwinner then regularly sends part of his income to his family back home for the family's upkeep. The statistics above show that the M-Pesa was widely accepted and mainly used for that purpose.[220]

4.1.4 The growth of M-Pesa

As pointed out earlier Safaricom was already a country wide used network before the inception of M-Pesa. The advantage of using M-Pesa was that the mobile operator already had access to 6 million Kenyans, of which the majority were low income earners and regarded as undeserved by the financial institutions.[221] The financial market has stringent entry requirements, thus being the reason why most people were excluded, especially those without regular income. The financial market requires customers to satisfy the "know-your-customer" (KYC) requirements, residential address and sometimes proof of income. All these requirements are not necessary for registration in the MNO; all that is required is an identity document and a mobile phone. Brick and mortar banks have limited branches in rural areas.

[218] Donkin C (2017).
[219] Donkin C (2017).
[220] Donkin C (2017).
[221] Mas I & Morawacynski O (2009) 89.

As pointed out earlier persons who could qualify to operate under the MNO could also register for M-Pesa. The entry level is low compared to that of financial institutions. This resulted in the inclusion of the unbanked as well as the banked population. In the past, Kenya had relied heavily for remittance, the Postal and other agencies such as Western Union, which had limited outlets countrywide.[222] Some of the people relied on long distance bus crews to send money to their families. As the system was based on trust, it could at times be unreliable.

M-Pesa is the preferred option for remittances because it only requires an SMS to have the funds delivered.[223] This is because it is efficient, fast and the value goes straight to the intended recipient. Remittance is achieved over vast distances in seconds. Costs are minimal compared to the cost of maintaining a bank account in the financial sector with its huge bank charges. Kenya also has security issues and it is safer not to move with cash but rather to store the value on one's mobile phone on long trips.

With time, M-Pesa is not only being used for remittance but one can convert value on the mobile wallet into cash. An individual is not required to withdraw or send balances immediately upon receipt, one can opt to accumulate savings on their M-Pesa account.[224] The value can be transferred to pay for services. In the rural areas payment of services can be through M-Pesa. The ability to store value as savings for future use is attractive to the rural, unbanked poor who previously had to turn to selling their livestock in times of need. Thus mobile money savings offer a buffer to economic shocks or seasonal functions when funds are lean.[225] In a way the unbanked can enjoy the same financial freedom as a person with a bank account, hence its attractiveness to a greater population. The fact that value can be transferred in a fast and safe manner, becomes an attraction even to the banked. The different uses of M-Pesa led to Safaricom coming up with more products.

[222] Jack W and Suri T (2011).
[223] This has been dealt with in Chapter 2.
[224] Jack W and Suri T (2011).
[225] Logan S (2017).

The growth of M-Pesa is also accredited to its multi-functional purpose. It is utilised in the P2P, payment of utility bills, purchase at department stores, buy mobile phone units, pay school fees among other uses.[226]

4.2 AGENTS

As Safaricom is country wide, and it is supported by super agents and agents, whose registration requirements are not as stringent as the requirements in the financial sector. The different levels of agents have been dealt with in detail in Chapter 2.[227] Business owners operational in the area can be registered as agents. The business functions ranges from small to big businesses. Its success also centers less on the optimal management of the mobile network resources but on the marshalling of retail agents. Customers require good experienced agents on the cash-in and cash-out points as this is where the bulk of the transactions occur.[228] Unlike Banks where reputational risk is centred at the Bank itself, in mobile money transactions reputation risk is grass-roots based. There is need to have established retail presence, with a constant reminder to customers that transacting with Safaricom is the best option. The retail agents need sufficient funds to meet customer transaction requests and there is need to keep agents motivated to promote the service. That is the reason it is noted that in Zimbabwe, the blue insignia for EcoCash is distinct and the service, second to none. M-Pesa is transacted by teams of agents and super-agents, operating at different levels and located in close proximity to subscribers.[229] Thus there is no need to carry cash in bulk. This has also reduced transaction costs for users and the agents are closer to users than bank branches which also have stringent requirements for setting up.

Mobile money thus has the potential to reach to remote corners, inaccessible geographical locations and disadvantaged communities. It cuts across and has effect on a wide range of

[226] Indongesit W (2013).
[227] Reference at 65 above.
[228] Mas I & Morawacynski O (2009).
[229] Indongesit W (2013).

economic, demographic and educational characteristics.[230] What follows next is an analysis of the relevant regulatory framework available in Kenya for mobile money.

4.3 REGULATORY ENVIRONMENT IN KENYA

4.3.1 Central Bank of Kenya Act

The Central Bank of Kenya is governed by the Central Bank of Kenya Act, [Chapter 491] hereinafter referred to as the CB Act. The Central Bank is established under section 3 of the CB Act. Its function is to among other things, license and supervise authorised dealers and implement policies and monetary policy. Monetary policy statements deal with institutions with a banking license held under the Banking Act [Chapter 488]. A "bank" under the definition section means a body corporate or a banking business under the Banking Act. "Financial institution" is also defined as a body corporate carrying on financial business in terms of the Banking Act.

Under the objects of the CB; it is mandated with licensing and supervision of authorised dealers but MNOs are not included as such authorised dealers.

4.3.2 Banking Act.[231]

The financial institutions or a bank operate under a license issued under the Banking Act [Chapter 488] (Banking Act). All the operations of these financial institutions are provided for under the CB Act. The "bank" is defined as any company carrying on banking business in Kenya. The "banking business" is defined in the Banking Act to include institutions that accept from the public, deposits or money into current accounts and employ such money held in the accounts as prescribed by the CB. This also excludes the functions of MNO as they are not in the business of accepting deposits from customers into current accounts. Therefore MNOs are

[230] Mas I & Morawacynski O (2009).
[231] The Banking Act, [Chapter 488].

neither “financial institutions” nor are they “banks”. MNOs as will be discussed later and they don’t require a Banking license to operate. The next legislation is on consumer protection in the financial sector.

4.3.3 Consumer Protection

The Kenya Deposit Insurance Act, 2012 (Act No. 10 of 2012) is the umbrella Act used to protect consumers in the event of any loss of funds because of liquidation or any loss.[232] The Act established the Kenya Deposit Insurance Corporation. Its membership includes all banks and institutions providing sources of investable funds. This membership does not include MNOs.

The Deposit Protection Fund Board is established under section 36 of the Banking Act to protect consumers and reimburse any lost funds in the event of a bank closure. The CB has power to prescribe conditions on deposits and withdraws and to intervene in the management of the Bank. Section 37 provides for the protection of interests of depositors and section 38, provides for protection of consumer contributions. Section 38 however provides that “contributors to the deposit protection fund includes every institution licensed to carry on business in Kenya.”. Section 2 provides for the meaning of the “institution” which is “a bank or financial institution or a mortgage bank finance company.”. This excludes MNOs, which are licensed under the Telecommunication Act which will be analysed in detail in the next section.

4.3.4 The regulations for mobile operations network

MNOs in Kenya are licensed under the Kenya Information and Communication Act [Chapter 411]. A Commission which is created in terms of this Act, is established to licence and regulate postal, information and communications services. Section 23 subsection (2) of that Act provides for the use and operations of telecommunication services. It also provides for the protection of the users of such services. The Act provides for the promotion of the provision of international

[232] Mwega K ‘Deposit Protection Fund Board Kenya: A Presentation by Kimani Mwega’ (2013) *International Association of Deposit Insurers* available at www.dicg.og.in (accessed 21 October 2019).

transit services. The MNOs are licensed under section 25. The discussed sections are the relevant sections in the Act providing for the ordinary course of business usually provided for by the MNOs.

There is no provision of mobile money in the Act neither has there been specific mention of mobile money transactions in all the Acts analysed so far. Having examined the legislation in place in the financial sector in Kenya, it is best to further investigate how mobile money transactions are regulated. As a starting point there is need to review the history of the introduction of mobile money, the transactions which are at such an astronomic scale and how they are governed in Kenya.

4.4 LEGISLATIVE HISTORY OF MOBILE MONEY IN KENYA

In Kenya the CB came up with an enabling environment that allowed for a conducive investment in new mobile technologies like M-Pesa by monitoring and allowing for growth without regulating first.[233] There was much debate at inception of how Safaricom, a telecom provider by trade, would enter in the payment system business. The CB opted to monitor the activities of M-Pesa at its introduction using the Payment Service System.[234] Some Banks fearing competition, petitioned that M-Pesa must be regulated like them. This was based on the understanding that the financial regulator plays a crucial role (1) as a buffer between the citizens and financial chaos; (2) engenders financial stability of the economy and the responsibility to consumer protection; (3) promotes the country's social objectives.[235] Many held the view that only the banking institution provides the necessary stability and those schemes such as M-Pesa could not be allowed, fearing past failures of branchless banking schemes.[236]

[233] Burns S (2015).
[234] The Central Bank of Kenya available at www.centralbank.go.ke>national-payments-system (accessed 22 November 2019). This is the Kenya Electronic Payment and Settlement System is a Gross Settlement System meaning that the transactions are cleared and settled on a continuous basis.
[235] Making P "Regulatory Issues around Mobile Banking" GSMA MMU Annual Report available on www.oecd.org/ict accessed on 18 September 2019.
[236] Making P (2019).

The regulator was on board from inception such that M-Pesa was thus launched under a special license catering for future regulatory developments.[237] M-Pesa was then able to operate as a quasi-financial institution and not a mobile operator. This is an advantage because the mobile money can grow under surveillance without legislation that could hamper growth.[238] During this period the mobile money was audited to prove that it was not used in money laundering activities or as a pyramid scheme. This is prudent, unlike the Zimbabwe situation were mobile money has been allowed to develop into something the legislature is now unable to regulate effectively.

Since the launch of M-Pesa, Safaricom has stressed that M-Pesa is not a bank regulated by the CB of Kenya.[239] Mobile phone technology has spread quickly and it is naive for any regulator to wish it away. Legislation is dynamic and needs to fit the changing conditions and the new problems which come to light due to innovation.[240] Over-legislation at times has hampered growth of a new industry as legislation is a result of formulation of policy into law. Policy is not clear on mobile money being new in Kenya neither is it covered by the "mischief rule".[241] The "mischief rule" gives rise to legislation to curb a mischief which has arisen and is not covered by existing legislation.

The monitoring stance taken by the CB and the Ministry of Finance in Kenya is the best approach to ensure coming up with relevant appropriate legislation. This is a new phenomenon where M-Pesa has substituted for bank accounts and reached the unbanked population in the same way Eco-cash has in Zimbabwe. As pointed out earlier, the legislation in place is strictly industry specific but M-Pesa operations straddle the financial as well as the telecommunication industry. There is need for appropriate legislation to cater for M-Pesa operations, potential risk of

237 Making P (2019) at 8.
238 Lowry C (2016).
239 Jack W & Suri T (2011).
240 Castellani LG (2013).
241 The "mischief rule" is when the legislator legislates to cover a gap in law which is being abused or to cover illegal activity not covered by legislation.

security breach and consumer protection. There is need for legislation, as at inception M-Pesa was only meant for remittance but it later turned into multi-faceted uses and involved various players.[242]

4.4.1 The players of M-Pesa

M-Pesa has different levels of players in different industries and regulated under different legislation. As pointed out earlier, Safaricom, the network operator is regulated under telecommunication which only regulates communication services. It does not regulate electronic and mobile commerce. The next in line is the super agent, which are the first in line after the banks. These as pointed out earlier are regulated by the Banking Act. Money from operations is stored in a physical bank account regulated by the CB of Kenya not Safaricom, but held in trust.[243] The agents, come next and these consists of kiosk owners, traders and any other delegated as such and these are registered agents with Safaricom. The agents are divided into super agents and agents operating the 'float' and cash. They are also mandated with the duty to hold registration materials of subscribers and registration. The last in line are the subscribers, these deal directly with the agents. The subscribers are all registered on the data base of Safaricom. As pointed out earlier the requirements for subscriptions is an identity document and a mobile phone. There is no need for all the stringent requirements of the financial sector.

4.4.2 Progression of regulating M-Pesa in Kenya

The CB of Kenya and the Kenya Ministry of Finance initially in 2008 agreed that M-Pesa is not a banking business and concluded that there was no need for regulation.[244] CB thus provided an "enabling" regulatory environment and thus allowed M-Pesa to flourish without regulatory hindrance. MNO need time and financial input to market their product and invest in educating

[242] Jack W and Suri T (2011).
[243] Indongnesit W (2013).
[244] Indongnesit W (2013).

the agents and users to the extent that customers are confident to use the product in their numbers, while endeavours would be constrained by a stifling regulatory framework.[245]

Kenya allowed M-Pesa to operate without the bureaucratic and traditional legislation, allowing for innovation. Kenya as discussed before allowed entry first and thereafter decided how best to regulate the new product.[246] Burns credit the flexibility, to the open regulatory framework that was to follow.[247] The Kenya approach is commendable in that it allowed the mobile money to develop while at the same time monitoring its activities. This allowed Safaricom sufficient regulatory space and leeway to experiment with products.

On the other hand, the CB Payment Service Group also allowed M-Pesa to operate outside the provisions of the Banking law. The main aim was to allow for development to expand the financial access to the unbanked. The regulator issued a special licence for experimental purposes especially on 'Know Your Customer' (KYC) requirements which were lower than that of a bank to allow for retailers to operate as agents.[248] This paved way for the unbanked to enter into the financial market.[249] Banks started competing by offering cheaper and reliable mobile banking and payments platforms. This however was no match to M-Pesa because of accessibility considering that banks are limited to 'brick and mortar' branches which are not countrywide. The rural poor benefited out of these trade competitions.

Different institutions monitor mobile money in their different spheres. Thus, the CB conducts monitoring in the following areas; (1) review of security features of technical platforms; (2) funds deposited in financial institution; (3) limitation of size of mobile money transactions to

[245] Mas I &Radcliffe D 'Scaling Mobile Money' (2011) 5 *Journal of Payments Strategy and Systems* 1-19.
[246] Burns S (2015).
[247] Burns S (2015) 15.
[248] Making (2009).
[249] Maurer B 'Mobile Money: Communication, Consumption and Change in the Payments Space' (2012) 48 *The Journal of Development Studies* Special Issue on Microfinance and Savings 589-604.

address money laundering and (4) limit interest revenue gained by deposits at Commercial Bank by allowing MNO to open non-profit trust accounts.[250]

The Competition Authority of Kenya investigated MNOs in Kenya for charging unregistered users of Safaricom M-Pesa high fees.[251] The Competition Authority also investigated exclusion of competitors due to high barriers to entry, monopoly of profits resulting in high switching costs to consumers.[252] After all the necessary monitoring and identification of the emerging issues the industry faced because of the inclusion of mobile money in the financial industry, Kenya then adopted the Payment System Bill 2011. This covers monitoring of electronic transaction legislation for all commercial operators.[253]

4.5 THE NATIONAL PAYMENT SYSTEM ACT

Ultimately Kenya adopted the National Payment System Act, 2011 (Act No. 39 of 2011) (Payment System Act). This Act provides for the regulation and supervision of payment systems and payment service providers. The participants of the payment system include the CB and any other designated payment system operator. In the definition section it provides "that a payment system provider means a company which owns or operates or controls a public switched network for the provision of payment systems or for sending, storing or sending payments through electronic system or processing and storing data.". In terms of section 3(3) the CB is responsible for issuing a designation as well as revoking or varying such designation under section 3(4). In terms of section 4 any amendment or variation to the conditions to the designation of a payment system must be approved by the CB to be effective. It therefore means that the CB has control to administer this Act. The MNOs are included as payment system providers.

[250] Beck T, Senbet LW & Simbanegavi W 'Financial Inclusion and Innovation in Africa: An Overview' 2015 *Journal of African Economics* 1 25.
[251] Nleya L & Robb G "Mobile Money in Kenya and Zimbabwe"available at www.static.squarespace.com/static. accessed 9 March 2018.
[252] Nyela L & Jena R.
[253] Castellellani LG (2013).

The Act provides for regulatory content that allows electronic means when providing payment service.[254] The CB does not require Safaricom to have a reserve requirement with Banks but must hold a trust account with a Bank.[255] The CB therefore regulates the MNOs through the National Payment System for mobile money transactions. The next section provides an analysis of the Act to identify how it relates to the activities of the MNOs and mobile money.

4.5.1 An Analysis of the National Payment System Act No 39 of 2011

The Act provides in the definition section, the meaning of "institutions" to include banking institutions under the Banking Act [Chapter 488] and the Microfinance Act No. 19 of 2006. "Payment system" means "arrangements that enable payments to be effected between payers and beneficiary or facilities' circulation of money including instrument and procedures enabled by CB.". MNOs are provided for under "payment service provider" which includes -

(1) A company sending, receiving, storing or processing payments through electronic system;

(2) A company which possess, owns, operating and manages controls, a public switched network for payment services; and

(3) Companies storing data or process on behalf of payment service provides or users of payment services.".

"Payment system" means "a system or arrangement that enables payments to be affected between payer and beneficiary or facilitation, circulation of money and instruments or procedure related to the system.". The whole system is controlled by the payment system management body that is recognised by CB.

The Act makes provision for regulations and supervision of payment systems and payment service providers. The payment system body is under the CB. Section 3 provides for operation of a payment system to apply for designation. CB has the power to revoke a designation in

[254] Castellani LG (2013).
[255] Mavhiki S, Nyamwanza T and Shumba L (2015).

contravention of the Act. It therefore can control liquidation or winding up of financial institutions. Payment system management body is under a Directive. An application to operate is made under this Act to the Management Board. The application is considered and processed under Section 7. Section 8(1) provides for sanctioning of policy matters.

4.6 POWERS AND FUNCTIONS OF THE CENTRAL BANK

Section 17 provides that "the CB is responsible for policy formulation and implementation, promoting the establishment, regulation and supervision of payment, clearing and settlement systems under the CB Kenya Act and any other law.". In terms of section 19 (1)(c) the CB has the ultimate responsibility to regulate and supervise such payment system. Section 21 provides "that in the event of a dispute it shall be deemed to be the CB settlement system participant and the CB as parties and resolved in terms of this section.". Mediation must also be conducted in terms of this section. The Act is clear on disputes such that no confusion can arise unlike in the Zimbabwe scenario which is not clear where functions are centred.

Section 22 provides that "the CB has power to advise and direct and can issue directives if there is a possibility of systematic risk, action that compromises security of payment systems.". In turn "systemic risk" is defined in the definition section and it means, "when one participant fails to meet its financial obligations that in turn causes the other players to fail in their own financial obligation.". This provision is relevant and vital for consumer protection as consumers are the ones who stand to lose financially if such failure occurs. The CB with its monitoring mechanism ensures that the risk is constantly monitored. The fact that the CB has the power to issue directives helps in monitoring because directives can be issued quickly and are effective instantly. This gives the CB power to avert any systemic risk, in the public interest or for national financial stability. However, in terms of section 22(6) "such directives shall not have any retroactive effect.". It therefore means that the CB is obliged to uphold a high standard of duty of care to the users of financial institutions.

Section 23 obliges the CB to conduct audits and inspection on all the designated payment system providers. The CB then prepares and submits periodic reports to the Minister in terms of section 24. Under section 31, the CB may prescribe to the Minister to make regulations under section 31.

From the analysis of the Act above it is clear that the CB is in control of the transactions of the MNOs as well as the transactions of such mobile money. The activities of Safaricom are governed by the Telecommunication Act but not the mobile money transactions.

4.7 CONCLUSION

The introduction of this chapter showed that M-Pesa's success is attributable to the usage of identity document on registration to get a mobile number. In Tanzania the equivalent of M-Pesa failed to grow at a comparable rate as it was not based on the usage of identity documents on registration.[256] The population dynamics also played a role in the promotion of the use of M-Pesa as a remittance platform. The fact that breadwinners go in search of jobs in urban areas having families in the rural area meant that M-Pesa therefore facilitated a quick and easier way to remit funds rather than by means of the old traditional means which were unreliable and expensive. In contrast, in Tanzania the population is mostly rural based and lacks the need for remittance.

Safaricom was in constant liason with the CB from inception. The CB allowed M-Pesa to grow without regulatory restrictions. When M-Pesa had taken root that is when the CB introduced special legislation before proceeding to the full regulations later.

The fact that M-Pesa transactions are simple, cheap, fast and easy allowed for its growth. Furthermore M-Pesa is easily accessible without the cumbersome requirements of the financial sector, thus enabling it to flourish. This enabled the inclusion of the unbanked and the rural

[256] Lowry C (2016).

population. Safaricom is country wide and agents are close to the users enabling it to grow. In South Africa mobile money is not that popular.

The last chapter discusses the Zimbabwean legislation in comparison with other legislation, and other regional and international instruments. It also explores the adequacy of the existing legislation considering international expectations of such legislation.

CHAPTER 5

OVERVIEW OF MOBILE MONEY REGULATORY FRAMEWORK

5.1 INTRODUCTION

This chapter discusses legislation and regulatory requirements in general and its adequacy in the prevailing economic environment. There is a comparison of Zimbabwe with that in other countries, regional instruments and general regulatory trends. In addition it discusses the general regulatory landscape, ideal for regulation regarding the mobile money transactions, the product thereof and the roles of the players in such industry.

5.1.1 Legislation catering for mobile money

Zimbabwean and Kenyan laws, mobile money is provided for in the relevant Payments System Acts. In Zimbabwe this is by way of an amendment of the legislation by adding the definition of "mobile money", to cater for mobile money transaction. The mere inclusion of the definition is not sufficient as there is need for consequential amendments. These amendments are done to the Act to provide for mobile money transactions as well as all other relevant financial legislation in order to cater for the transactions. Such consequential amendments must be amended together with all the other relevant provisions and legislation to include mobile money transactions.[257]

5.1.2 Licensing requirements

The licensing requirements must be proportionate to the risk as there is need for an equilibrium between mobile money service provider and mobile network operator.[258] As discussed earlier, in Kenya, the launch of M-Pesa came before the development of formal legislative licensing and regulatory framework for mobile money.[259] The MNO operations were legitimised in Kenya by a "letter of objection" issued by the CB to allow for operation while assessing levels of risk and best regulations.

[257] See paragraph 3.6.1 where there is discussion of consequential amendments.
[258] Henderson W (2014).
[259] Henderson W (2014).

Mobile money straddles two-industries namely, the financial and the telecommunications sectors. The "service-based" regulatory approach must take into consideration the component services. Regulators therefore must consider these questions -

1. Is regulation needed; if yes, is it justified by benefits for example financial stability; and

2. If market failure requires for regulatory intervention, how does it compare with dangers of regulatory failure.[260]

There must be a distinction between non-banks and banks in regulation as those taking deposits must be prudently managed to ensure funds are managed safely. This allows for an opportunity to provide for and to offer safe storage, savings vehicles with full benefits of interest and deposit insurance. In Zimbabwe as well as in Kenya the MNOs are under instruction by the CB to link the funds of the special agent to a bank. The Bank accounts are in the form of trust accounts. This trust accounts as discussed earlier, are not treated as ordinary bank accounts run by banks with capital reserves as required by the CB.[261]

5.2 REGULATORY AUTHORITY AND CAPACITY

There is no clear-cut regulator to supervise mobile money, as this is shared between the CB, bank regulator and telecommunication authority. Mobile money is unique in that it cuts across several regulatory domains with resultant overlapping risk of coordination failure as the different domains are inconsistent.[262] There is need to provide a regulator or multiple regulators with authority to regulate mobile money, implement trust protection and create a consistent environment. The nominated regulator needs capacity and authority to regulate mobile money and needs enough technical expertise to supervise effectively. Mobile money is the new domain in trust law and a financial ombudsman must be established to govern this and cover for the eventuality of bankruptcy.

[260] Dermish A, Kneiding Ch, Leishman P, Mas I (2011).
[261] See paragraph 4.3.2 on the operation of the financial institution.
[262] Greeacre J and Buckley RP. (2014) 75.

5.2.1 Operations of Trust account

Econet Wireless Zimbabwe opened bank accounts with Steward Bank. Safaricom is linked to an account with Kenya Equity Bank. All the accounts opened are trust accounts, these accounts are separate from the MNO business accounts they only hold funds for mobile money. The duty of the regulator is to monitor the way a Provider, the MNOs comply with the conditions set out in the trust deed. To determine who to nominate as the regulator the policy maker must answer the following questions;

1. Which regulator should have authority to operate?;

2. Provisions to outline duties of the regulator to operate in the interest of customers and powers to refuse any amendments;

3. Powers of regulator to demand additional audited accounts, remove the provider and sue on behalf of customers;

4. Regulator can review audits of trust fund;

5. Who is best suited regulator to operate in the interests of customers and have powers to oversee any amendments?;

6. What are the powers of regulator or who has the power to demand additional audit and to determine which class to use, e-money regulations must be approached holistically?[263]

Based on the above, the policy makers can then decide who to nominate as the regulator.

[263] Greenacre J & Buckley R P (2014).

5.3 FRAMEWORK OF ENABLING PRINCIPLES

The application of principles varies at different stages of market development. These are two tier principles namely;

1. The first-tier principle necessary for mobile banking is based on;

(a) Certainty around electronic contracting;

(b) Protection of customers against fraud and abuse of funds;

(c) Access to payment platforms and consumer ability to switch from one financial provider to the other.[264]

The monitoring process can be in conjunction with banks. This however differs with prudential framework, which will be discussed in detail later, and level of financial system development.

2. The second tier is based on-

(a) Due diligence for account opening;

(b) Ability to make deposits and withdraw cash through agents considering the remote points; and

(c) The provision for issuance of e-money capitalised and supervised entities not limited to banks.[265]

The above guidelines are used as technical assistance to policy makers and regulators to enable transformation models of mobile banking and the same time can be used for mobile money. Although these examples relate to mobile banking and electronic money it is relevant and can be borrowed for use in the study of mobile money in most aspects.

[264] Porteous D (2006).
[265] Portoeus D (2006).

5.4 TRUST PROTECTION

Trust relationship is where a person holds property in trust on behalf of a third person. A trust can be established by execution of a trust deed. This is a legal document with clauses governing the obligations of the trustee and rights of beneficiaries. The trust creates a fiduciary relationship between parties and a duty to use trust assets for the benefit of the beneficiaries.[266] Beneficiaries can therefore enforce rights and sue the trustee for failure to comply with trustee duties in regulations. There is a new domain in trust law which is customer protection, and this includes rules which include fund isolation, fund safeguarding and the reduction of operational risk.[267] This is regarded as the safest way to ensure the protection of beneficiary funds. This has been the case in Zimbabwe as well as in Kenya where the MNOs are obliged to open trust accounts with Banks. The trust fund is ideal in the operation of an MNO which lacks the fiduciary oversight as is the case with banks where the CB requires reserve capital in tandem to deposits. The trust accounts though they are opened with the Banks they are exempt from the normal requirements of the bank.

5.4.1 Safeguarding Customers' funds

The funds held by the MNOs in the bank accounts are subject to restrictions. The CB requires that the provider must have a ratio between e-money and the float based on liquidity rules, in that the provider must hold liquid assets equivalent to e-float.[268] The money held at the bank operates as insurance. The MNO is restricted not to use customers' funds for its operational expenses. The funds can only be used to cash out remaining e-money and such money cannot be used as

[266] Greenacre J and Buckley RP. (2014).
[267] Greenacre J and Buckley RP (2014).
[268] Greenacre J & Buckley R (2014).

collateral nor guarantee neither can it be used to extend credit.[269] It is however prudent that the MNOs hold bank accounts with various banks to diminish risk in the event of insolvency.

It is prudent for banks are required to have insurance to alleviate risk arising from insolvency. This same requirement is not the same with the case with MNOs. The trust deed must include a provision to cater for trust duties as well as safeguarding customers' funds. The MNO must be in a financial position to pay customers' funds in the event a trust is terminated. The CB must regulate so that the MNO employs reliable and trustworthy persons in-order to safeguard customers' funds. The CB or the regulator must have mechanisms in place to check on compliance with the terms of the trust deed. This therefore means that the regulator must have regular and efficient monitoring mechanisms. Hence the regulator must be prudent.

5.5 PRUDENCE OF THE REGULATOR

The regulator must have records of accounts of customers' funds checked. The trust law must create rules to minimise operational risks of customer's funds through monitoring and auditing of the trust account. All these duties must be included in the trustees' duties. Of the audit, the rules must be clear on how such is carried out, the process and integrity of the system.[270] The regulator must also ensure that there is adherence to compliance with the terms of the trust deed. Lack of compliance exposes the trust to operational risk. The e-money regulator must be engaged in active monitoring and enforcing the terms of the trust to ensure storage and protection of customers' funds.

The regulator therefore must have the following powers to -

1. remove and appoint trustees;

2. approve the trustee remuneration to protect against abuse of funds;

[269] Greenacre J & Buckley R (2014) 68.
[270] Greenacre J & Buckley R (2014).

3. review administration of trust;

4. settle disputes and terminate the trust.[271]

Questions must be satisfied as to who the ideal regulator of a trust is. The regulations must specify whether the regulator must be a private entity or a public body. The trust deed must be clear on the role of the regulator and be clear on who has powers to modify, limit and define the role of the Protector. The deed must also provide for regulatory authority to monitor duties of the provider, MNO and have regulatory supervision to protect customers' funds. This is necessary since customers' funds are not protected the way funds at banks are protected for example in Zimbabwe it is through the Deposit Protection Act. In case of insolvency of the MNO the funds from mobile money must be protected. In Kenya funds are protected under the Deposit Protection Fund discussed in 4.3.3 above.

All these considerations must be taken into account when deciding who is to administer the trust, the regulations and who has the supervisory role because mobile money as noted earlier straddles two industries.

As discussed in the Kenya scenario credence to the flourishing of M-Pesa has been credited to the absence of regulation initially.

5.6 FLEXIBLE REGULATIONS

Regulations governing mobile money need flexible regulatory framework. There must be a balance between risk management against light-touch approach to encourage innovation and access to financial services.[272] There is need to have regulatory provision split between local and cross-border remittance. A flexible regulatory framework is appropriate to cater for risk posed by mobile money services. Authors have argued that stringent regulations on emerging mobile

[271] Greenacre J and Buckley R (2014).
[272] Logan S (2017).

money sectors drives up compliance costs and hampers sector growth and innovation and greater access to financial services.[273] I tend to agree with this school of thought as mobile money is in its infancy and forever changing such that policy is not clear on inception. The legislation must encompass mobile money transactions and all eventualities. There is need for regulations to separate systems of mobile money, customer registration from e-storage, cross-border transfers from agent management.[274]

The enabling regulatory frameworks must include policies to include competition policy concerns, reporting requirements, financial and customer protection.[275] This allows customers to transact using mobile money across MNOs. Regulations must also cater for know-your-customer (KYC), due diligence procedures, which though as discussed in the earlier chapters is difficult considering the requirements for registration as a user.

KYC must also be on the cash merchants. This is so because they impact on existing models of monetary theory on the impact of mobile banking on operations of financial systems and implications for monetary and regulatory policy faced by the CB. My view is that a light touch approach must be used as digital technology is new and the concept of mobile money is new, and a growing phenomenon. There is however need to have monitoring regimes to check the development of mobile money.

5.7 CROSS BORDER REMITTANCE

A uniform reference text can assist to overcome national difference in addressing legal challenges arising from cross-border transactions. Mann recommended that the issue of payment policy need to be separated into two; (1) rules which are determined and influenced by

[273] Suri T and Jack W (2016).
[274] Logan S (2017).
[275] Logan S (2017).

technology of payments; and (2) rules dependable on the nature of the underlying transaction.[276] There is need to include legal aspects of activities of MNO rather than to prepare standard contractual rules to be enacted voluntarily by MNO or co-regulation in the ICT sector. The fact that mobile money activities are under the operation of MNO, requires that the financial aspect of mobile money be regulated. The policy makers need to emphasise the importance of uniform legislative framework for mobile payments in order to achieve fundamental policy goals.[277] This can be achieved by the promotion of small to medium-sized enterprises in order to attract attention from all players in the mobile money market. The best way to cater for this can be regulation under regional groupings for example SADC, ECOWAS, where cross border remittances are a common phenomenon.

There is also need for consumer protection against losses.

5.8 CONSUMER PROTECTION

Consumers must be given the same protection that apply to credit and debit cards. The card holders are protected against fraudulent use of their cards. There must also be a provision that limit customers' liability for unathorised transactions when false charges are made with a lost or stolen phone, which limit consumer liability for unauthorised transactions or disputed charges resulting from mobile payments.[278] Hence there is need to link existing programs and strategies when funds are lost at the bank with that of the mobile money transactions.

Consumer protection regulations must cater for matters of privacy and data protection. MNO contracts must be simple have transparency with regard to rates charged at account openings and

[276] Mann R 'Making Sense of Payments Policy in the Information Age' 93 (2005) *Georgetown Law Journal* 633-652.
[277] Bradley C 'International Credit Transfers: The Influence of Article 4A on the Model Law' (1991) 19 *CAN. Business Law Journal* 166-180.
[278] Mas I & Ng'weno A 'Three Keys to M-Pesa's Success: Branding, Channel Management and Pricing' *Journal of Payments Strategy and System* Volume 4 167 available at www.papers.ssrm.com (accessed on 10 October 2019).

when transacting.[279] This is necessary as the majority of mobile users have low literacy levels and constitute the bulk of users of mobile money, as discussed earlier. Transaction fees must remain low to cater for the low transaction amounts. In Zimbabwe EcoCash users are restricted to set monthly transaction amounts and daily transactions amounts are also limited. Mobile money is a new innovation, where there is model legislation availed by international organisations and countries can borrow from these.

There is also need of an enabling environment.

5.9 THE ENABLING ENVIRONMENT

An enabling environment means the conditions which promote sustainable market development to bring about socially desirable outcomes which must be present.[280] This is achieved by conditions forged by larger macro-political and economic forces and sector specific policy and laws.

For mobile money to flourish there is need for an enabling environment and a light touch approach to allow it to grow. The aim is the creation of an enabling environment to fit into the Millennium Development Goals (MDGs). The United Nations Information and Communication Technologies (UN ICT) task force defines the MDGs as allowing investment, innovation and entrepreneurship.[281] There are key outcomes in considering an enabling environment.

The environment must support -

1. Financial stability to ensure the safety and soundness of banking and payment systems is not comprised;

[279] Logan S (2017).
[280] Porteous D (2006).
[281] Castellani L G (2013).

2. The economic efficiency must support and contribute to economic growth;

3. Access to financial services; broader access to affordable financial services is promoted;

4. Financial integrity which is a financial system not compromised by abuse for criminal or terrorist financing purpose;

5. Consumer protection where vulnerable consumers are protected against abuse or loss.[282]

Mobile banking increases efficiency of payment system and expansion of access to financial services but objectives may be in conflict with existing approaches targeting other objectives for example for financial integrity or consumer protection.[283]

5.10 IDEAL REGULATIONS

Jack and Suri have summed up recommendations on regulations as follows -

1. Governments must ensure there is adequate competition as the market matures;

2. Regulations should be flexible and proportional to the level of risk;

3. Governments should act as catalyst to sector growth; and

4. Governments have a role to design regulations that are conducive to growth rather than stifle innovation.[284]

For market development and industry growth there is need for regulation. Further, where there are changes brought about by market developments, regulations may be necessary to stabilise and protect against the potential of greater risk to society arising from market failure.[285]

[282] Porteous D (2006).
[283] Porteous D (2006).
[284] Jack W and Suri T 'Risk Sharing and transaction costs: Evidence from Kenya's mobile money revolution' (2014) *The American Economic Review,* 104 (1) 183-223.
[285] Porteous D (2006).

5.10.1 Fund Isolation

Funds are kept in an aggregate bank account and the balance in the bank account is in the name of the MNO not that of the user and if there is insolvency the liquidator can attach the user's funds to pay off debts.[286] There is therefore need to have rules to address this anomaly. These rules address loss of customers' or agents' funds. Fund isolation helps by requiring the provider to store customer's funds in a separate trust account. The beneficiaries are the e-money (mobile money) customers and therefore customers retain ownership and cannot be claimed by the creditor's providers.[287]

There has been an emerging trend of fraud targeting mobile money accounts. In Uganda mobile money services lost $3.5 million to a single type fraud.[288]

The regulatory approach must be flexible, allowing for innovation that creates predictability as well as protection of customer's funds.[289] Trust instruments grant certainty and protection of users, and ensure implementation of legislation and cater for issues apart from possible money laundering or terrorist financing.

5.10.2 Prudential Regulations

International best practice requires that customer money be kept in a pool account held by a prudentially regulated bank with restrictions to prevent pool money being loaned or to prevent it from being used as collateral by MNO or bank. This is a departure from banks where they are required to use a proportion of customer deposits as liquid assets and to invest the remainder.

[286] Greenacre J & Buckley RP (2014).
[287] Makin P 'Regulatory Issues around Mobile Banking' *Organisation for Economic Co-operation and Development* available at *www.oecd.org* (accessed on 11 October 2019) 1-14.
[288] Lake AJ 'Risk Management in Mobile Money: Observed Risks and Proposed Mitigants for Mobile Money Operators' (2013) *International Finance Corporation-World Bank Group* 1-22.
[289] Mas I & Ng'weno A (2009).

Mobile money regulation must include regulation of agents, money laundering or financing of terrorism activities regulation, prudential regulation, licensing option and consumer protection.

With prudential regulations, mandating minimum capital requirements required to operate a bank account do not apply on mobile money accounts. Customers' money is held in a prudentially regulated and ring-fenced pool account so there is no need to impose minimum capital requirements as these are trust accounts. This will create additional risk mitigation benefits and increase barriers to market entry for mobile money operators.

5.10.3 Anti Money Laundering Risk Management (AML) and Combating of Financing of Terrorism (CFT)

The main concern with any financial transaction is security. The regulator must establish -

(1) rules governing information security requiring data encryption and storage in mobile banking; and

(2) standards governing implementation of banking, anti-money laundering, counter terrorism laws, which are meant to protect mobile consumers.

In all this care must be taken so that the regulations do not create barriers to growth of mobile money. The regulations must provide for anti-money laundering (AML) and combating of financing of terrorism (CFT). These are met by KYC requirements on mobile money operations also known as customer due diligence.[290]

KYC requirements require the recording of customer information from key document such as an identity document. In South Africa the Regulation of Interception of Communication and Provision of Communication Related Information Act, 2003 requires MNOs to demand information from users. It imposes duties on telecommunication service provider and or

[290] Henderson W (2014).

electronic communication service to obtain and retain certain information from their customers including identification. This however is difficult where identity documents are not a requirement on allocation of a mobile number.

This can be a tiered scheme which differentiate KYC requirements to a variety of transactions or account limits depending on transaction. KYC require that a financial institution demand identification before opening an account to prevent money laundering and terrorist activity and this can be done with mobile money.[291] Legislation can also be borrowed from international organisations which have Model laws which can be adopted by any regulator.

5.11 THE UNCITRAL MODEL ON INTERNATIONAL CREDIT TRANSFER

The UNCITRAL formulated a Model Law on International Credit Transfer (MLICT). In the Eastern African Organisation member states of the Commission formulated enabling legislation as a set regional model which members have an option to adopt such model law to better facilitate cross-border electronic transactions. The model law can be adopted because of two developments namely :-

1. Increasing use of electronic means in payment orders; and

2. Shift from prevalence of debit transfers to prevalence of credit transfers.[292]

This model law is designed for "high speed electronic transfers" like for mobile money. Article 1(2) of the MLICT provides that mobile payments are effected through mobile network operators. The legislation also provides for consumer protection which is lacking in most legislation. In small and medium-sized enterprises which cater for the greater number of the users

[291] Harris K K & Terkel A 'Mobile banking can the Unbanked Bank on it?' 46 Clearing House review 16 (2012) *Journal of Poverty Law and Policy* 16.

[292] Jobodwana Ntozintle Z 'E-Commerce and Mobile Commerce in South Africa: Regulatory Challenges' (2009) 4 *J International Communication Law and Technology* 287.

of mobile payments in developing countries and consumers are prevalent in the case of micro (small) payments.[293] It therefore means there is need to choose between conflicting rules that arise if opposite goals are at stake, the interest of the MNO and that of the user. Countries can thus also sign and adopt Conventions into their legislation through Parliament. All users are covered under Article 14 of the Electronic Communications on the Use of Electronic Communication in International Contracts Convention which provides for technical features of device used for transactions and has provisions aimed at consumer protection.

Under the MLICT, payment is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. These are rules adopted that may not place mobile money users funds at risk when payments cannot be completed due to insolvency of the MNO or its bank. Mobile payments are considered completed when the sum is credited to the account of the beneficiary. That is the time of performance of an underlying obligation, for example the payment of the price for a good or service sold. However, it must be noted that validity of payment and validity of the underlying obligation are two distinct matters.[294] Article 14 provides for "money-back guarantee" which imposes a liability on the originator's bank for return of money if payment is not completed as instructed. The rationale is that the originator has no say in the choice of intermediary banks, which are chosen by the originator's bank. However mobile money transaction is fast and swift and it is difficult to have a clear distinction on performance.

With money transfer via mobile network operator, the choice is limited by location of the account of beneficiary. However, there must be a difference between liability for technical failures which remain that of the operator of the failing network and liability for other reasons such as wrong allocation of funds. The liability of payment service must be limited to avoid consequential damages to the users. There is a general duty to assist clients by sending notices of value which can be imposed on payment service providers.

[293] Castellani L G (2013).
[294] Castellani L G (2013).

Article 8(4) and Article 19(2) of MLICT provide that the bank must notify sender (when identified) if the payment order contains insufficient automated data. The sender key usage of the service, opts to be reached for communications at the mobile telephone number used to initiate payment. Therefore, the telephone number used when a short message service (SMS) is sent is therefore a valid designated electronic address. Article 5(2) of MLICT states that there must be provided a commercially reasonable method of security against unauthorised payment orders. Such payment orders received must be authenticated by a procedure other than the mere comparison of signatures to the purported sender. The test is to determine if the signature at the receiving bank has complied with authentication criteria. Global standards for banking require authentication on different levels, this is the commercially reasonable method.[295] The security procedures used for payments must place a heavier burden on the bank that cannot be falsified easily.

MLICT does not allow for revocation of payment orders unless the bank receives revocation before payment is executed. This is impossible to implement in the case of mobile money because of the speed of electronic transactions. Ultimately the regulations must be agreed upon by the users.

5.11.1 Implementation principles to determine which regulations to use

Mobile money regulations must be formulated holistically as they cater for interest of different players in the mobile money market. The consultative approach is preferably, and this is where the Providers, banks and regulators should consult to come up with effective regulations. Such consultation must include policy on customer protection and continuous development of products.

5.11.2 Dialogue between provider and regulator

During the dialogue, the Provider, in this case an MNO and the regulator must consider the effectiveness of local circumstances and customise the regulations in line with such. The negotiators must adopt a "proportional" approach to implement recommendations.

[295] Castellani LG (2013).

Implementation must not unduly increase regulatory cost to Provider as such cost will be passed on to customers and result in the reduction of the ability of the Provider to experiment with mobile money products which are beneficial to the unbanked or underbanked population. Therefore, as discussed above there should be a light touch approach to regulation.

5.12 CONCLUSION

Mobile money transactions are a new phenomenon. The main problems which have been discussed are peculiar to mobile money transaction as the product straddles two industries; the financial sector and the telecommunication industries. Traditionally these two industries were separate and each had their own industry related regulations. Mobile money as well as technology is fast growing, and the products are fast revolving. This makes it difficult to come up with policy and legislation with a product or industry which has quickly evolved to extend to areas beyond mere remittances. For example, as discussed earlier the Kenya M-Pesa was initially only for remittance but there are many products like the savings facilitate at present which even Safaricom did not anticipate at inception.

It is therefore prudent to let the mobile money industry grow and only come up with legislation when all players, especially the regulator, financial and telecommunication sectors are clear on the product to be regulated. If legislation comes first without knowing the full product range meant for such, then it has the potential of ineffective regulations. It can also result in giving powers to the wrong regulator or having regulations which may be in conflict with other existing regulations. As discussed earlier, mobile money transactions dynamics differ from country to country as well as the population dynamics, therefore the legislation must be tailor made for each country although there are underlying commonalities.

International instruments, that are Conventions, once ratified, are there for adoption with Model Laws and assist in formulation of local legislation. However, the country needs to be clear on the mobile money transactions and the products on offer in their jurisdiction. Further, the effectiveness and speed of how a transaction is concluded needs to be taken into consideration to ensure there is adequate consumer protection. The legislation must also be KYC compliant and pro-active in countering money laundering activities. The world is on high alert to combat money laundering and mobile money must not be used as a loop hole to circumvent stringent anti-money laundering legislation in place in the financial market.

The Kenyan approach to mobile money legislation as discussed in chapter 4 is commendable in that it allows the mobile money market to grow and only afterwards regulate. On the contrary the Zimbabwe mobile money landscape is inadequate. This is because they are coming up with legislation as a knee-jerk reaction to public outcry and this results in amendments which are haphazard and do not cater for all the facets of mobile money transactions.

The next chapter will provide final conclusions and recommendations on how Zimbabwe should proceed to regulate mobile money transactions.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

The main objectives of this study was to investigate whether the Central Bank has powers to regulate mobile money transaction in Zimbabwe which is run under the telecommunication industry. An examination was done of mobile money transactions, regulatory framework and consumer protection. The scrutiny is carried out with the aid of a comparison of the Kenya system with the use of international legislation. The main focus was to analyse how the unbanked population has been included in the financial sector, which has stringent entry requirements with only the aid of a registered mobile phone and an identity document.

In that regard, Chapter 1 to 5 provided the following:

6.1.1 Chapter One

The Chapter set out the history of the financial service sector with regards to the economic and hyper inflation situation experienced in 2008 which is a resultant of an economic meltdown and closure of banks.[296] When the Reserve Bank started issuing bearer cheques, the result was customers withdrew their money from banks resulting in a run on the banks.[297] It sets out an overview of the introduction of Ecocash mainly for the purpose of remittances which included unbanked persons.[298] It explained how Ecocash later expanded to other uses.[299] Later in the Chapter is the research question and potential solutions to the problem. There is a discussion of the literature survey and the impact on socio-economic development.[300]

[296] Reference at 7 above.
[297] Reference at 16 above this was due to past bad experience of losing savings in banks.
[298] Reference at 18 above as discussed how the unbanked have been included.
[299] Reference at 23 above.
[300] Reference at 38 above.

6.1.2 Chapter 2

The Chapter gives a detailed outlook of the mobile money transactions. It gives the -

(a) Various definition of mobile money;

(b) How mobile money transaction is conducted;[301]

(c) The different types of agents and transactions;[302]

(d) The reason for the success of mobile money;[303]

(e) The consumer protection and conclusion on the operation of the mobile money transaction.

6.1.3 Chapter 3

This Chapter gives a detailed overview of the mobile money in Zimbabwe.[304] It sets out the purpose for the introduction of mobile money, that is for remittance and explained how due to the bank note and coin shortages it came to be used as a pseudo currency.[305] It gives the different levels of players and various uses of EcoCash. The Chapter gives a detailed analysis of the financial, consumer protection and telecommunication legislation.[306] The interpretation of statutes and policy formulation of the regulatory environment is discussed.[307] The Chapter ends with a conclusion that the existing legislation in Zimbabwe is inadequate to cater for mobile money transaction.

6.1.4 Chapter 4

This Chapter starts with the history and background of the introduction of M-Pesa in Kenya. It discusses the various uses and repercussion of the use of M-Pesa on the financial sector and

[301] Reference at 81 above.
[302] Reference at 96 above.
[303] Reference at 112 above.
[304] See paragraph 3.2 of chapter 3.
[305] See paragraph 3.2 of chapter 3.
[306] See paragraph 3.3 of chapter 3.
[307] See paragraph 3.10 of chapter 3.

telecommunication industry.[308] A detailed study is carried out of the regulatory environment in Kenya relevant to the finance, telecommunication industry as well as consumer protection.[309] The success of M-Pesa is analysed and the enabling legislation, the Payment Systems Act and how regulation was eased to allow for growth of M-Pesa.

6.1.5 Chapter 5

In this Chapter there is a comparative examination with the Zimbabwe legislation. The main focus is on Kenyan legislation, as well as other relevant international Model Laws and Conventions.[310] A detailed study is also carried out of trust law and trust protection especially for protection of consumer funds.[311] There is also a guideline to policy makers and regulators to reach equilibrium on legislation that are flexible to allow for growth.[312]

6.2 FINDINGS

As discussed earlier Zimbabwe amended the Payment Systems Act to include the definition of mobile money but did not amend the whole Act appropriately to include mobile money transactions.[313] An analytic review of the Act, was carried out, it was found that the amendments on the Payment Systems Act, of adding the definition of mobile money is inadequate to cater for mobile money transactions.[314]

On the interpretation of statutes, the intention of the legislature comes through from the long title, headings, sections, text, through to the language used.[315] The case law referred to buttresses the notion that the interpretation of statutes can also be derived from the words used in the

[308] See paragraph 4.1.2 of chapter 4.
[309] See paragraph 4.3.3 of chapter 4.
[310] See paragraph 5.11 of chapter 5.
[311] See paragraph 5.4 of chapter 5.
[312] See paragraph 5.10.2 of chapter 5.
[313] See paragraph 1 3.6 of chapter 3.
[314] See paragraph 2 3.10 of chapter 3.
[315] Reference 169 above.

legislation.[316] There is need for a regulatory environment which supports mobile money transactions and its growth.[317]

It is suggested that the enabling legislative environment could be in terms of international standards, the UNICTRAL laws.[318] It is clear that the current Zimbabwe legal framework does not cover transactions dealing with mobile money.[319] The Central Bank neither has a mandate nor the powers to regulate the MNOs as it has powers only with regard to financial institutions accepting deposits.[320] The Central Bank however mandated all MNOs to open trust bank accounts.[321] Thus the Central Bank has no power to control transactions of mobile money nor any resultant loss as they are not covered under the Deposit Protection Act.[322]

6.3 RECOMMENDATIONS

As discussed earlier the transactions of mobile money overlaps several regulatory domains.[323] This necessitates the need to have adequate amendments done to the Payment System Act but that then also gives rise to the need for consequential amendments to all other relevant Acts.[324] The mere amendment by inclusion in the definition section is not sufficient.[325] Mobile money straddles two industries, it is thus recommended that Zimbabwe implements separate legislation dealing with mobile money transaction and consumer protection.[326] This conclusion is reached considering that the overlap can result in co-ordination failure and inconsistency or contradictory legislation.[327]

[316] See paragraph 2 3.10 of chapter 3.
[317] See paragraph 1 of 3.10.1 of chapter 3.
[318] See paragraph 2 of 3.10.1 of chapter 3.
[319] See paragraph 1 of 3.10.2 of chapter 3.
[320] See paragraph 1 of 3.10.2 of chapter 3.
[321] See paragraph 1 of 3.11.1 of chapter 3.
[322] See paragraph 3 of 3.11.1 of chapter 3.
[323] Reference 185 above.
[324] See paragraph 4 of 3.11.1 of chapter 3.
[325] See paragraph 1 of 5.1.1 of chapter 5.
[326] See paragraph 5.1.2 to avoid consequential amendments to a number of relevant legislation.
[327] See paragraph 3.12 of chapter 3.

Zimbabwe must adopt the Kenya approach wherein they allow a progression of regulation without hindrance to growth.[328] There is no need to overburden the legislation in its infancy.[329] The Act must comprise of and include the provisions set out below :-

6.3.1 The regulator

The process of how to choose a regulator has been set out earlier.[330]The regulator needs capacity and authority to regulate mobile money.[331] The regulator must have power to appoint or remove a trustee; approve remuneration; review administrative trust and to settle and terminate the trust.[332] The CB can be assigned the powers and the duties of a regulator since it licenses, regulates and monitors financial institutions.[333] The Deposit Protection Act is also under the control of the CB which caters for loss of funds at a bank. The Reserve Bank of Zimbabwe has mandated all MNO to open a trust account with a Bank.[334]

6.3.2 Trust Protection

(a) The MNO must have a trust account with a Bank.[335] The CB must dictate the contents of the trust deed and have power to review audits of the trust fund.[336] There is need for a monitoring process. CB has authority to monitor financial institutions and that can be extended to include agents which are core to MM.[337]

(b) The trust deed must include trust protection.[338] There must be a section on safeguarding of customers' funds. This is achieved by isolation of funds from operational risk.[339] The CB must

[328] See paragraph 5.1.2.
[329] Reference 186 above.
[330] Reference at 259 above.
[331] See paragraph 2 of 5.1.2 of chapter 5.
[332] Reference 259 above.
[333] See paragraph 3.4.1 on powers of the CB.
[334] See paragraph 3.11.1 of chapter 3 on the directive by the CB to all MNO to open a trust account.
[335] See paragraph 1 of 5.2.1 of chapter 5.
[336] See paragraph 2 of 5.2.1 of chapter 5.
[337] Reference at 259 above.
[338] See paragraph 1 of 5.4 of chapter 5.
[339] Reference 261.

demand liquid assets which are equal to the e-float as insurance against insolvency.[340] Fund isolation must be a prerequisite to cater for insolvency, and a strict requirement to have funds in separate accounts from MNO business accounts and trust accounts.[341]

(c) For compliance with the trust deed the CB must ensure that the deed must include monitoring and auditing of trust account and duties of trustees.[342]

(d) Ultimately the CB must have power to remove, approve trustees' remuneration and settle disputes.[343]

The regulations must also allow for the following-

(a) Cross border remittance can be done within the regional groupings like SADC and adopted as regulations within the countries;

(b) There is need to have an enabling environment to fit with MDGs and to provide for legislation that provides for financial stability that contribute to economic growth and consumer protection.[344]

(c) The regulations must be flexible and allow for competition and sector growth.[345]

(d) The mobile money regulations must include regulations of agents, money laundering, financing of terrorism, prudential regulations, licensing options and consumer protection.[346]

(e) There is also need for know-your-customer with requirements of an identity document.[347]

(f) There must be a difference between liability for technical failures which remain that of the MNO and liability of wrong allocation of funds.[348]

[340] See paragraph 1 of 5.4.1 of chapter 5.
[341] See paragraph 1 of 5.10.1 of chapter 5.
[342] See paragraph 1 of 5.5 of chapter 5.
[343] See paragraph 2 of 5.5 of chapter 5.
[344] Reference 276 above.
[345] See paragraph 1 of 5.10 of chapter 5.
[346] See paragraph 1 of 5.10.3 of chapter 5.
[347] See paragraph 1 of 5.10.3 of chapter 5.
[348] See paragraph 3 of 5.11 of chapter 5.

6.4 INTERNATIONAL CONVENTIONS

It is best to borrow from UNCITRAL model laws which are designed for "high speed transfers".[349] Zimbabwe can also borrow the aspect of consumer protection which is fused in one Act as in the model laws.[350]

Overall the regulations must be flexible and strike a balance between risk management against light touch approach to encourage innovation and minimising costs.[351] Licensing requirements must be proportional and remain low to keep the service charges low.[352]

6.5 FINAL THOUGHTS

Mobile money transactions are not catered for in the regulatory framework in Zimbabwe neither has the Central Bank have power over such transactions. An alternative is to have the Payment System Act amended to include mobile money. However this alternative will give rise to too many consequential amendments not only to that Act but to various other relevant Acts discussed in Chapter 3.

It is advisable to have a new Act which only caters for mobile money transaction and consumer protection. This allows for amendments to be done as and when the industry grows as it is still in its infancy. So far the system has been working well in serving the unbanked targeted market and it is hoped that it will continue to improve when legislation is in place and the general customers are more educated on mobile money transactions.

[349] See paragraph 5.11 of chapter 5.
[350] See paragraph 1 of 5.11 of chapter 5.
[351] See paragraph 1 of 5.6 of chapter 5.
[352] See paragraph 5.1.2.

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