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

SCZ APPEAL NO. 117/2001

SIMEZA, SANGWA & ASSOCIATES — 1ST APPELLANT
THE LEGAL RESOURCES FOUNDATION — 2ND APPELLANT

AND

THE BANK OF ZAMBIA — 1ST RESPONDENT
THE ATTORNEY-GENERAL — 2ND RESPONDENT

Coram: Lewanika, DCJ., Sakala and Mambilima, JJS.,
14th May and 2nd August, 2002.

For the Appellants: Mr. R.M. Simeza of Simeza Sangwa and Associates.
For the 1st Respondent: Mr. A. J. Ndhlovu of Christopher Russell Cook & Co.
For the 2nd Respondent: N/A.

JUDGMENT

Sakala, JS., delivered the Judgment of the Court.

Cases Referred to:

1. *Lochgelly Iron & Coal Company Vs M. Mullan (1934) AC at p. 9.*
2. *Bank of Zambia Vs Chibote Meat Corporation Ltd SCZ Appeal No.99of1998.*

The Appellants, hereinafter referred to as the first and second Plaintiffs, launched proceedings against the first and second Respondents, hereinafter referred to as the first and second Defendants, claiming financial losses and other consequential losses suffered allegedly due to failure by the first Defendant to perform its statutory duties as provided for under the Bank of Zambia Act Cap 699 and the Banking and Financial Services Act of 1994. Initially, the writ of summons and the statement of claim had included the then Minister of Finance as a Defendant. As against the Minister of Finance,

the claim was based on the alleged negligent misstatements made at the various public fora on the stability of the Meridien Bank. The claim against the Minister was discontinued following upon his untimely demise. It must also be observed that at the trial, as well as during the hearing of this appeal, counsel for the second Defendant, the Attorney-General, did not attend the proceedings. The reason seems obvious since the claim against the Minister of Finance had been dropped.

The facts of the Plaintiff's case as pleaded were that they maintained various accounts with the Meridien Bank, one of such account was an interest earning account. Sometime in the month of January 1995, there were wide spread rumours of the Meridien BIAO Bank being insolvent. These rumours were confirmed by press reports. In view of these rumours and press reports, the first Plaintiff withdrew a substantial amount from its account and deposited it into another bank. It was common cause that in reaction to the anxieties among the depositors caused by reports on the viability of the Meridien Bank, the then Minister of Finance and the Bank of Zambia made representations at various public fora and issued press

statements reported in the public media, not denied, assuring the depositors not to panic as the first Defendant and the government had decided to provide the needed liquidity by the Meridien Bank and that the deposits were completely safe.

It was not in dispute that acting on the said representations, the Plaintiffs continued to maintain their accounts with the Meridien BIOA Bank. It was also common ground that on 19th May 1995 the Meridien BIOA Bank was seized by the first Defendant and placed under the control of a Receiver and subsequently on or about 16th August 1995, the first Defendant passed a resolution to liquidate the Meridien BIOA Bank followed by a notice of compulsory liquidation filed in the High Court of Zambia. Following the closure of the Bank, the Plaintiffs were refunded all their monies but without interest. They commenced this action seeking damages for financial loses and other consequential losses suffered as a result of the first Defendant's failure to perform its statutory duties and secondly they claimed general damages resulting from both Defendants' negligent misstatements.

The Defendant's case as pleaded was that the role of the Central Bank is to protect the financial system hence, if individual banks threaten or undermine the financial system, the Central Bank intervenes to rescue the bank if deemed feasible and if rescue attempts fail, the Central Bank can still intervene and put the particular bank in Receivership. Finally, if the bank does not recover, then the Central Bank can put that bank under compulsory liquidation.

It was the case for the Defendant that in the case of the Meridien Bank there was a run on the bank. Therefore, the Central Bank had two options, the first was to close the Meridien BIOA Bank immediately and the second was to give the promoters of the bank a chance. In this connection, the Central Bank accepted the promoters' proposal to allow the bank to continue upon the Government and the Central Bank lending Meridien BIOA Bank some money against the Meridien Bank assets to recapitalise the Bank. It was also the case for the Defendant that the Central bank accepted the proposal on condition that the Meridien Bank Board and the Management were dissolved. The Central Bank appointed a new Board and a new Management in an attempt to rescue the Bank after the Government and the

Central Bank put in money against the assets of the Meridien Bank. These measures, according to the Defendant, were taken in accordance with the Banking and Financial Services Act. However, in spite of all these measures, confidence in the bank was not restored. The run on the Bank continued, hence, on 19th May, 1995, in accordance with the Banking and Financial Services Act, the first Defendant seized the Meridien Bank as the rescue exercise was not possible. It was further the case for the Defendants that whatever measures were taken they were taken to secure the country's financial system. It was also the Defendant's case that the Central Bank has no direct relationship with customers of commercial banks as the transaction is between depositors and various commercial banks.

The learned trial judge considered the facts not in dispute as well as the submissions by both learned counsel including the authorities cited. The court examined the provisions of the Banking and Financial Services Act as contained in Chapter 6 of that Act. The court found no provisions that placed a duty on the first Defendant. The court found that certain provisions **prohibit** Commercial Banks to do certain things and that certain provisions place a duty on the Commercial Banks to do certain things. The court further

found that the role of the first Defendant was only to supervise and regulate the Commercial Banks when the need arose. Thus, the court held that failure to perform statutory duty on the part of the first Defendant had not been proved. The court pointed out that if ever there was any breach of statutory duty, the Plaintiffs' claim had to fail on the ground that they did not suffer any injuries as a result of the alleged breach because, on the Plaintiff's own evidence, they had been paid all the monies in 1997, long before the hearing of the matter. The court observed that a mere breach of statutory duty without resultant injury to a Plaintiff, is not actionable.

On the question of negligence against the first Respondent, the court noted that the Plaintiff having already been paid all their money, no injury was proved as a result of the alleged negligence. The court declined to make a finding that the Defendant should be liable for careless and negligent statements made in respect of the Meridien BIOA Bank because, according to the court, that finding would merely be an academic exercise. It was the view of the trial court that whatever cause of action the Plaintiff may have had, the same terminated when they were paid all their monies. The court also declined to award interest on the ground that the Plaintiff had

been paid their money long before the hearing of the case. The court observed that the interest the Plaintiff was claiming was for the period when the money was locked up in the Bank. The court pointed out that this was negligible interest. The Plaintiffs' action was dismissed with costs to the Defendants hence this appeal before us.

The appeal was argued on six grounds which can be summarized into three grounds namely; that the learned trial judge misdirected himself in law by holding that the Banking and Financial Services Act does not place a specific statutory duty on the Central Bank; that the learned trial judge erred in law when he held that the Plaintiffs' had not suffered any injuries as a result of the alleged statutory breach; and that the Plaintiffs had failed to prove injuries suffered as a result of the alleged negligence. In our view, this appeal succeeds or fails depending on the views we take on these three summarized grounds.

The detailed written heads of argument in support of the appeal on these grounds first analysed numerous sections of the Banking and Financial Services Act and the Bank of Zambia Act which provide various functions

of the Central Bank; such as licensing Commercial Banks, setting out liquid assets to be kept by the Commercial Banks and spelling out the powers of the Central Bank to regulate activities of the Commercial Banks. It was submitted that from the various sections of the two acts, it would be wholly unconscionable and highly irresponsible for the Bank of Zambia to deny their statutory duty over Commercial banks and customers of the banks such as the Plaintiffs. It was contended that had the first Respondent performed its statutory duty of supervisory role over the Meridien Bank, the insolvency which led to winding up, would perhaps have been avoided and the Plaintiffs would not have suffered any loss. It was submitted that failure to perform a statutory duty as distinguished from negligence attracts damages for breach of that statutory duty. In support of this submission, Mr. Simenza cited the case of ***Lochgelly Iron & Coal Company V Mullan (1)*** where fault and negligence complained of was the failure to observe the provisions of the Coal Mine Act.

The submissions on the ground relating to negligence were that the Plaintiffs suffered loss as a result of the Defendants' negligence. It was submitted that the Defendants were under a duty to take care in making

representations on which the Plaintiffs and other depositions relied on and induced them to continue their relationship with the Meridien Bank.

In responding to these submissions, Counsel for the first Defendant pointed out that ground one of appeal as argued in this court was an attempt to mislead the court because it was different from that which appears in the Memorandum of Appeal in which specific reference is made only to Chapter six of the Banking and Financial Services Act. Counsel further pointed out that at trial, the submission on behalf of the Defendant was that the Plaintiffs had failed to specify or give particulars of the specific duty that the Defendant had failed to perform. According to counsel for the Defendant, it was on the basis of this submission that the court held that it had not found any provision in chapter six of the Banking and Financial Services Act that placed a duty on the first Defendant. But in this court, Counsel made submissions based on different sections of the two Acts which were not an issue and not argued at trial. We take note of the observations of Mr. Ndhlovu. We agree that in submitting on breach of statutory duty, Counsel argued the case before us beyond what was pleaded.

Mr. Ndhlovu supported the findings of the trial court contending that, in their writ, statement of claim as well as in the evidence, the Plaintiffs did not give any particulars or specify duty or duties under Chapter six of the Act which the Defendant failed to perform. Counsel further submitted that the Bank of Zambia Act and the Banking and Financial Services Act do not oblige the Central Bank to take "all possible measures" when a situation like in the Meridien Bank arises. Mr. Ndhlovu argued that the two Acts are not intended to be an injunction directing the Central Bank to shut down banks without attempting to rescue them. For this argument he cited the case of ***Bank of Zambia Vs. Chibote Meat Corporation Ltd (2).*** He submitted that the alleged misrepresentations and the evidence of the Governor of the Bank of Zambia were measures to rescue the bank and safeguard the depositors including the Plaintiff.

On the ground of negligence, Counsel supported the findings of the trial court and submitted that because of the measures the Central Bank took the depositors of the closed bank including the Plaintiffs were paid their deposits. He concluded that the Plaintiffs suffered no damages or injuries.

We have carefully considered the submissions and the arguments on the grounds as summarized as well as the judgment of the trial court. Despite the size of the record and the detailed submissions, the question for determination is whether the liquidation of the Meridien Bank was caused by the Defendants' failure to perform any statutory duty or as a result of negligent misrepresentations resulting in the Plaintiffs'suffering the losses claimed. The answer to this question would settle the whole appeal in our view.

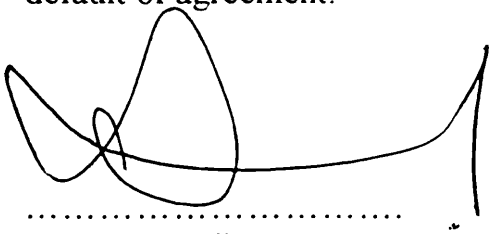
At this juncture, we wish to repeat that the position taken by Counsel for the Plaintiffs in this court in relation to the Banking and Financial Services Act shifted from that taken at trial. At trial, the Plaintiff contended, among other things, that the first Defendant had failed to take necessary measures under Chapter six of the Banking and Financial Services Act. But in this court, the Plaintiff attempted to persuade us to find that the Plaintiff breached other parts of the Banking and Financial Services Act as well as the Bank of Zambia Act. Indeed, ground one of appeal as argued is different from ground one of appeal in the Memorandum of appeal which alleged statutory breach of only chapter six of the Banking and Financial Services Act. Be that as it may, we have examined the evidence as testified

by the Governor of the Bank. We are satisfied that the Central Bank did take some measures to deal with a situation of the Meridien Bank. We agree with Counsel for the Defendant that the two Acts do not oblige the Central Bank to take all possible measures. Further, as we stated in the ***Chibote Meat Corporation Ltd(2)*** case, the provisions of the two Acts are not an injunction directing the Central Bank to shut down the banks and not to attempt to rescue them. The two Acts indeed do not require the Central Bank to take "all the measures possible". The learned trial judge was on firm ground in holding that the Plaintiffs did not plead a specific statutory duty that was breached by the Defendant.

In our view, the case for the Plaintiffs overlooked the salient facts not in dispute. These were that there was a run on the bank. The Central Bank took measures to rescue the Bank which included lending the Bank a substantial sum of the money. This did not help matters. Indeed, the so called "negligent misrepresentations," were in our opinion part of the rescue measures. We are not satisfied that on the facts of this case it can be contended that the Defendant made negligent misrepresentations.

In conclusion, we hold that the Defendant breached no statutory duty and made no negligent misrepresentations. This conclusion makes it unnecessary to consider the rest of the grounds and submissions on injuries, damages and interest which were infact dependent on whether there was breach of statutory duty or negligent misrepresentations.

In the result, the whole appeal fails and is dismissed with costs to be taxed in default of agreement.



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D.M. Lewanika,

DEPUTY CHIEF JUSTICE.

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E. L. Sakala,

SUPREME COURT JUDGE.

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I. C. Mambilima

SUPREME COURT JUDGE