

IN THE SUPREME COURT OF ZAMBIA

SCZ Judgment No. 17/2006

HOLDEN AT LUSAKA

Appeal No. 112/2004

(Civil Jurisdiction)

BETWEEN:

FIRST MECHANT BANK ZAMBIA LIMITED
ATTORNEY-GENERAL

1st Appellant

2nd Appellant

AND

AL SHAMS MATERIALS COMPANY LIMITED
JAYESH SHAH

1st Respondent

2nd Respondent

Coram: Sakala, CJ., Silomba and Mushabati JJS.

6th October 2005 and 28th March 2006

For the 1st Appellant: Mr. G.C. Mulenga, Legal Counsel, Bank of Zambia

For the 2nd Appellant: N/A

For the Respondents: Mr. C.K. Banda, SC., of C.K. Banda and Associates

Mr. V. Malambo, SC., of Malambo and Company

Mrs. A. Sharpe-Phiri of Messrs, Sharpe & Howard,
Legal Practitioners

J U D G M E N T

Sakala, CJ., delivered the judgment of the Court.

Cases referred to:

1. *Nestle V. National Westminster Bank plc* [1994] 1 ALL ER 118.

2. *Swindle and Others V. Harrison and another* [1997] 4 ALL ER 70

3. *Mwamba Kaenga V The Attorney-General and the Electoral Commission, SCZ Appeal No. 6 of 199.*

The delay in delivering this judgment is deeply regretted. The delay was caused by pressure of work, which resulted in an accumulation of pending judgments, which in turn led to misplacement of the record.

For convenience, the 1st appellant will be referred to as the 1st respondent and the 2nd appellant will be referred to as the 2nd respondent; while the 1st and 2nd respondents will be referred to as the 1st and the 2nd applicants, respectively, which designations they were in the Court below.

This is an appeal against the Ruling of the High Court ordering that the Bank of Zambia, as the liquidator of the First Merchant Bank, the 1st respondent, pays all the moneys remaining unpaid on the judgment sum to the applicants.

The brief facts of the case not in dispute were that the applicants' monies were, on 16th January, 1998, frozen following upon an order for seizure issued by the Drug Enforcement Commission directed at the 1st respondent bank. The matter was litigated in the High Court. The High Court found that the seizure of the monies was illegal. The applicants were consequently granted judgment in the sum of US\$1,013,973.91. There was an appeal to the Supreme Court. The Supreme Court affirmed the High Court judgment. The amount awarded was to be liquidated in preference to all other creditors. Subsequent to the Supreme Court judgment, the 1st respondent's liquidation manager was

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liquidating the judgment sum as and when he found the funds to do so. However, it turned out later that the liquidation manager had difficulties to settle the entire judgment sum as ordered.

The applicants applied to the High Court, by way of summons, for an order against the Liquidator to settle their fiduciary functions pursuant to **Section 104 3(a) of the Banking and Financial Services Act, Cap 387** of the Laws of Zambia.

The application was supported by two affidavits. The respondents, too, filed an affidavit in opposition.

The trial Judge examined the affidavit evidence and considered the arguments and the submissions on behalf of the parties. The Court noted that the question to resolve was whether there existed a fiduciary relationship between the 1st respondent Bank and the applicants. The Court pointed out that the most important fact, which ought to be taken into account, was that by the time the judgment debt arose, there was no 1st respondent Bank as the banker, but 1st respondent Bank in liquidation at the hands of the Bank of Zambia. The Court pointed out that in those circumstances, the proper question to resolve in the matter was whether the Bank of Zambia owed a fiduciary duty to the applicants.

The Court then looked for the definition of the term "**Fiduciary**". The Court found that the authorities considered emphasized that a fiduciary relationship in relation to a banker arises in circumstances beyond the relationship of banker and customer or creditor and depositor.

The Court found that the facts and the circumstances of this case clearly showed that by the time the Judgment was delivered in the case, the judgment sum consisted of funds which were previously deposited in the 1st respondent Bank by the applicants, but were, by operation of an unlawful order of the Drug Enforcement Commission, transferred into a suspense Account, which no longer belonged to the applicants. The Court further found that the unlawful order having been invalidated by Court, the funds continued in the suspense Account. Thus, neither the 1st respondent Bank nor the applicants had access to those funds until the 1st respondent Bank was liquidated by the Bank of Zambia, under the provisions of the **Banking and Financial Services Act**. The Court observed that in the circumstances of this case, the applicants' funds could not have vanished.

The Court was satisfied and found that when the Bank of Zambia placed the 1st respondent Bank in to liquidation, they acquired a special relationship with the applicants in relation to the funds in the suspense Account which were no longer in the 1st respondent Bank's Depositor's Account. The trial Judge pointed out that this relationship could not by any means be said to be anywhere near a relationship between a banker and a customer or a creditor and a depositor, but that the funds did not belong to anyone else other than the applicants. The Court found that the judgment in this case bound the Liquidator to return the money to the applicants in preference to all other creditors. According to the trial Judge, this order was in keeping with the relationship between the 1st respondent Bank (in Liquidation) and the applicants, arising out of the circumstances of the case.

The trial Judge concluded that the Bank of Zambia, as the Liquidator of the 1st respondent Bank (in Liquidation), does not only have a fiduciary duty but has also a statutory obligation under the Act to pay the applicants; that the main purpose of a fiduciary statutory duty placed on the Bank of Zambia is to protect the assets and funds which are not in the depositors Account of a Bank from being abused; and that this is precisely the reason the Bank of Zambia should acquire the trusteeship. The Court found that the application had merit and granted the order as prayed, ordering the Bank of Zambia to pay all the monies remaining unpaid by the Liquidation Manager to the applicants. The court also ordered costs to be paid to the applicants; but same to be taxed in default of agreement.

The respondents appealed against the whole Ruling. The appeal was based on three grounds; namely:

- (1) That the Learned Judge in the court below misdirected himself in law and fact when he held that the Bank of Zambia, as the Liquidator of First Merchant Bank (in liquidation), does not only have a fiduciary duty but also has a statutory obligation under the Act to pay the Applicants;
- (2) That the Learned Judge in the court below misdirected himself in law when he held that it was irrelevant to establish evidentiary a fiduciary relationship between the 1st Appellant and the Respondents; and

- (3) That the Learned Judge in the court below misdirected himself when he ignored public policy considerations and held that all monies remaining unpaid on the judgment sum by the Liquidation Manager to the Applicants should be paid by the Bank of Zambia.

The parties filed written heads of argument, supplemented by brief oral arguments, based on the three grounds of appeal.

On ground one, the summary of the written heads of argument is that the finding by the trial Judge that the Bank of Zambia did not only have a fiduciary duty but also a statutory duty to pay the applicants flew squarely in the face of the plainest wording of the **Banking and Financial Services Act**. **Section 3** of the Act was cited in support of this argument. It was submitted that the operative word of that section in relation to any suggestion of duty being imposed on the Bank of Zambia is "expressly". It was further submitted that nowhere in the **Banking and Financial Services Act** is "fiduciary duty" expressly mentioned as falling on the Bank of Zambia.

It was also contended in the written heads of argument on ground one that the only mention of a fiduciary duty is only in the context where it clearly suggests that it is the Bank in liquidation and not the Bank of Zambia that bears the duty, if any. **Section 104 (3) (a)** was cited in support of this contention. It was submitted that in purporting to interpret **Section 104 (3) (a) of the Banking and Financial Services Act**, the trial Judge did not apply the Literal Rule of interpretation and that there was no justification for the departure. It was further submitted that since neither the High Court in the earlier proceedings nor the Supreme Court in the subsequent appeal found the

existence of a fiduciary relationship between the Bank of Zambia and the applicants, it was far too late in the day to allege that such a relationship existed. It was also submitted that the applicants were seeking a back door avenue of enforcing a judgment against a party in a matter that was effectively *res judicata*.

The short oral submission, on behalf of the respondents on ground one by Mr. Mulenga, was that the fiduciary relationship was on the Bank in liquidation. He repeated his written submissions based on **Section 3 of the Banking and Financial Services Act**.

The written arguments on ground two were that the trial Judge did not make a finding that there existed a fiduciary duty between the 1st respondent Bank and the applicants; that unless there was a positive finding of the existence of a fiduciary duty between a bank in liquidation and a customer, there can be no question of such a duty arising independently and crystallizing upon the Bank of Zambia for performance; that the Bank of Zambia merely steps into the shoes of a liquidated bank and is only liable, if at all and subject to realizations, to the same extent as that to which a liquidated bank would be; and that there can be no question of the Bank of Zambia expending its personal resources to make good the fiduciary account of a distressed institution. It was submitted that if the lower Court's Judgment was to be upheld, the manifest injustice would have been implied as there was no evidence that a situation had been created, as between 1st respondent Bank and the applicants of trustee and beneficiary; and that in the absence of such evidence, it was not open to the trial Judge to make a finding of the existence of a fiduciary relationship between the Bank of Zambia and the applicants.

In the alternative, it was submitted on ground two that if this Court was to be of the view that there was a fiduciary duty between the Bank of Zambia and the applicants, then it was not the breach of any such duty that led to the applicants' loss; that the applicants' loss, if any, occurred at the time of the freezing order by the Drug Enforcement Commission or indeed at the point of liquidation; that the liquidation was not caused by the Bank of Zambia; and that the intervention of the Bank of Zambia could not be the cause of liquidation, but the result of the insolvent status of the supervised institution.

It was further submitted that since the insolvency of the 1st respondent Bank is not a fact attributable to the Bank of Zambia, it followed that no consequential liabilities should be attributable to the Bank of Zambia, even under some fiction of a 'statutory fiduciary.' The cases of **Nestle V. National Westminster Bank plc⁽¹⁾** and **Swindle and Others V. Harrison and another⁽²⁾** were cited in support of this further submission. It was contended that the position of the applicants here was that of a judgment creditor entitled to priority payment out of the assets of a liquidated bank, but not out of the assets of the **Regulator**.

In the short oral submissions, it was pointed out that it was not irrelevant to lead evidence on fiduciary relationship. Counsel also repeated the written submissions on ground two.

In ground three, the written heads of argument were a repeat of those in ground two. It was, however, pointed out that the applicants' loss was occasioned actually by their placement of funds in a doomed institution. It was argued that going by the authority of **Mwamba Kaenga V The Attorney -**

General and the Electoral Commission ⁽³⁾ that if this Court should take the view that there was in fact a breach of statutory duty by the Bank of Zambia, such breach must not necessarily sound in damages and that this was a proper case for not awarding damages to the applicants on the grounds of public policy. It was submitted that it would be contrary to public policy that the Central Bank should be held personally liable for failure to settle every purported fiduciary account; and that to hold the Bank of Zambia liable in these circumstances would set a precedent so dangerous that it would lead to the collapse of the Central Bank itself, a situation that Parliament could certainly never have intended. It was finally submitted on ground three that public policy considerations alone should therefore persuade this Court that liability, in these circumstances, could never properly be ascribed to the Bank of Zambia.

The written response on behalf of the applicants was premised by a preamble that the basis of the appeal appeared to be an attempt to have a second bite at the cherry by asking this court whether the 1st respondent Bank had a fiduciary duty to the applicants. It was pointed out that the decision of this court in its judgment of 2nd November, 2000 had resolved the question of the relationship between the 1st respondent Bank and the applicants when it found that the status of the applicants had changed from a mere depositor when their account was frozen; that prior to the date of seizure of the applicants account, it was undisputed that the relationship was that of customer and Banker, but after the seizure, the relationship changed as the monies were placed in a suspense account and that the 1st respondent Bank held the money as a trustee and as such, the 1st respondent owed the applicants a fiduciary duty.

In direct response to ground one, it was submitted that the trial Judge was on firm ground when he held that the Bank of Zambia, as the liquidator of the 1st respondent Bank (in liquidation) does not only have a fiduciary relationship, but also has a statutory obligation under the Act to pay the applicants. It was pointed out that the provisions of the **Banking and Financial Services Act** are clear and unambiguous; and that the law does impose a statutory obligation on the Bank of Zambia after a decision to liquidate a Bank to return all assets and property held by the bank to the owner. It was pointed out that as conceded by the respondents' advocates in their submissions in the Court below, the law is very clear that the Bank of Zambia merely steps into the shoes of the Bank in liquidation in order to settle whatever fiduciary obligations it owed to the customers. It was further submitted that the trial Judge was, therefore, in order to rule that the Bank of Zambia had a statutory obligation to the applicants after resolving the issue of the fiduciary relationship between the 1st respondent Bank and the applicants. It was submitted that a Trustee who breaches his statutory duty under the Act is personally liable to make good for the failure to comply with the provisions of the Act.

The short response to ground two was that the learned trial Judge was on firm ground when he found that it was irrelevant to lead evidence by way of witnesses to establish why the fiduciary obligation was not complied with.

On ground three, it was submitted that the argument was an after thought, as the respondents did not raise the issue in the court below. In his oral response, Mr. Malambo invited the Court to frown upon conducting running litigation in the circumstances of this case. He argued that orders of

the Court are to be enforced in the High Court. He pointed out that **Section 104(3) of Cap 387** expressly places a duty on the liquidator and names the Bank of Zambia as the institution that must hand back all assets and property held by a Bank in liquidation. He submitted that grounds one and two must fail.

Further on ground three, Mr. Malambo pointed out that Counsel for the respondents wants to be heard that it is against public policy to enforce orders of the Court. He submitted that what amounts to public policy is that when the highest Court in the land expresses itself and orders performance of certain action, all present must oblige. He submitted that to expressly ignore this Court's order is certainly not in the interest of public policy. He submitted that ground three should also fail.

In concluding his oral submissions, Mr. Malambo informed the Court that the Bank of Zambia has continued to pay other people while the order of the Court was that the applicants must be treated preferentially. He urged the Court to dismiss the appeal with costs.

We have reviewed and considered the arguments and submissions by both learned Counsel in great detail in order to narrow down the issue for determination as raised by the grounds of appeal. A critical examination of the three grounds of appeal clearly shows to us that they raise only one question for determination; namely: whether the Bank of Zambia, as the Liquidator of a bank (in liquidation), has a fiduciary and also a statutory duty under the **Banking and Financial Services Act** to pay the applicants in the instant case.

At the outset, we must agree with Mr. Malambo that this appeal was founded on an attempt to have a second bite at the cherry by again asking this Court whether the Bank of Zambia had a fiduciary duty to the applicants.

In its judgment of 2nd November 2000, this Court said:

"It is common cause that the 1st and 2nd Respondents account was frozen by the Drug Enforcement Commission. It is also common cause that consequent upon the freezing of the count the said Respondent's monies were put in a suspense account. It is also common cause that later the appellant went into receivership and eventual liquidation"

Later in that judgment we said:

"when the account was frozen and the money put in the suspense account the money in that account was no longer part of the general depositors' account and for this reason it could not be used either by the bank or the respondents that money did not form part of the liquidation process ... Since it did not form part of the liquidation process, the learned judge was right in disregarding the provisions of Section 107 of the Act."

From the foregoing, we agree and we are satisfied that the issue of the status of the applicants and their relationship with the Bank of Zambia had been settled by this court in its judgment of 2nd November 2000. This appeal is-- definitely an attempt to have a second bit at the cherry. Above all, this appeal

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flies in the face of the Bank of Zambia's own action of having already made some payments to the applicants.

In addition to all this, is **Section 104 (3) of the Banking and Financial Services Act, Cap 87 of the Laws of Zambia**. The Section provides as follows:

"104 (3) After the decision to liquidate, wind up or dissolve a bank or financial institution, the Bank of Zambia shall –

(a) take any necessary steps to terminate all fiduciary functions performed by the bank or financial institution, return to each owner all assets and property held by the bank or financial institution as a fiduciary in relation to the owner, and settle its fiduciary account; ..."

We agree that these provisions are clear and unambiguous. The law imposes a statutory obligation on the Bank of Zambia, after the decision to liquidate a bank, to return all assets and property held by a bank to the owner. In their own submissions in the Court below, Counsel for the respondent then conceded in these words **"The law is very clear that Bank of Zambia merely steps in the shoes of a Bank in liquidation in order to settle whatever Fiduciary obligations if owed to its customers."**

We do not appreciate the complaint of the respondents in this appeal, when they acknowledge that the Bank of Zambia steps in the shoes of a bank in liquidation.

The trial Judge cannot now be criticized for holding that the Bank of Zambia had a statutory obligation to the applicants.

Our short answers to the grounds of appeal are that the trial Judge was on firm ground when he held that the Bank of Zambia, as the Liquidator of the 1st respondent (in liquidation), does not only have a fiduciary duty but has also a statutory obligation to pay the applicants; and truly, it was irrelevant at that stage, in the face of our judgment of 2nd November 2000, to establish, evidentiary, a fiduciary relationship between the 1st respondent Bank and the applicants. We have considered the case of Nestle on ground one, the only case whose report was available in our Library. In that case, the duty of the trustee towards the benefits claim was not in dispute but the Bank failed to invest prudently. The Court among, other things, held that the bank's failure to diversify the equities was not sufficient to entitle the plaintiff a remedy. The plaintiff had to prove that the failure caused the loss. In the instant case, failure to return to the applicants their money caused a loss. Grounds one and two are therefore dismissed.

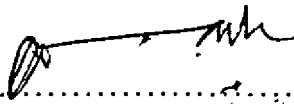
On ground three, we are baffled with the submissions. It was suggested that the applicants' loss was occasioned by placement of funds in a doomed institution and that if this Court should take the view that there was in fact a breach of a statutory duty by the Bank of Zambia, such breach must not necessarily sound in damages and that this was not a proper case for awarding damages to the applicants on the grounds of public policy. All we can say is that if the 1st respondent Bank was a doomed institution, then the Bank of Zambia did not perform its supervisory rôle. However, all the issues argued in ground three, were not raised in the Court below. The case of **Kaenga**⁽³⁾ relied

upon in support of arguments on ground three cannot also assist the respondents because damages in that case were not awarded on the basis of the underlying principle of law that where a law provides for a remedy for its breach, such a breach does not give rise to an action for damages. The applicants in the instant case were not claiming for any damages for any breach; but for money remaining unpaid on a judgment sum. Ground three must also fail

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



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E.L. Sakala
CHIEF JUSTICE



.....
S.S. Silomba
SUPREME COURT JUDGE



.....
C.S. Mushabati
SUPREME COURT JUDGE