

AL SHAMS GLOBAL BVI LIMITED
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF COURT OF ZIMBABWE
DUBE JP
HARARE, 27 June 2022, 26 January & 20 October 2023

Civil Trial

L. Uriri with T Zhuwarara, for the plaintiff
S. Hashiti with P Nyeperai, for the Reserve Bank of Zimbabwe

DUBE JP

Introduction

1. This case concerns the liability of the Reserve Bank of Zimbabwe, [the RBZ], following the failure of Interfin Bank Limited [Interfin], a bank under its supervision. The subject of liability of financial supervisors charged with supervision of a failed bank poses intricate legal issues, particularly because, their exercise of public power raises both delictual and administrative liability issues. Owing to a different liability regime concerning public bodies, liability of central banks poses problems for application of ordinary principles of delictual liability. The statutory provisions in central bank legislation which make provision for their immunity complicates the whole matrix, safeguards them from liability and the full force of the general liability regime, thereby calling for a different approach to liability and one onerous to triumph in claims against central banks.

Background Facts

2. The plaintiff alleged that the RBZ, being aware that Interfin was operating with a capital deficit of over US \$38 million and having failed to satisfy the RBZ's conditions for a license, failed to ensure that it was adequately capitalized and fit to operate. The plaintiff accused the RBZ of failing to take steps to address the situation. It submitted that the RBZ failed in its duty to adequately supervise a weak bank and take corrective action in

breach of its statutory obligations and hence breached the provisions of s48 of the Banking Act which obliged it to act.

3. The plaintiff maintained that the RBZ's reckless failure to act caused it to suffer huge losses having lent to Interfin US\$3 million which was not paid back. Its sole witness, Mr. Jayesh Shah narrated how bankers' acceptances (BAs), it purchased from Interfin on a buy back basis were not honoured. It averred that it only discovered when it instituted proceedings against the liquidator of Interfin that it had been operating with a capital deficit. It submitted that the RBZ ought to have foreseen and by implication, did foresee that its breach of statutory duty would culminate in direct loss to the plaintiff and that were it not for the RBZ's negligence, it would not have suffered damages. The plaintiff claims US\$19,5 million in damages for grossly negligent breach of statutory duty, allegedly incurred as a result of the Central Bank's negligence in performing its statutory duties as spelt out under the Reserve Bank Act [Chapter 22:15], the Act, as read together with the Banking Act, [Chapter 24:20] and banking regulations.
4. According to the RBZ, it is not privy to the arrangements made between the plaintiff and Interfin regarding the purchase of BA's, was not a party to the transactions and is not responsible for having led the plaintiff to conclude such transactions with Interfin. The RBZ's witness Mr Madamombe, told the court that the RBZ was aware that Interfin was operating with a capital deficit and took various remedial actions which did not yield the desired results. The RBZ refuted that it acted negligently, insisting that it acted reasonably to address the situation. It refuted that the plaintiff suffered any damages as claimed or at all arguing that if any loss arose out of the plaintiff's arrangement with Interfin, it cannot be held liable for either contractual or delictual damages arising therefrom as it did not do anything negligently as alleged in performing its duties.
5. The RBZ submitted *in limine*, that the claim is improperly before the court as the plaintiff failed to plead the section on which its *causa* is predicated. In addition, that it is incompetent for the plaintiff to bring a delictual claim against the RBZ as it did not owe it a duty of care and is immune from prosecution. It contended in addition that the plaintiff has no entitlement to bring a purely economic claim and has not exhausted the alternative remedies available to it contending that its recourse lies with the liquidator, the Deposit Protection Corporation and a litany of other remedies.
6. In response, the plaintiff insisted that its claim is properly premised, submitting that the RBZ was in terms of s45(1)(a) of the Banking Act enjoined to ensure that Interfin

complied with the law and was a viable entity which could safely interact with members of the public which it failed to do. It maintained that there was a breach of statutory duty which is actionable and that once negligence is pleaded by a claimant, the statutory immunity is not effectual and only a factual finding that the RBZ acted in good faith and without negligence will activate the immunity.

7. The court was requested to resolve two main issues as follows:

- “a) Whether the RBZ was negligent as alleged.
- b) Whether the plaintiff suffered the alleged damages as a result of the RBZ’s alleged negligence.”

The issue of the RBZ’s exercise of discretion and duty of care is central to these proceedings.

Failure to plead the statutory provisions relied on

The general position at law is that a case stands or falls on its pleadings with the result that where a litigant fails to plead his case fully, he cannot later on seek to rely on unpleaded facts. Where a breach of a statutory provisions is relied on as a cause of action or defence, the statute and section relied on must be clearly formulated in pleadings specifying the provisions relied on. There are exceptions. A litigant who fails to specify statutory provisions relied on in pleadings must ensure that his cause of action or defence is formulated clearly in such a way that the facts as pleaded support the conclusion that the statute or provisions relied on justify the conclusion that the provisions apply thereby rendering it unnecessary to refer specifically to the statute or section relied on. He is entitled to plead the benefit of the statutory provisions at any stage of proceedings and is not barred from relying on them. The plaintiff need not refer specifically to the sections relied on. All that is required is that the plaintiff’s case be clearly formulated.

8. *Amlers Precedents of Pleadings, 7th Edition by LTC Harms*, on p 367 gives guidance on how to plead breach of a statutory duty as follows:

“A party, who wishes to rely on a statutory provision as a cause of action or as a defence, must formulate the relevant pleading in clear terms with reference to the provision relied on.

Yannakou v Apollo Club [1974] 2 All SA 129 (A), 1974 (1) SA 614(A)

Bekker v Oos-Vrystaat Kaap Kooperasie Bpk [2000] 3 All SA 301(A)

Dali v Government of RSA [2000] All SA 206 (A).

It is not necessary to refer specifically to the statute or the section relied on, provided that the case is formulated clearly. Put differently, it is sufficient that the facts

pleaded justify the conclusion the provisions of the statute apply. *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* [1997]1 SA 644(A),1997 (1) SA 710 (A).’’

In *Koos v Runstenburg Local Municipality and Anor* (1240/15) [2017] ZANWHC 56 (3 August 2017), a litigant referred to municipal legislation in broad terms and failed to give details of the specific legislation and statutory duty relied on. The court held that the statutory

duty and particulars of the breach alleged should have been given and that the other party was as a result unable to plead to the particulars of claim. The measure is whether the case as formulated is clear enough to enable the other party to plead his case given the shortcomings.

9. The issue is whether the case was formulated clearly despite the shortcomings. *In casu*, the

plaintiff specified the statutory duty relied on by making reference to s 6(1)(e) of the Act for the proposition that the RBZ has a statutory duty to supervise all banking institutions. The particulars of the breach are particularized in para 12 of the declaration. Its bone of contention is that the RBZ was negligent in that it allowed Interfin to operate with a capital

deficit alleging that it failed to take action as required by s48 of the Banking Act. Whilst the

plaintiff did not lay out in detail the provisions of s48 which specify the course open to the RBZ when faced with a weak bank, the pleadings are clear that the cause of action relied on

is breach of statutory duty as provided for in the legal framework referred to. Fairly detailed

particularity of the statutory duty was given and the case formulated and pleaded in such a way that the other party is left in no doubt regarding the nature of the statutory duty alleged,

the statutes and sections relied on, enabling it to answer to the allegations. The facts as pleaded justify the conclusion that the provisions of the statutes relied on apply. This case is distinguishable from *Local Authorities Pension Fund v Nyakwawa & Ors* 2015 (1) ZLR

103 (H), where there were two possible statutes referred to in pleadings rendering the other

party unable to answer the case brought against it. Although there are two statutes cited

here, they are inter- related and the statutes relied on are not in doubt as they are named.

What is duty of care

10. Whether a State functionary is liable for damages arising out of negligent performance of statutory duty depends on the intention of the legislature and interpretation of the provisions of the statute concerned, see *Tele Matrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73; [2006] ALL SA 6 (SCA). In order to succeed, a plaintiff must show that the RBZ owed him a duty of care. Generally, the approach followed in determining wrongfulness, is to consider whether the conduct of the RBZ can be said to be “wanting in the application of that care, in the exercise of his duty, which the Act envisaged” , see *Da Silva and Anor v Coutinho* 1971 (3) SA 123 (A). The concept of duty of care entails a legal obligation to take care of another. A person said to have a duty of care is required to avoid any acts or omissions that are likely to cause harm to another, failure of which he is liable for damages for the loss or injury caused to the injured party resulting from the breach of duty of care. Unless there is a duty of care owed to the person harmed by one’s carelessness, there can be no claim.
11. Duty of care is an essential of negligence. Negligence is defined as a failure, judged objectively, to exercise a degree of care expected, see *Local Authorities Pension Fund v Nyakwawa(supra)*; *R.G McKerron, The Law of Delict*, 7th ed pp 25-26 where negligence is defined as follows:

“It involves a duty of care and a breach of that duty. To found a cause of action there must have been a duty of care owed to the plaintiff that the RBZ ought reasonably to have guarded against”.
12. For all intents and purposes, a claim based on negligence is a delictual claim. G. Feltoe, in *A Guide To The Zimbabwean Law of Delict*, 2nd Edition, defines a delict as a duty imposed by law arising from an unlawful, wrongful, blameworthy act or omission causing damage or injury to a person or his property and includes, a “breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach.” A breach of statutory duty resulting in a failure to meet a duty imposed by statute constitutes unreasonable conduct and is *prima facie* evidence of negligence giving rise to delictual liability.

13. A litigant who relies on breach of statutory duty as a cause of action must show that an interpretation of the statute concerned gives a right of action and the plaintiff is a person for whose benefit the duty was imposed. He has an obligation to show that a duty of care can be implied from the wording of a statute. The harm or damages suffered must be shown to be the kind contemplated by the statute and the conduct complained of must constitute a breach of statutory duty. A *nexus* must be shown to exist between the conduct of the defendant and the alleged breach. See *Amlers at p365*; *G. Feltoe, A Guide to The Zimbabwean Law of Delict*, 2nd ed, p74, where the author summarizes the requirements of breach of statutory duty and states thus:

“The breach of statutory duty allows a person affected thereby to sue if:
he has suffered damage as a result of such breach;
he is one of the persons for whose benefit the duty was imposed;
the harm caused was within the mischief contemplated by the statute;
the statute has not expressly or impliedly excluded the ordinary civil remedy; and
the breach of the statute was the proximate cause of the loss.”

14. In *Steenkamp NO v Provincial Tender Board of Eastern Cape* 2007 (3) SA 121(CC), the court stated the requirements of a claim of breach of statutory duty against a State functionary as follows:

“... and courts in other common law jurisdictions readily recognize factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party, whether there are alternative remedies such as an interdict, review or appeal, whether the object of the statutory scheme is mainly to protect individuals or advance public good, whether the statutory power conferred grants the public functionary a discretion in decision-making, whether an imposition of liability for damages is likely to have a “chilling effect on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness, foreseeability of harm, although ordinarily a standard of negligence, is not relevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages”

15. Charles Proctor in an article titled “*The liability of financial regulators for bank failures*”, published in *Amicus Curiae*, Issue 52 March/April 2004, deals with liability of financial regulators and states as follows:

“On general principles, the regulator could in theory incur tortious liability in negligence to a depositor/investor who suffers loss as a result of placing funds with a supervised entity. The claimant would however have to establish that there exists (i) a duty of care owed by the regulator to a specific person or class of persons (including the claimant), (ii) a breach of that duty and (iii) actual loss suffered by the claimant as a result of that breach of duty. Alternatively, the claimant might seek to establish the

tort of breach of statutory duty. He would have to demonstrate that (i) there was a statutory duty to supervise the institution, (ii) the duty was imposed for the benefit of an identifiable class of persons, (iii) the claimant is a member of that class and (iv) there has been a breach of the duty.”

16. Duty of care in the context of a central bank liability entails a statutory responsibility to ensure that banks supervised by it are compliant and carry out their operations in a manner that does not cause harm to persons or class of persons for whose benefit the duty was imposed. Nevertheless, central banks must be allowed to carry out their statutory functions, and be protected from baseless claims. There must be a balance between the competing interests of the central bank and those to whom it is said to owe a statutory duty.
17. A litigant who contends that the legislature intended to impose an obligation bears the onus of showing that a duty can be implied from the wording of the statute concerned. Where a plaintiff makes allegations of negligence in a claim for breach of statutory duty, he must prove the existence of a duty of care, the issue of the existence of negligence being a factual enquiry determined taking into account the circumstances giving rise to each case. Crucial to note is that the existence of a statutory duty to act does not necessarily translate into a duty of care giving rise to delictual liability. There must be a statutory duty of care implied from the provisions of the statute and a breach of that duty. Liability for breach of statutory duty will arise where a statute has positively enjoined the RBZ to do something.
18. Not all statutes providing for statutory duties create a cause of action. While some statutes will do so expressly, others do not. Where a statute is silent on whether a breach of statutory duty gives a right of action and an entitlement to damages, the courts must decide. In doing so, courts are guided by the wording of the statute. Where permissive words are used in a statutory provision creating a duty, they do not give rise to a duty of care and no delictual liability arises. This position was articulated in *Van Buuren v Minister of Transport* 2000(1) ZLR 292, a case concerning negligent performance of statutory duty instituted following an incident involving an aero plane that fell into a hole when taxiing across a grass patch at an aerodrome. The plaintiff had argued that the Ministry of Transport had been negligent in failing to comply with its statutory duty to maintain the aerodrome in a safe condition giving rise to a duty of care. The court held as follows:

“... although the Minister was empowered by s 6 of the Aviation Act [Chapter 13:03] to establish and maintain aerodromes, the words used in the legislation were permissive. Where the legislature has not positively enjoined that something shall be done but has merely satisfied itself with permitting something to be done, no duty to act can be implied. In addition, that a litigant who contends that the legislature intended to impose an obligation bears the onus of showing that a duty can be implied from the wording of the statute. The power reposed in the Minister by the Act was discretionary. He could not be directed to exercise it. It therefore did not create a duty giving rise to delictual liability. His liability could only arise if the exercise of his statutory power caused injury to another, and the power had been exercised negligently.”

19. The court held further that the Minister cannot be directed to exercise his powers and made it crisply clear that no automatic duty of care arises in respect of acts that fall within the ambit of statutory discretion. With a permissive provision, a duty to act giving rise to liability can only arise where the exercise of statutory power caused injury to another and where the power conferred was exercised irrationally or negligently. Absent duty of care, no negligence arises.

Do the statutes in question create a duty of care giving rise to delictual liability

20. As a public entity and State functionary, the Central Bank’s key responsibility is embraced in section 9 of the Constitution which demands “... efficiency, competence, accountability, transparency, personal integrity and financial probity...”, and is also reiterated in s3 of the Administrative Justice Act, [Chap 10:28] which requires an administrative authority to act lawfully, reasonably and in a fair manner. The responsibility of the RBZ is recorded in the Reserve Bank Act and Banking Act and Regulations. Section 6(1) (e) of the Act reposes on the RBZ the statutory duty to supervise banking institutions. It has the responsibility for formulation and implementation of monetary policy of Zimbabwe. This is a huge responsibility placed on the shoulders of the RBZ which must be carried out as envisaged.
21. In similar vein, s 45 (1) (a) of the Banking Act gives the RBZ the responsibility to supervise banks and outlines its supervisory powers as follows:

“45 Responsibilities of Reserve Bank

- (1) Subject to this Act, the Reserve Bank shall be responsible for
- (a) continuously monitoring and supervising banking institutions and associates of banking institutions to ensure that they comply with this Act; and [Paragraph amended by Act 16 of 2004]
 - (b) conducting investigations into any particular banking institution or class of such institutions, where the Reserve Bank considers such an investigation necessary for the

purpose of preventing, investigating or detecting a contravention of this Act or any other law; (c)

[Paragraph repealed by Act 16 of 2004]’

22. The RBZ has the duty to continuously monitor and supervise banking institutions to ensure compliance with the law in terms of s45(1)(a) of the Banking Act. It has the responsibility to consider whether or not a bank must trade. Where a banking institution has been found to have contravened the provisions of the Banking Act or conditions of registration, the RBZ may take action in terms of s 48 of the Banking Act which stipulates as follows:

“48 Action that may be taken by Reserve Bank where banking institution found to have

contravened Act or condition of registration, etc

(1) If, following a report by a supervisor and, where appropriate, after considering any representations made by the institution concerned in terms of subsection (2), the Reserve Bank is satisfied that a banking institution has contravened any term or condition of its registration or any provision of this Act or any direction, requirement or order made under this Act, the Reserve Bank may, subject to this section, do any one or more of the following—

(a) issue a warning to the institution;

(b) require the institution to appoint a person who, in the Reserve Bank’s opinion, is qualified to advise the institution on the proper conduct of its business;

(c) issue a written instruction to the institution to undertake remedial action specified in the instruction;

(d) impose a monetary penalty not exceeding the equivalent of a fine of level ten a day for each day that the contravention has continued;

[Paragraph amended by Act 22 of 2001]

(e) instruct the institution to suspend or remove any of its directors, officers or employees from his duties;

(f) direct the institution to suspend all or any of its banking business;

(g) appoint a supervisor to monitor the institution’s affairs;

(h) convene a meeting of the shareholders or other owners of the institution to discuss the remedial measures to be taken;

(i) subject to Part X, place the institution under the management of a curator;

(j) recommend to the Registrar

(i) the imposition of any term or condition on the institution’s continued registration, or the deletion of any such term or condition; or

(ii) the cancellation of the institution’s registration.’’

23. Read alone, the provisions of s48 of the Banking Act are permissive in nature and the exercise of power by the RBZ and its officials discretionary. The wording of s48 does not positively enjoin the RBZ to do something. Use of the word “may” in the phrase “may, subject to this section, do any one or more of the following...” must be taken in its ordinary and plain grammatical meaning. The word “may” is permissive and speaks not only to a discretionary exercise of the power as such but to its manner of exercise. Section 48 allows the RBZ to employ any one or more of the many alternatives provided for, is

highly discretionary , giving the RBZ a lot of latitude in deciding what course to take in the decision-making process.

24. There is no obligation on the part of the RBZ to take “any action”, the legislature being content with merely permitting it to take any of the measures provided for in its discretion. The intention of the legislature being to permit the RBZ to take any one or more of the listed actions, in no way obliges or directs the RBZ to take the actions specified nor does it positively enjoin that something shall be done. The exercise of statutory power reposed on the RBZ being discretionary, no statutory liability giving rise to a duty of care can be implied from a reading of the provisions of s48 of the Act, which do not create a duty giving rise to delictual liability unless it is shown that the RBZ owed it a duty of care and exercised its power in bad faith and negligently giving rise to injury to the plaintiff.

Was the statutory duty imposed for the benefit of an identifiable class of persons

25. The plaintiff submitted that it is a member of the public and is one of the persons for whose benefit the statutory duty was imposed. Statutory provisions sometimes explicitly or impliedly articulate the duties it creates, the standards applicable to the discharge of the statutory duty and sometimes identify the persons to whom statutory duty is owed. A duty of care is not definitely implied from the provisions of s 63A as it does not expressly pinpoint the object meant to be protected in the event of harm. There is no mention of who may bring a claim against the RBZ preferring to put it in general terms. There is no mention of specific groups, institutions or individuals who can hold the RBZ liable for “anything done” by it. Accordingly, no statutory duty of care was imposed for the benefit of a particular identifiable class of persons , section of the public or individuals.
26. The overriding purpose of the Act as read with the provisions of the Banking Act and regulations is to ensure financial stability and ensure a sound financial system in the market. It must protect the financial integrity and stability of the banking system and will take into account not merely the interests of a depositor or investor in banking institutions but other dynamics such as the possibility of improving the financial position of banking institutions and the necessity to preserve confidence in the financial markets. This it does for the benefit of the general public interest as a whole , in order to benefit the public at large and not the commercial or individual interests of the many different players in the financial and banking sector.

27. The world over, the aim and object of bank supervision has been redefined resulting in there being a shift from depositor protection to safeguarding soundness, confidence and stability in the financial markets. The approach is that claims by depositors have the ability to divert attention of bank supervisors from their core business of ensuring financial stability and hinder effective exercise of the supervisor's powers. See *M Andenas / D Fairgrieve, to supervise or to Compensate? A Comparative Study of State Liability for Negligent Banking Supervision, Judicial Review in International Perspective* (2000) 190-338, Donal Nolan, *The Liability of Financial Supervisory Authorities, De Gruyter*, jcti2013 ;4(2)-222 for this view.
28. When the RBZ exercises its powers and in considering whether to place an ailing bank under curatorship or revoke its license or take any other action , it does so to protect the general public interest. No separate, specific or targeted duty of care is owed to depositors or investors in banks under supervision as a class as they are not specifically mentioned. The protection of depositors and investors in banking institutions becomes a secondary objective achievable through sound, management of the sector. The RBZ does not owe a duty of care to individual depositors or investors of Interfin thereby limiting liability of the RBZ.
29. Depositors and investors who lose investments when a bank under supervision goes down, are not the class of persons for whose protection the Act was promulgated. The plaintiff is not one of the persons for whose benefit the statutory duty was imposed by the statutes concerned. It cannot be inferred from s63A of the Act or s48 of the Act that the RBZ as a supervisor of banks owes a specific duty of care or private law duty of care to the plaintiff in the exercise of its statutory powers. There is no sufficient legal proximity between the RBZ and the plaintiff. There can be no duty of care as the statutory duty or power on which the negligence claim is premised is exercisable to benefit public interest and not for a particular or individual class of persons.
30. Absent a specific and targeted duty of care and no "close and direct" proximity between the RBZ and the plaintiff as a depositor or investor in a third party, there cannot be a causal link between the alleged breach of duty and loss allegedly suffered. The relationship between the RBZ and the plaintiff as a depositor or investor is not such that it would be proper to impose a duty of care on the RBZ. In *Patz v Greene* 1907 TS 427, Solomon J laid down the rule that where the Legislature simply wants to protect the

interests of a particular group of persons, if the plaintiff is part of that group, he does not have to prove that he has suffered damage as it will be presumed that he suffered damage. Where the legislature simply wants to protect the general public interest, he must prove that he suffered damage. This test is used to determine *locus standi* of a claimant, there still being a need to prove that a plaintiff has suffered damages. See also *Salisbury Bottling Ltd & Ors v Central African Bottling Ltd* 1958 R&N 17; *Tobacco Finance Ltd v Zimnat Insurance* 1982(1) ZLR 47 *Da Silva v Coutinho* 1971 (3) SA 123a ; *Van Buuren v Minister of Transport* (*supra*). In the face of an immunity clause as in this case, the requirement to prove harm suffered is obviated unless it is shown that a duty of care exists and the RBZ has no immunity.

The liability standard used

31. This observation leads to the provisions of s63A of the Act which sets out the standard to be employed in determining liability of the RBZ. Section 63A stipulates as follows:

“63A Immunity of Bank, etc.
No claim shall lie against the State, the Bank, the board, the Governor, a Deputy Governor or any employee of the Bank for anything done in good faith and without negligence under the powers conferred by this Act”

32. Section 63A is an immunity clause and employs the “anything done in good faith and without negligence” standard of liability to determine liability of the RBZ to limit its liability and protects the RBZ and named officials against litigation for “anything done in good faith and without negligence”. Immunity provisions protect supervisory authorities from liability for actions taken and, in some instances, omissions made by officers of the regulatory authorities and persons acting on their behalf in the process of discharging their duties. Immunity provisions in central bank legislation are common and have the effect of limiting liability of central banks thereby negating the duty of care of central banks based on policy.

33. Immunity provisions safeguard and equip central banks with independence in the process of supervision of banks enabling them to carry out bank supervisory responsibilities, duties and make policy decisions without unwarranted influence or threat of being sued. A central bank should not be distracted from its core business of maintaining a stable financial system of banking. In its performance of regulatory powers, a central bank must be able to balance its independence, the interests of the weak bank, those of depositors or investors, the public interest and the stability of the banking system. Whilst the law

guarantees a central bank's independence, it must be accountable for its actions and thus the limited protection provided for.

34. New Zealand has a clause couched in similar fashion to s63A under s146 of the Reserve Bank of New Zealand Act, which entitles the regulator to immunity so long as it has acted “ ... in good faith and without negligence ...”. Courts in New Zealand have opined that the effect of this clause is to negate the duty of care of statutory bodies based on policy only if the regulator has acted in good faith and without negligence. In *Oceania Aviation Limited v Director of Civil Aviation* CA 163/00 (February 2001), a decision of the Supreme Court of New Zealand, the court rejected the notion that public or statutory functionaries are capable of creating a private law duty of care and held that the relevant legislation provides for immunity for the regulator, provided that it has acted with reasonable care, see also *Fleming v Securities Commission* [1995] 2 NZLR 514. Most jurisdictions have not found support for the existence of a duty of care by regulators unless there is a finding of bad faith, an ulterior motive or negligence. In Australia , no legal action can be taken against the regulator “ in respect of anything done or omitted to be done in good faith and without negligence in connection with the exercise of powers or the performance of functions ...” under the applicable legislation (section 70A of the Banking Act 1959, as amended)”.
 35. The same interpretation ought to be given to the provisions of s 63A which are similarly worded. An interpretation of s63A must promote the purpose and objective of the provision. The major objective of the Act being to repose on the RBZ regulatory powers to supervise banks and promote financial stability and confidence in the financial market in Zimbabwe. The immunity clause is based on policy, the legislature having realised that when the RBZ acts in its capacity as the regulator of banks, it has no means of protecting itself for liability for mistakes made in the exercise of power conferred upon it. In order to aid and protect the regulator and its officials from litigation and give it some form of immunity, the legislature included s63A in the Act, to give it some form of protection provided that “anything done” by it was done “in good faith and without negligence” in the process of bank supervision.
 36. The immunity envisaged will only kick in where the things done are done in good faith and without negligence. Where the RBZ in its discretion, decides to take any action in terms of s48, it will not be liable for its conduct and there will be immunity where it is shown that anything done by it, was done in “good faith and without negligence”.

Because of the qualification that anything done by the RBZ must be done “in good faith and without negligence”, a plaintiff must show the existence of a duty of care, the onus being on it to show that the regulatory authority has no entitlement to benefit from the immunity clause. The provisions of s63A confer immunity on the RBZ provided that the regulator acted reasonably in which event, the duty of care of the RBZ is negated based on policy.

37. Only if the RBZ is found to have acted in good faith and without negligence will it be entitled to immunity and this so regardless of errors in judgment, mistake of fact or errors in fact or law made by it. This may justify the conclusion that it acted in good faith and is the reason why the RBZ may have an entitlement to immunity. There can only be a duty of care where the RBZ acts in bad faith and with negligence. To successfully invoke the provisions of s63A, the RBZ in a suit, must show that it acted “in good faith and without negligence” failure of which it becomes liable for its conduct. This is a departure from the general rule that he who asserts must prove. The provisions of s63A are outweighed where it is shown that the central bank acted in bad faith and with negligence giving rise to injury, based on the reasoning that the RBZ must exercise its supervisory powers for the public good, not for some ulterior or improper motive and without negligence. A finding of bad faith and negligence gives rise to a duty of care. The qualification that anything done must be shown to having been done “in good faith and without negligence” implies that the immunity provisions are not absolute and do not offer blanket immunity from all liability and may be outweighed where the RBZ is shown to have acted in bad faith and with negligence resulting in the plaintiff suffering damages.

38. The standard is laid down by statute and goes beyond the ordinary common law or general principles governing delictual liability. Determination of duty of care liability is to be considered in the context of duty of care of financial supervisors and is denoted in negligence sounding terms and implies a duty to act with the care expected of a bank supervisor. Section 63A focuses on three things being , things done, the *bona fides* of the things done and the requirement that anything done be without negligence. Good faith defences rule out liability where it is shown that the RBZ’s motives are good, notwithstanding that there may be an error in fact or law, or some default in the manner in which conduct is performed.

39. Good faith defences are capable of defeating or limiting liability of government functionaries or as in this case central banks, regarding “anything done” in pursuance of their duty as prescribed in terms of the enabling Act. The liability of the RBZ arising from performance of its statutory duty in terms of the s63A of the Act does not extend to “things not done”, thereby shielding the central bank from the full force of the general principles of liability. The negligence envisaged in terms of s63A stems from the actions of the RBZ and does not extend to omissions. The requirement that the action taken by the RBZ must be done without negligence entails that the good faith defence applies only to the duties expressly provided for in the Act. There is no provision for negligent liability arising out of omissions as s63A zeros in on positive acts causing harm, thus the manner of exercise of the power by the RBZ in a case where it has taken action in the employment of its supervisory powers. Section 63A is grounded on commissions not omissions of the RBZ. If the legislature had intended that the provision extend to omissions of the RBZ, it would have specifically stated so as with the provisions of the Australian Central Bank legislation. No duty of care arises with respect of omissions of the RBZ.

40. *Iain Field, in "Good Faith Defences in Tort Law" [2016] Sydney Law Rv 7; (2016) 38(2) Sydney Law Review 147*, says the following of good faith defences:

“tort liability is constrained in many contexts by a species of statutory protection that exempts certain classes of defendants from civil liability provided that, in the relevant circumstances, he or she acted in ‘good faith’ (or ‘bona fide’, ‘honestly’, ‘without malice’, and so forth)’”.

41. Proctor relies on *Little v Commonwealth* [1947]HCA 24; (1947)75 CLR 94 (11 July1947), a decision of the High Court of Australia, and states thus:

“The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted *bona fide* in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.”

42. With good faith, the focus is on the mental state of the RBZ and its officials. It must show that it exercised its powers for a legitimate purpose. A thing done in good faith may be defined as one done honestly, fairly and with noble intentions. The RBZ must perform its supervisory duties with the required degree of care, generally, “in good faith and without

negligence”. Conversely, bad faith exists where the RBZ discharged its duties dishonestly, fraudulently intentionally, with malice, arbitrarily or capriciously entitling a court to make a finding of duty of care. It must be shown that it acted outside the confines of the law or with some dishonest or ulterior motive . Where there is a desire to injure or deceive, a finding of a duty of care will be made.

43. With the negligence component part of the standard, the consideration is the existence of a duty of care. The mischief sought to be addressed by the provisions of s63A is abuse of office. The legislature did not create an automatic right of recourse in delict unless perversity and dereliction is proven. A litigant who alleges that it was owed a duty of care by the central bank and makes allegations of bad faith and negligence must prove these allegations. Whether the RBZ acted in good faith and without negligence entitling it to claim immunity and negation of a duty of care is both a legal and factual issue. Allegations of bad faith and negligence must be proved in order to show that the RBZ owed a duty of care. All components of the “in good faith and without negligence” defence must be satisfied. The particulars of bad faith and negligence must be correctly alleged and be apparent on the face of the plaintiff’s pleadings. Where a plaintiff pleads bad faith and negligence, that is sufficient to trigger the court’s jurisdiction thereby inviting the court to explore the allegations.
44. Theoretically, based on the provisions of s63A, the RBZ may incur delictual liability based on a negligence claim brought by a depositor or investor in a failed bank. In reality however, this a tall order to surmount. Case law authorities tell the difficulty of bringing a claim against financial regulators. In *Yuen Kun-Yeu v AG of Hong Kong* (1988) AC 175 (PC), depositors lost money after a finance company went into liquidation and sued the regulator for breach of statutory duty. The court dismissed the claim on the basis that they were not owed a specific duty of care in the exercise of statutory powers. The court took the position that there was insufficient proximity between the regulator and prospective investors for a duty of care to arise and held that the granting of a licence could not amount to an official “seal of approval” and could not form a basis for a claim by depositors and was no warranty that all deposit-taking companies were sound and creditworthy. The court held that the system in place served the interests of the public at large and was not intended to give individual rights and further that the power to refuse to cancel a registration was quasi-judicial in character and that the claimants could not seek to impose liability for deliberate acts of a third party.

45. This case was followed in *Davis v Radcliffe* [1990] 1 WLR 82I (PC), involving a collapsed bank which resulted in depositors suing the regulator on the basis that it owed a duty to adequately supervise the failed bank. The court held that the functions of the regulator were to be exercised in the general public interest, and that no separate or specific duty of care was owed to the depositors as a class. See also *Pyrenees Shire Council v Day* (1998) 192 *Commonwealth Law Reports* (CLR) 330, at 347. The court held in addition, that the depositors were seeking to render the regulator liable for losses flowing from the default of a third party. The court was not inclined to impose such an extensive duty of care regard being had to the fact that it had only secondary control over the conduct of the failed bank. The courts in Australia have followed the decision in *Cooper v Hobart*, 2001, SCC 79, a Canadian case where the court held that the failure to exercise power to revoke a trading licence does not give rise to liability in negligence to a person who lost funds in an investment. In the New Zealand case of *Oceania Aviation Limited v Director of Civil Aviation*, the court held that the duty of care which a regulator may owe to individual participants is negated. Clearly, the focus in determining immunity of a financial regulator is on the existence duty of care.

Liability for acts of a third party

46. Immunity is not the only barrier to a claim against a central bank, there being other factors capable of negating the existence of a duty of care for the RBZ. It has to be considered that the plaintiff seeks to place liability for loss stemming from the conduct of Interfin and its officials. The collapse of the bank was primarily caused by mismanagement by Interfin and its officials who include directors, officers and shareholders who were responsible for running it. There is a legal framework to ensure internal governance as the first line of control. The Banking Act has strict guidelines which provide a self-policing framework to govern the management of banking institutions. The responsibility of the regulator is simply to superintend the operations of the banking institution, the primary function and responsibility to ensure that the bank is sound and runs in compliance with the law lies on management of a banking institution. The result is that the question of a regulator or public body's duty and standard of care becomes complicated given the domestic responsibilities that lie on individual institutions. The framework is not simplistic and has pronouncements on who

should do what to ensure that banking institutions are soundly administered. The legislature imposed these domestic duties for a reason.

47. The plaintiff seeks to impose liability on the RBZ for deliberate acts and failure of a legally responsible third party. There are policy reflections that influence considerations of the duty of care of the RBZ to depositors and investors in a third party, the banks and have the effect of limiting and negating duty of care. Paramount is that the RBZ had secondary control over the conduct and activities of the business of Interfin. The plaintiff entered into the contractual arrangements involving the BAs with Interfin and the RBZ was not in the picture. There is no banker and client relationship, no contractual or close and direct relationship between the plaintiff and the RBZ, the connection being that of a depositor/investor in a third party. There is no existence of a special relationship between the parties. The RBZ cannot be held responsible towards an individual investor or depositor with whom it had no contractual relationship in the absence of an assumption of responsibility in favour of Interfin. The RBZ's function being quasi-judicial and the legal framework available investing it with wide discretionary powers over what course of action to take when it comes to formulation of government financial policy, I am wary of substituting my own decisions on policy issues for those of the RBZ as this would have the undesirable effect of usurping the discretionary powers of the central bank on policy issues..

Competence of a pure economic loss claim

48. There are difficulties that lie in imposing a duty of care where the loss claimed arises from pure economic loss. The plaintiff's claim is for diminution of value of its investment, is not loss causally connected to nor does it flow from personal injury or damage to property of the plaintiff but is a claim for pure economic loss. The general rule is that in the absence of a special relationship between the parties, a plaintiff has an entitlement to recover only monetary losses which are consequent to damage to person or property and not "pure economic loss". This type of loss is not generally claimable in negligence claims. In *Steenkamp*, the court refused to impute delictual liability on an organ of State for pure economic loss and held that conduct giving rise to pure economic loss and the negligent causation of pure economic loss is not *prima facie* wrongful with the result that the loss lies where it falls even in a case where it is negligently caused unless it can be shown that the conduct giving rise to the loss was unlawful. No basis has been laid for holding a financial supervisory authority liable for negligence where the loss

complained of is purely economic loss suffered and in the absence of an assumption of responsibility on the part of the RBZ. The loss lies where it falls.

Are damages contemplated by the provisions of the Act.

49. Bearing in mind that the purpose of financial supervision as provided for is not to protect individual depositors or investors as a class, coupled with the immunity clause, there can be no obligation on the part of the RBZ to repair any damage the plaintiff may have suffered. Nonetheless, there is no express mention that the RBZ be held liable for its conduct from a reading of s48 of the Banking Act and therefore no such legislative intent can be inferred. The absence of a remedy implies that the provisions refer to administrative liability as no reference is made to civil liability. Neither ss48 nor 63A state that if sued, the RBZ will be liable under criminal, administrative or civil law nor does it state the sanctions to be imposed in the case of breach of statutory duty. Noteworthy is that s63A is silent on whether an aggrieved party can institute proceedings against the RBZ for breach of statutory duty and claim damages, the question of liability being resolved by an examination of s48 of the Banking Act. The damages suffered, if any, are not the kind that the legal framework available was intended to prevent.

Availability of alternative remedies.

50. The other factor that has a bearing on wrongfulness is the availability of alternative remedies. The plaintiff has failed to show that there is no other possible remedy available to it. The plaintiff as a depositor or investor has a remedy in terms of the Deposit Protection Corporation Act,[Chapter 24:29], which provides for the establishment of a deposit protection fund for compensation of depositors where a financial institution becomes insolvent. The plaintiff is able to recover its investments wholly or in part in terms of s35 of the Deposit Protection Corporation Act which stipulates as follows:

“35 Compensation payable to depositors on insolvency of contributory institution

Subject to this Act, if a contributory institution becomes insolvent, the Corporation shall as soon as practicable compensate depositors for any direct loss they may have suffered through the institution’s insolvency in respect of their protected deposits with that institution”

51. The plaintiff should be concentrating on recovering whatever it may have lost from the liquidator of Interfin in terms of s35 of Deposit Protection Corporation Act. It has an

entitlement to file a claim with the Deposit Protection Corporation and has chosen instead to pursue instead the central authority perceiving that the RBZ has deeper pockets. It has the option to pursue criminal proceedings against Interfin and hold it criminally accountable for its own misdeeds. Its directors, contributories and officers are accountable in terms of ss277 and 318 of the Criminal Law Codification Reform Act [Chapter 9:23] which penalizes fraudulent or other criminally offensive conduct on the part of a corporate body or its directors, employees or agents. Where a company has been wound up, its present and past members can be held accountable for its debts and liabilities and in terms of s197 of the Companies and Other Business Entities Act, [Chapter 24:31] for any loss, damages or costs sustained as a result of reckless, fraudulent, grossly negligent conduct and breach of fiduciary duty in the conduct of business by Interfin. These measures have the effect of turning focus from the RBZ onto persons directly involved in the running of the business and causing loss. It is startling that the plaintiff has chosen to pursue the RBZ in the absence of the persons directly involved in the running of Interfin, making it difficult for the court to scrutinize the conduct of the RBZ in their absence.

Liability of the RBZ for omissions

52. I have great difficulty with the plaintiff's pleadings which allege sins of omission. There are allegations that the RBZ, took no action, failed to ensure that Interfin was adequately capitalized and fit to operate, failed to take more decisive action to protect depositors against Interfin and should have intervened at an earlier stage or taken other appropriate sanctions such as revoking Interfin's license and shut down Interfin or sanctioned it instead of placing it under curatorship which action was taken late and did not yield any desired results because the RBZ delayed in acting. In addition, that the series of corrective measures "agreed on" were not implemented.
53. These allegations are misplaced and do not fall within the ambit of s63A which does not impose negligent liability for omissions but focuses on positive acts resulting in harm to the plaintiff. It is not sufficient to allege that there was a failure to take any action or that there was a careless performance of statutory duty. The focus ought to be on things done and not omissions of the RBZ, the enquiry being whether these things were done in good faith and without negligence. Instead of focusing on the remedial actions taken by the

RBZ, the plaintiff chose to concentrate on omissions instead. The immunity of the RBZ remains intact as regards omissions.

54. The standard to be employed entails an examination of all its elements which entails an enquiry into the existence or otherwise of good faith and negligence and not negligence alone. The court was only asked to enquire into the existence of negligence. In its declaration, the plaintiff makes no direct allegation of bad faith. Because of the statutory standard of liability to be employed, the plaintiff needed to make averments of both negligence and bad faith apparent on the face of its summons and declaration. It was required to plead bad faith coupled with allegations of negligence because the requirement for good faith is inextricably linked to negligence. The plaintiff seemed not to be alive to the import of the provisions of s63A at the time of pleading.
55. **Disposition:** In light of the foregoing, the plaintiff's claim must fail. As a consequence, no need arises for the court to venture into the finer details of the merits of this case. Accordingly, the plaintiff's case is dismissed with costs.

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