

**FIRST MERCHANT BANK LIMITED (IN LIQUIDATION) v AL SHAMS
BUILDING MATERIALS COMPANY LIMITED JAYESH SHAN AND THE
ATTORNEY-GENERAL**

Supreme Court
Chaila, Muzyamba and Chibesakunda, JJS
6th September, 2000 and 2nd November, 2000
(SCZ Judgment No. 37 of 2000)

Flynote

Company Law – Bank in Liquidation – Unlawful seizure of account – Effect

Headnote

This appeal is against a High Court decision that the first and second appellants ceased to be depositors upon seizure of their money by the third respondent's agent and that they do rank as preferential creditors in the appellants liquidation.

Held:

- (i) When the account was frozen and the money put in the suspense account, the money in the 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.
- (ii) The seizure was unlawful and illegal; that the respondent's status as depositors changed with the wrongful seizure of their money and that they were entitled to be paid their money in preference to other creditors.

Case referred to:

1. *Space Investments Limited v. Canadian Imperial Bank of Commerce and Trust Company (Bahamas) Limited* [1986] 3 ALL ER 75

A. M. Wood of A. M. Wood and Company for the appellant

C. K. Banda, SC, of Chifumu Banda and Associates appearing with *N Sharpe-Phiri (Mrs) of Mopani Chambers* for the respondent

Judgment

MUZYAMBA, JS, delivered the judgment of the court.

This is an appeal against a High Court decision that the 1st and 2nd respondents ceased to be depositors upon seizure of their money by the 3rd respondent's agents and that they do rank as preferential creditors in the appellant's liquidation.

The brief facts of this case were that the appellant was a registered Commercial Bank under the Banking and Financial services Act, Cap 387, of the Laws of Zambia hereinafter referred to as the Act and the 1st respondent opened and operated an account with the appellant. The 2nd respondent was a partner in the 1st respondent and a signatory to the 3rd respondent's account with the appellant. On 9th January 1998, the 1st respondent's account with the appellant showed a credit balance of US \$1,013,973.91. On 16th January 1998, the 3rd respondent's agents, the Drug Enforcement Commission seized and froze the 1st respondent's account. From that date the 1st respondent's monies were held in a suspense account and no withdrawals were allowed. Later, the appellant went into receivership and eventually liquidation and in the meantime the 1st and 2nd respondents challenged the seizure and freezing of their account. The court held that the seizure was unlawful and illegal and that the respondents status as depositors changed with the wrongful seizure of their money and that they be paid their money in preference to other creditors.

On behalf of the appellant Mr Wood argued the two grounds of appeal that were filed as one and we also propose to treat them as one. He argued that at the time of the seizure the appellant was already insolvent and so there was nothing to seize. That at law in any liquidation only secured creditors are paid first and unsecured creditors' claims rank *pari passu* and not in priority to other creditors claims. That the respondents were unsecured creditors who should be treated as ordinary creditors. That the court below therefore, erred in giving them priority over other creditors. Moreover, that Section 107 of the Act sets out the order of priority in a bank liquidation. That the learned trial Judge therefore erred in disregarding the provisions of this section. He further argued that the respondents status as depositors did not change when their account was frozen. It remained the same. He cited the case of *Space Investments Limited v Canadian Imperial Bank Of Commerce And Trust Co. (Bahamas) Limited* (1) in support of his arguments that the respondents had no priority over other creditors.

On behalf of the respondents, Mr Banda argued that the learned trial Judge was right in holding that the respondents status changed with wrongful seizure of their money because from the date of seizure they could not operate their account. They were not allowed to make withdrawals from the account or to deal with the account in anyway. Nor was the appellant allowed to use the money. That this is so was quite clear from the evidence of the appellant's witness, DW1, Mr Arthur Nelson Ndhlovu, Chartered Accountant who said that upon seizure the respondents' monies were put in a suspense account and no activities or transactions were allowed on the account and the account was not earning any interest. That the account was controlled by the Drug Enforcement Commission. That since their status changed the respondents were no longer ordinary creditors but preferential creditors.

We have examined the evidence on record, the judgment of the court below and the arguments by both learned counsel. 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 account, the said respondents' monies were put in a suspense account. It is also common cause that later the appellant went into receivership and eventual liquidation. Section 107(1) of the Act provides: "107(1) In any compulsory liquidation of a bank there shall be paid in priority to all other debts in the following order:

- (a) Necessary and reasonable expenses incurred by the Bank of Zambia in the application of the provisions of this part;
- (b) Taxes and rates due, whether payable to the Government or to a local authority;
- (c) Wages and salaries of officers and employees of the bank for the three-month period preceding the effective date of seizure, within the limit of an amount not exceeding one hundred thousand Kwacha per person or such high amount as may be prescribed by regulation;
- (d) Fees and assessments due to the Bank of Zambia;
- (e) Deposits up to an amount not exceeding five hundred thousand Kwacha per depositor or such higher amount as may be prescribed by regulation;
- (f) Other deposits; or
- (g) Other claims against the bank in such order of priority as the Court may determine upon application by the Bank of Zambia. And in the case of Space Investments Limited cited above, it was held by Lord Templeman:

"A customer who deposits money with a bank authorizes the bank to use that money for the benefit of the bank in any manner the bank pleases. The customer does not acquire any interest in or charge over any asset of the bank or over all the assets of the bank. The deposit account is an acknowledgement and record by the bank of the amount from time to time deposited and withdrawn and of the interest earned. The customer acquires a chose in action, namely the right on request to payment by the bank of the whole or any part of aggregate amount of principal and interest which has been credited to the account. If the bank becomes insolvent the customer can only prove in the liquidation of the bank as unsecured from the amount which was or ought to have been credited to the account at the date when the bank went into liquidation."

We do agree with the decision but then the principle laid there does not apply to the case presently before us because 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. The money remained in the suspense account until the court declared the seizure of the money unlawful and illegal. Before then, the appellant went into receivership and liquidation but that money did not form part of the liquidation process. There is no evidence that the money vanished. Since it did not form part of the liquidation process, the learned trial Judge was right in disregarding the provisions of Section 107 of the Act.

As the money remained in the suspense account to the date of the judgment in the court below, the proper order would have been for the release of the money to the respondents. Since there is no cross appeal, we will not vary the order. We will simply dismiss the appeal and it is so dismissed with costs to be taxed in default of agreement.

Appeal dismissed

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