IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 157 OF 2018

FBME BANK TANZANIA LTD (Under Liquidation) ..... APPELLANT

VERSUS

CRISTAL RESORT LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)
(Sepetu, J.)

dated the 19th day of April, 2016
in
Civil Case No. 36 of 2015

.....

JUDGMENT OF THE COURT

10th December,2019 & 3rd January, 2020

NDIKA, J.A.:

Cristal Resort Limited, a limited liability company incorporated in Zanzibar (the respondent), successfully sued FBME Bank Tanzania Limited (FBME bank), a commercial bank incorporated in the Mainland Tanzania with a certificate of compliance in Zanzibar. In the suit which was instituted on 15th May, 2015 in the High Court of Zanzibar vide Civil Case No. 36 of 2015, the respondent sought various reliefs. Being aggrieved by the judgment and decree of the High Court (Sepetu, J.), the appellant (FBME Bank Tanzania Limited – Under Liquidation) has now appealed to this Court.

The background to this case, reduced to its essentials, is as follows: FBME bank maintained at its branch in Zanzibar bank accounts for the respondent. Sometime in 2014 a dispute arose between the bank and the respondent, the latter claiming that the former had unduly refused its request for a change of signatories to its accounts. It was further alleged that the bank, without any cause, persistently refused to release bank statements to the respondent. On the basis of these and other acts, the respondent alleged that the bank was in breach of the law and contractual duties arising from the banker-customer contractual relationship existing between them. Thus the respondent prayed as per the plaint for judgment and decree against FBME bank as follows:

> *"(a) An order for specific performance of the banking contract.*
>
> *(b) An order that the Defendant [FBME bank] should pay the Plaintiff [respondent] a total of TZS. 143,000,000.00 ....*
>
> *(c) An order that the Defendant should pay general damages to be assessed by the court of not less than TZS. 200,000,000.00 for breach of contract which has caused hardship to the Plaintiff company.*

(d) An order that the Defendant should refund any loss, penalties and interest from TRA, ZRB and ZSSF payable by the Plaintiff.

(e) An order that the Defendants should refund and indemnify any future loss to the Plaintiff directly caused by the Defendant's action due to the fact that the Defendant has not provided requisite bank statements; has not allowed the Plaintiff to control the receivable (revenue incoming) and the fact that the Plaintiff is also not able to defend itself in a current tax audit.

(f) An order that the Defendant should pay punitive damages to be assessed by the court, arising from the fact that the Plaintiff had fulfilled all central bank requirements for operating her bank account with the Defendant.

(g) An order that the Defendant should pay general damages to be assessed by the court of not less than TZS. 120,000,000.00 for illegal interference with the Plaintiff's business operations ....

(h) An order that the Defendant should pay general damages to be assessed by the court of not less than TZS. 120,000,000.00 for harassment and denying her enjoyment of her accounts.

(i) An order for costs."

In response, FBME bank filed its written statement of defence (the WSD) on 8th July, 2015 denying all the respondent's claims. However, the WSD was met with a preliminary objection raised by the respondent vide its reply to the WSD filed on 28th July, 2015 on three grounds: **one**, that the said WSD was not properly signed as per the requirements of Order XXXIII, rule 1 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD); **two**, that the verification in the WSD was bad for being made by an unauthorized person and without any declaration that he was conversant with the facts of the case; and **three**, that the verification in the WSD was bad for not giving the grounds for belief on the information and advice received upon which the averments were made.

Having heard and considered the opposing submissions of the learned counsel for the parties, Sepetu, J., in his ruling dated 11th March, 2016, sustained the preliminary objection on all points. He thus held consequently that the "defendant failed to comply with the requirements of the law" and "therefore there is no written statement of defence before the court." As a result, he set down the case for pronouncement of a default judgment. Then and there, on 19th April, 2016, he entered default judgment for the respondent granting all the reliefs prayed for in the plaint with certain slight adjustments that need not be reproduced herein.

By its memorandum of appeal lodged on 24th August, 2018, the appellant raised four grounds of appeal as follows:

> *"1. That the trial court erred in law and fact in holding that the appellant's written statement of defence was not properly signed and verified by the authorized person.*
>
> *2. That the trial court erred in law and fact for entering default judgment against the appellant.*
>
> *3. That the trial court erred in law and fact for entering default judgment without requiring respondent's proof on the alleged claims against the appellant or subjecting the claim to scrutiny.*
>
> *4. That the decision of the trial court is otherwise bad in law."*

When the appeal came up for hearing before us on 10th December, 2019, Mr. Abubakar Mrisha, learned Senior State Attorney, assisted by Ms. Grace Lupondo, learned State Attorney, appeared for the appellant whereas Mr. Salim Hassan Bakari Mnkonje, learned advocate, represented the respondent.

Ahead of submitting on the grounds of appeal, Mr. Mrisha sought leave under Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009, which we granted, for him to argue an additional ground of appeal. The said ground contends that:

"the trial court erred in law and in fact for entertaining a suit without having jurisdiction in contravention of section 9 of the Bankruptcy Act, Cap. 25 RE 2002."

In his oral argument, Mr. Mrisha only canvassed the above new ground and opted to abandon all the four grounds originally raised in the Memorandum of Appeal.

Mr. Mrisha began his argument by submitting that it is on record that the respondent's suit against FBME bank was lodged on 15th May, 2015 when the bank had ceased to operate on its own but under a Statutory Manager duly appointed on 24th July, 2014. Referring to Paragraph 10 of the Plaint in which the respondent averred that it once wrote "an official complaint to the Statutory Manager of the Defendant, in order to inform him about the lack of cooperation from the Defendant", Mr. Mrisha contended that the respondent was aware at the time of instituting the suit that FMBE bank had been placed by the Bank of Tanzania (the BoT) as the central bank under statutory management with Mr. Lawrence N. Mafuru serving as the Statutory Manager.

According to Mr. Mrisha, the legal consequence of the BoT's takeover of possession of FBME bank and its placement under statutory management was that no suit could be lawfully mounted against the bank without leave of the

court being sought and obtained in terms of section 9 (1) of the Bankruptcy Act, Cap. 25 RE 2002 (the BA). The said provisions stipulate that:

> *"On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act,* ***no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose."*** [Emphasis added]

According to Mr. Mrisha, the absence of leave of the court was exacerbated by the respondent's omission to implead the Statutory Manager as the defendant in the suit. It was his submission that the suit had to be directed against the Statutory Manager, not FBME bank as such. To shore up his propositions, he referred to four unreported decisions including the following two decisions of the Court: The first decision was **Christina Mrimi v. Coca Cola Kwanza Bottles Ltd**, Civil Appeal No. 112 of 2008 (unreported) for the holding that a party against whom a legal proceeding is instituted must be named correctly.

The second decision was that of **Mathias Eusebi Soka (As a personal representative of the Late Eusebi M. Soka) v. The Registered Trustees of Mama Clementina Foundation and Two Others**, Civil Appeal No. 40 of 2001 (unreported). It relates to the application of section 9 (1) of the BA. In that case the Court held that once a public corporation has been declared a specified corporation, by dint of section 43 (1) of the Public Corporations Act, 1992 (the PPA), as amended by Act No. 16 of 1993, the Presidential Parastatal Sector Reform Commission (PSRC) becomes the official receiver and that section 9 (1) of the BA becomes applicable meaning that no action or other legal proceedings can be commenced against such corporation without leave of the court.

In conclusion, Mr. Mrisha submitted that since the proceedings before the High Court against FBME bank were initiated without leave of the court being sought and obtained under section 9 (1) of the BA when the bank had already been placed under statutory management, the said proceedings were illegal. He thus urged us to allow the appeal with costs and proceed to quash and set aside the High Court's judgment and decree.

Replying, Mr. Mnkonje sturdily opposed the appeal. Although he acknowledged that the suit in the High Court was lodged when FBME bank was already under statutory management in terms of section 56 of the Banking and

Financial Institutions Act, 2006 (the BFIA) with the said Mr. Mafuru serving as the Statutory Manager, he denied that it was at that point under liquidation. He boldly submitted that the BA was not operative in Tanzania Zanzibar, meaning that the requirement under section 9 (1) of the BA for leave to sue was inapplicable to the respondent's suit lodged in the High Court of Zanzibar. As regards the authorities cited by his learned friend, Mr. Mnkonje argued that the case of **Christina Mrimi** (supra) did not represent the correct position because its holding was vacated by the Court upon review. On the case of **Mathias Eusebi Soka** (supra), Mr. Mnkonje distinguished it on the reason that it concerned a specified public corporation. He thus implored us to dismiss the appeal with costs.

Rejoining, Mr. Mrisha maintained that the authorities he cited were aptly applicable to the matter at hand. He added that even though FBME bank was a private bank, it was under the BoT's supervision and that the provisions of section 9 (1) of the BA were necessarily applicable. While acknowledging his learned friend's submission that the taking of possession of FBME bank was made pursuant of section 56 of the BFIA, he argued that the Statutory Manager appointed by the BoT to manage the bank acted as an official receiver contemplated by section 9 (1) of the BA.

We have carefully examined the record of appeal and considered the rival submissions advanced by the learned counsel for the parties and the authorities relied upon. The main issue for our determination is whether the respondent's action in the High Court was incompetent for want of leave of the court required under section 9 (1) of the BA.

From the contending submissions of the learned counsel for the parties, it is common ground that the respondent's suit against FBME bank was lodged on 15th May, 2015. By then, FBME bank had ceased to operate independently as the BoT had taken its possession, with Mr. Mafuru having been duly appointed the Statutory Manager on 24th July, 2014. Based on the respondent's own averment in Paragraph 10 of the Plaint, which Mr. Mrisha referred to in his argument, it is irrefutable that the respondent was aware at the time of instituting the action that FMBE bank was under statutory management.

As stated earlier, Mr. Mrisha confidently argued, on the authority of **Mathias Eusebi Soka** (supra), that the BoT's seizure of FBME bank automatically triggered the application of section 9 (1) of the BA, imposing the requirement for leave of the court before any legal action or proceeding could be commenced. With respect, we do not agree. At first, we endorse Mr. Mnkonje's submission that our decision in **Mathias Eusebi Soka** (supra) is plainly distinguishable; it does not carry the appellant's case forward. In that

case, the Court held that the National Insurance Corporation of Tanzania, being a specified corporation under the Public Corporations (Specified Corporations Declaration) Order, 1998, could not be sued without leave of the court under section 9 (1) of the BA. That position was predicated on section 43 (1) of the PPA, as amended by Act No. 16 of 1993, triggering the application of section 9 (1) of the BA once a public corporation is declared a specified corporation with the PSRC becoming the official receiver. In the instant case, FBME bank is not a specified corporation. In addition, we do not see why its seizure by the BoT should bring up the application of the BA. Mr. Mrisha cited not express provisions, akin to section 43 (1) of the PPA, bringing up the application of the provisions of the BA. Moreover, we agree with Mr. Mnkonje that the entirety of the BA is inapplicable because it has no pan-territorial application. This law, not being a law on a Union Matter as stipulated by Article 64 (4) (b) and (c) of the Constitution of the United Republic of Tanzania of 1977 (the Constitution), could only have applied in Zanzibar if, in terms of Article 64 (4) (a) of the Constitution, it had expressly stated that it was applicable to both parts of the United Republic. But that law contains no such express provision meaning that it applies to the Mainland Tanzania only.

The foregoing apart, we think that the correct position of the law in this matter can be found by examining closely the relevant provisions of the BFIA

under which the BoT took possession of FBME bank and placed it under statutory management. To be sure, this law, which came into operation on 1st July, 2006 vide Government Notice No. 85 of 2006, applies to both parts of the United Republic of Tanzania as stipulated by section 2 (1) thereof.

It is common cause that the BoT seized FBME bank and placed it under statutory management pursuant to its powers under section 56 of the BFIA. Whatever may be the reasons for the seizure, what is relevant in the instant case are the legal consequences of that action which are expressly stated under section 57 (1) of the BFIA as follows:

> *"57. –(1) Where the Bank takes possession of any bank or financial institution in accordance with the provisions of this Act–*
>
> *(a) any term, whether statutory, contractual or otherwise, on the expiration of which a claim or right of the relevant bank or financial institution would expire or be extinguished, shall be extended by six months from the date of seizure;*
>
> *(b) no attachment or lien, except a lien created by the Bank in carrying out authority of the Bank under this Act or the Bank of Tanzania Act, 2006 shall attach to any property or assets of the bank or financial*

institution concerned so long as possession by the Bank continues;

(c) ***no action or proceeding may be commenced by creditors of the bank or financial institution under the provisions of the Companies Act, relating to impending or actual insolvency or under any other law regarding insolvency or bankruptcy;***

(d) any transfer of asset of the relevant bank or financial institution made after or in contemplation of its insolvency or the seizure with intent to effect a preference shall be voidable by the Bank; and

(e) any attachment or lien except for a lien existing six months prior to the seizure of the relevant bank or financial institution may be vacated by the Bank." [Emphasis added]

The above provisions are plainly unambiguous. That being so, we have to go by the ordinary and natural meaning of the words used – see **Republic v. Mwesige Geofrey and Another**, Criminal Appeal No. 355 of 2014 (unreported). Of relevance to the instant matter is Paragraph (c) above, which, by its plain meaning, bars commencement of legal actions or proceedings, under the Companies Act or any other law on insolvency or bankruptcy, by creditors of any seized bank or financial institution. No doubt that these

provisions are aimed at obviating unnecessary insolvency or bankruptcy proceedings against a seized bank at the behest of the creditors. But, they do not insulate such seized bank from other kinds of legal actions or proceedings founded on tort or breach of contract, as was the case in the instant appeal.

We wish to stress that, in essence, a seizure of a bank or financial institution necessarily entails, in terms of section 58 (1) of the BFIA, the taking over by the BoT of full and exclusive power of management and control of the affairs of the relevant bank or financial institution including all rights, titles, powers, and privileges of the bank or financial institution. Thus, in terms of subsection (2) of section 58, the BoT enjoys enormous powers to:

> *"(a) continue or discontinue operations as a bank or financial institution, notwithstanding that its licence has been revoked;*
>
> *(b) stop or limit the payment of its obligations;*
>
> *(c) employ any necessary staff;*
>
> *(d) discontinue employment of any staff of a bank or financial institution;*
>
> *(e) execute any instrument in the name of the relevant bank or financial institution;*

(f) ***initiate, defend and conduct in its name any action or proceeding to which the bank or financial institution may be a party;***

(g) merge the bank or financial institution with another bank or financial institution;

(h) transfer any asset or liability of the bank or financial institution, including assets and liabilities held in trust, without any approval, assignment or consent with respect to such transfer; and

(i) reorganize or liquidate the bank or financial institution in accordance with the provisions of this Act."

That the BoT enjoys the power in terms of Paragraph (f) above to "initiate, **defend and conduct in its name any action or proceeding to which the bank or financial institution may be a party**" fortifies our view that the bar under section 57 (1) (c) of the BFIA to commencement of legal actions against a seized bank is not absolute but one restricted to specified bankruptcy or insolvency proceedings. We think the power to "defend and conduct in its name any action or proceeding" includes authority for defending against existing or impending legal actions other than the barred creditor-initiated bankruptcy or insolvency proceedings.

In the upshot of the matter, we hold that the sole ground of appeal canvassed by the appellant is unmerited as we are unpersuaded that the action in the High Court could not be lawfully commenced without leave of the court. Consequently, we dismiss the appeal with costs.

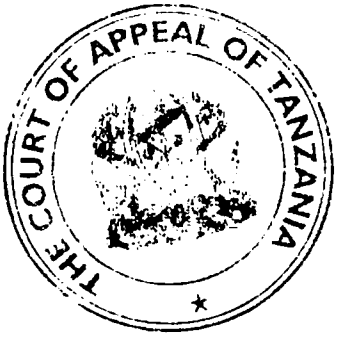
DATED at **DAR ES SALAAM** this 24th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of January 2020 in the presence of Mr. Stanley Kalokola, State Attorney for the Appellant and Mr. Salim H.B Mnkonje Counsel for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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