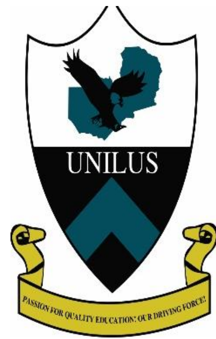

UNIVERSITY OF LUSAKA

VOLUNTARY LIQUIDATION OF ZAMBIAN FINANCIAL SERVICE PROVIDERS AND DEPOSITOR PROTECTION: COMPARATIVE STUDY WITH NIGERIA, KENYA AND SOUTH AFRICA

BY

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A DISSERTATION SUBMITTED TO THE UNIVERSITY OF LUSAKA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE BACHELOR OF LAWS (LLB) DEGREE

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I recommend that the obligatory essay written under my supervision

By

CHINYAMA ARNOLD

Entitled:

"Voluntary Liquidation of Zambian Financial Services Providers and Depositor Protection: *A Comparative Study with Nigeria, Kenya and South Africa"*

Be accepted for examination and admitted to the University of Lusaka. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to the format as laid down in the regulations governing obligatory essays.

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MS. N. MWANAMWAMBWA **DATE**

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DECLARATION

I, **Chinyama Arnold** of computer number **LLB 1411159**, do hereby declare that **"Voluntary Liquidation of Zambian Financial Services Providers and Depositor Protection: A Comparative Study with Nigeria, Kenya and South Africa"** is my own work, that it has not been submitted for a degree or examination in any other University and that the contents of this obligatory essay are entirely based on my findings and that I have not in any way used anybody else's work without prior permission or acknowledging the same to be so.

Signature…………………………………….

Date…………………………………………..…

DEDICATIONS

First and foremost, I dedicate this work to my late father, **Mr. Green Chinyama** who did not live to see this work. To you dad, I would like to say that I am so indebted to you for the love, kindness, and encouragement you gave me during my formative years. I will always treasure those moments. I will forever miss you dad. May Your Soul Rest in Peace.

To my wife, **Prudence Mukoba, Chinyama**, I say thank you so much my sweetheart for your unwavering support during this four year journey during which I used to come home late every day and denied you my most precious and lovely presence.

To my lovely boys, **Samuel, Nathanael, and Emmanuel,** I thank you my boys for your understanding during the four difficult years. Particularly, to **Emmanuel**, my youngest boy, I thank you in a very special way for always reprimanding your elder brothers that **"Leave dad alone, he is studying"** yet as a young kid you hardly understood what studying meant.

Lastly, I give special gratitude to my niece, **Mirriam, Allan**, my nephew and **Clara**, my sister- in law. You guys are simply special.

May the good Lord bless you all.

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Lastly, but certainly not the least, I thank colleagues in the legal department at Zanaco, Sandra Wamulume, Angela Mwalula, Kate Musana and Oscar Mulekwa Moonga for the material and intellectual support.

LIST OF ABBREVIATIONS

BASA	BANKING ACT OF SOUTH AFRICA
BAK	BANKING ACT OF KENYA
BOFIA	BANKING AND OTHER FINANCIAL INSTITUTIONS ACT OF NIGERIA
BFSA	BANKING AND FINANCIAL SERVICES ACT
CAMA	COMPANIES AND ALLIED MATTERS ACT
CBK	CENTRAL BANK OF KENYA
CBN	CENTRAL BANK OF NIGERIA
DIS	DEPOSIT INSURANCE SCHEME
KDIC	KENYA DEPOSIT INSURANCE CORPORATION
NDIC	NIGERIA DEPOSIT INSURANCE CORPORATION
SARB	SOUTH AFRICAN RESERVE BANK

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Financial services providers are, by their nature, special due to a unique role they play in the economy of any country through financial intermediary. Consequently, they are subject to a distinct set of rules that may not apply to ordinary entities. The special status of financial services providers is widely recognized.[1] Financial service providers play a key role in financial stability in respect of the financial system and the economy as a whole. Growth of financial services industry has led financial services provider to become too big and too interconnected and in terms of supervisory authorities too important for financial stability.[2] Further, the intensification of the linkages between banks through interbank payments and interbank deposits has greatly expanded the scope of financial shocks. Many of the bank closures that Zambia has experienced in the past were largely compulsory. However, section 121[3] of the Act provides for voluntary liquidation of financial services providers. Although Bank of Zambia approval is required, section 121 (2) provides that Bank of Zambia shall not grant approval for voluntary liquidation of a financial services provider unless it is satisfied that the financial services provider is solvent and has sufficient liquid assets to repay its depositors. Since Zambia has not experienced many instances of voluntary liquidation of banks, the efficacy of the legal regime involving voluntary liquidation of financial services providers has not been fully tested. It is common cause that the primary objective of liquidation, whether voluntary or otherwise, is to preserve and optimize collection of the financial service provider's

[1]Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, University of Colorado Law Review (2014), Volume 85, P2

[2]Oana Raluca Dragan, Ioan Batraga and Liviu Bechis, Systemic Risk in the Banking Sector, Vasile Goldis University Arad, Romania, Volume 13, Issue 1(17) 2013

[3]Banking and Financial Services Act no. 7 of 2017

assets in order that creditors (including depositors) receive as much as possible of what is owed to them[4]. This objective is the same for a financial service provider as for any other enterprise. However, effective financial service provider liquidation presupposes that the legal system provides satisfactory answers to certain special problems, which may not be present in a non-financial enterprise[5]. The absence of such a framework will not only result in a disorderly closure of individual financial service providers, but also increase the risk of spill-over effects, with potential systemic implications[6]. This research will therefore review the provisions in the Banking and Financial Services Act No. 7 of 2017 in relation to voluntary liquidation of financial services providers as well as depositor protection mechanism and draw a comparison with the voluntary liquidation regimes and depositor protection schemes in other jurisdiction namely Nigeria, Kenya and South Africa and evaluate how voluntary liquidations are carried out and depositors' interest protected in those jurisdictions.

1.2 STATEMENT OF THE PROBLEM

The Banking and Financial Services Act (BFSA) of 2017 does not expressly state who should carry out the voluntary liquidation process neither does it provide the statutory duties of the liquidator thereby causing reliance to be placed on the Companies Act (CA) yet the Banking and Financial Services Act is the principal Act on matters pertaining to banking and financial services. Section 4 of the BFSA provides that:

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[4]**An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency -** Prepared by the Staffs of the International Monetary Fund and the World Bank For the IMF, approved by Sean Hagan and Christopher Towe, April 17, 2009, P44

[5]Ibid

[6]Ibid

"Where any written law relating to, or impacting on, banking business or financial services is inconsistent with this Act, the provisions of this Act shall, to the extent of the inconsistency, prevail."

Further section 159[7] provides that a financial service provider shall maintain a special reserve account, with an amount that the board considers adequate, which shall be reserved exclusively for making good any losses resulting from the negligence or dishonesty of any director, chief executive officer, chief financial officer, manager or other employee of the financial service provider and insure itself against loss. Section 159 is a narrow provision which does not expressly cover the depositors in the event of a winding up. Therefore Zambian depositors still stand to lose out in the event of a winding up. Even if the depositors are ranked second in priority to all other debts[8], the Act is silent as to the extent to which the depositors can recover their funds.

1.3 PURPOSE OF THE STUDY

i) To highlight the lacunae in the Banking and Financial Services Act (BFSA) no. 7 of 2017 provisions regarding depositor protection.

ii) To bring to the fore the challenges in carrying out a voluntary liquidation process.

iii) To assess whether appropriate legislative recommendations could be made to address the challenges.

1.4 JUSTIFICATIONS OF THE STUDY

i) No such work has been done in Zambia

ii) Need to protect the interests of the depositors.

[7] Section 159 of the Banking and Financial Services Act No. 7 of 2017

[8] Ibid Section 132

iii) Need to provide clarity on how voluntary liquidation of a financial service provider can be carried out and the basis for Central bank approval for such liquidation.

1.5 OBJECTIVES OF THE STUDY

The objectives of this study are:

i) To analyse the adequacy of the Banking and Financial Services Act provisions on voluntary liquidation and depositor protection.

ii) To compare voluntary liquidation and depositor protection in Zambia with those of Nigeria, Kenya and South Africa.

iii) To outline the challenges of Zambia's voluntary liquidation process and depositor protection.

1.6 RESEARCH QUESTIONS

i) To what extent are the provisions of the Banking and Financial Services Act adequate on voluntary liquidation and depositor protection?

ii) How is voluntary liquidation of financial services providers and depositor protection administered in other jurisdictions?

iii) How is the voluntary liquidation process of financial services providers in Zambia carried and what are the major challenges in protecting the interests of the depositors?

1.7 RESEARCH METHODOLOGY

Data for this research will be gathered from secondary sources mostly through desk research that is, by studying books, journals law reports, scholarly articles, statutes and interviews with industry experts such as central bankers and insolvency practitioners.

1.8 SCOPE OF THE STUDY

This research will focus on the provisions of the Banking and Financial Services Act of Zambia. A comparison will be made with other similar legislations in Kenya and Nigeria to identify progressive provisions in this area.

1.9 LITERATURE REVIEW

Chilufya Kasuba, The Liquidation and Receivership Process in Zambia with Special Reference to Banking Institutions (2005) looked at compulsory liquidation of Banks and outlined the regulatory framework including the powers and duties vested on the Bank of Zambia as liquidator. He further outlined the wide discretion that Bank of Zambia enjoys. The work largely looked at the compulsory winding up of banks and financial service providers and how Bank of Zambia automatically assumes the role of liquidator. He recommended for the review of certain sections of the Banking and Financial Services Act.

Mubita Likando M, Unsafe and Unsound Banking Practices in Zambia (2012) analysed the concept of unsafe and unsound banking practices and the power that the Bank of Zambia possesses in taking over the running of a bank that is involved in unsafe and unsound banking practices and the challenges that exist in making a conclusion that such practices are taking place within a bank or financial service provider. No aspects of voluntary liquidations or depositor protection were dealt with.

Mushota Mwaba, Causes of the Collapse of Banks in Zambia: A Legal perspective (2002) analysed the causes, immediate and long term, of bank failures in Zambia and lessons to be drawn from such bank failures. He went further to propose the need for depositor protection schemes although he did not state how these schemes

were to operate in the event of winding up in so far as protection of depositors is concerned.

George M Kanja, Banking Law and Practice merely emphasized on the rights of the depositors in a voluntary winding up as provided in the Banking and Financial Services Act of 2000. He did not address how depositors are protected in the likely situation where the Bank of Zambia takes over the voluntary winding up upon realizing that the assets will not be sufficient for the full discharge of the financial service providers' obligations.

Kenneth Mwenda, Legal Aspects of Banking Regulation: Common Law perspectives from Zambia (2010) analysed the regulatory framework of banking and financial services providers in Zambia, risk management and insolvency of banking and financial services providers. No much detail was provided with respect to the voluntary liquidation and financial services providers and how depositors' interest are protected. Mwenda only looked at liability insurance resulting from the negligence or dishonesty of banking employees.

Thorsten Beck, Deposit Insurance as Private Club (2000) analysed the operation of deposit insurance schemes in Germany. The Germany Bankers Association operates a private deposit insurance scheme. Membership of this scheme is voluntary and each member is able to peer review the other. The author does not provide the legal framework under which the scheme operates.

My research is different in that it will specifically interrogate the lacunae in the provisions of the Banking and Financial Services Act no. 7 of 2017 regarding voluntary liquidation process of banking and financial services providers and will go further to examine how the Act provides mechanisms for depositor protection in such

a winding up. This will be done through a comparative study with other common law jurisdictions namely Nigeria, Kenya and South Africa.

1.10 LAYOUT OF CHAPTERS

Chapter One has introduced the study and has covered the background to the study, the statement of the problem, objectives of the study, research questions as well as the literature review.

Chapter Two provides an evaluation of the voluntary liquidation and depositor protection provisions in the Zambian BFSA in terms of its adequacy to provide effective mechanisms clarity in the execution of voluntary liquidation and depositor protection.

Chapter Three examines voluntary liquidation and depositor protection law in Nigeria and Kenya. The chapter highlights key areas from which Zambia can learn lessons from the two jurisdictions in terms of best practice.

Chapter Four evaluates the challenges in carrying out voluntary protection and mechanisms for protection of depositor interest in the Zambian Banking and Financial Services Act no. 7 of 2017.

Chapter five as the final chapter provides findings, conclusions and recommendations of the study.

CHAPTER 2

AN EVALUATION OF THE EFFCTIVENESS OF VOLUNTARY LIQUIDATION AND DEPOSITOR PROTECTION PROVISIONS IN THE ZAMBIAN BANKING AND FINANCIAL SERVICES ACT NO.7 OF 2017

2.1 INTRODUCTION

The preceding chapter outlined the problem statement, objectives and research questions of the study. This chapter critically evaluates the effectiveness of voluntary liquidation and depositor protection provisions in the Zambian Banking and Financial Services Act.[9] This chapter therefore seeks to examine the procedure involved in the voluntary liquidation of financial service providers and how interests of depositors are protected. The Act defines a financial service provider as either be a bank, financial institution or a financial business.[10]

Financial service providers as companies first, are mandated to operate within the confines of the Companies Act.[11] The Act provides that a company may be wound up voluntarily if the company so resolves.[12] The resolution for voluntary wind up must be a special resolution unless the period, if any, fixed by the articles for the duration of the company has expired or the event, if any, has occurred, on occurrence of which the articles provide that the company is to be dissolved.[13]

There are two types of voluntary winding up; members' voluntary winding up and creditors' voluntary winding up. The essential difference between the two types of winding up is that is that members' voluntary winding up is only possible if the

[9] Act no. 7 of 2017
[10] Ibid Section 2
[11] Chapter 388 of the Laws of Zambia
[12] Section 305 of the Companies Act Chapter 388 of the Law of Zambia
[13] Ibid section 305(2)

company is solvent, in which case the members will appoint a liquidator, whereas, if it is a creditors' voluntary winding up, the power to appoint a liquidator vests in the creditors.[14] Both types of voluntary liquidation are, however, triggered by the actions of the company members.[15] The members can pass a special resolution in favour of voluntary liquidation.[16] Creditors' voluntary liquidation is, however, outside the scope of this study since such type of voluntary winding up is not available under the Banking and Financial Services Act because when the assets of a financial service provider are not sufficient to fully discharge all obligations, Bank of Zambia takes possession of such a financial service provider. Therefore, this study will confine itself to a members' voluntary liquidation. In liquidation, a bank is dissolved after a liquidator assumes legal control of its estate, collects and realizes its assets, and distributes the proceeds to creditors, in full or partial satisfaction of their claims, in accordance with the principle of equal (*pari passu*) treatment of similarly situated creditors and the applicable rules on priority.[17] Such a liquidator must be a qualified insolvency practitioner.[18]

2.2 PROCEDURE FOR VOLUNTARY LIQUIDATION OF A FINANCIAL SERVICE PROVIDER IN THE BANKING AND FINANCIAL SERVICES ACT

The Banking and Financial Services Act[19] requires that a financial service provider should obtain written approval of Bank of Zambia before passing a special resolution for the voluntary winding up in accordance with the Insolvency act of 2017 or any

[14] Paul L Davies, Gower and Davies' Principles of Company law(2003), Sweet and Maxwell, London P856
[15] Vanessa Finch, Corporate Insolvency Law Perspectives and principles, 2nd edition, Cambridge, Cambridge University Press, 2009, P529
[16] Ibid P530
[17] International Monetary Fund and The World Bank, **An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency.** Prepared by the Staffs of the International Monetary Fund and the World Bank For the IMF, approved by Sean Hagan and Christopher Towe, April 17, 2009, P44
[18] Roy Goode, Principles of Corporate Insolvency, 2nd Edition, London, Sweet & Maxwell, P120
[19] Section 121(1) of the Banking and Financial Services Act No. 7 of 2017

other law. Further the Act requires a financial service provider seeking approval of the Bank of Zambia to voluntarily wind up to submit the following:

a) Certified copy of the resolution; and
b) An audited declaration of solvency by the directors to which shall be attached a statement of affairs of the financial service provider showing the

i) Assets and total amount expected to be realized therefrom
ii) Liabilities; and
iii) Estimated expenses of the winding up, made to the latest practicable date before the resolution to wind up was made.

A careful scrutiny of sections 121(1) and 121(2) of the Act reveals that the two sections are contradicting each other. While section 121(1) requires that Bank of Zambia approval should precede a resolution to wind up, section 121(2) requires that one of the key documentation that requires to be submitted to Bank of Zambia when seeking approval for voluntary winding up is a certified copy of a resolution. Section 121(2) on its proper construction therefore, presupposes that by the time a financial service provider is seeking Bank of Zambia approval for voluntary winding up it would have already passed a resolution in compliance with the companies Act. That being the case, it is not clear at what point voluntary liquidation of a financial service provider commences. The companies Act, however, unequivocally provide that voluntary liquidation commences at the time of passing of the resolution for voluntary winding up.[20] This lacuna in the Banking and Financial Services Act requires to be resolved.

[20] Section 306 of the Companies Act Chapter 388 of the Laws of Zambia

Ironically, section 121 of the BFSA provides for passing of an ordinary resolution for the voluntary winding up of a financial service provider despite the seriousness of such a resolution and the sensitive nature of the financial services sector. As noted earlier in this chapter, financial service providers are registered as companies first before they apply for a licence to engage in financial service provision. Therefore they are also subject to the provisions of the Companies Act. Section 305 (2) of the Companies Act[21] provides that a company may be wound-up voluntarily upon passing of a special resolution which requires not less than three-fourths of the votes[22] while the BFSA provides for an ordinary resolution on voluntary winding up which requires a simple majority. This does not reflect the serious and sensitive nature of financial service providers. Further, section 121 (1) refers to the insolvency Act of 2017 which Act is not yet in effect. The obvious challenge with this provision is that should a financial service provider resolve to go into members' voluntary liquidation, interpretation of this law would prove to be problematic since the insolvency Act of 2017 has not yet been passed.

The granting of approval by Bank of Zambia to a financial service provider to voluntarily liquidate itself will depend on the Bank of Zambia being satisfied that the financial service provider is solvent and has sufficient liquid assets to repay to repay its depositors and all other creditors in full and without delay.[23] However, the Banking and Financial Services Act does not provide the basis upon which the Bank of Zambia shall derive satisfaction that the financial service provider is solvent. Further the Act only provides for criminal responsibility on a director, senior officer or

[21] Chapter 388 of the Laws of Zambia
[22] Section 156(3) of the Companies Act Chapter 388 of the Laws of Zambia
[23] Section 121(3) of the BFSA No. 7 of 2017

other employee of a financial service provider who makes a false declaration of solvency. Section 5[24] states that:

> ***A director, senior officer or other employee of a financial service provider who makes a false declaration, causes or permits any false declaration to be made, contrary to subsection (2), commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding five years, or to both.***

No civil remedies are provided for depositors or creditors who are prejudiced by this false declaration. The criminal sanction does not therefore protect adequately the interests of the depositors or creditors as envisaged in section 124 of the Act which provides that:

1) ***An approval by the Bank of Zambia for voluntary winding up or dissolution of a financial service provider as provided in this part, shall not prejudice the right of a depositor or creditor to payment in full, or to the return of funds or property held, by the financial service provider.***
2) ***All lawful claims shall be paid promptly and all funds and other property held by the financial service provider shall be returned to the rightful owners within such maximum period as the Bank may direct in writing.***

2.3 POWERS AND DUTIES OF THE FINANCIAL SERVICE PROVIDER AFTER BANK OF ZAMBIA APPROVAL

A financial service provider is required within seven days of receipt of approval to voluntarily liquidate itself to surrender its license and cease to do banking business.[25] A financial service provider may only exercise its power to the extent necessary to

[24] Ibid section 5

[25] Section 122 (1) (a) of the Banking and Financial Services Act No. 7 of 2017

effect its orderly winding up or dissolution in accordance with the corporate insolvency act of 2017.[26] A financial service provider is required to repay in full its depositors and other creditors.[27] Section 122(1)(b) of the Act vests power to voluntarily carry out the voluntary liquidation process within the company itself. The Act therefore presumes that the directors of the financial services provider will execute the voluntary liquidation process. This provision poses obvious challenges. It fails to recognize that first and foremost it was the same directors who made a declaration of solvency and that they had made an inquiry into the affairs of the company. Therefore to repose the responsibility of paying the depositors in full in the hands of the directors and expect that the interests of the depositors and other creditors will be protected is far-fetched. The directors, by the nature of their duties, are bound to be conflicted because on one hand they have a fiduciary duty as agents of the company while on the other hand, they ought to protect the interest of the depositors.

It is further noted that apart from the provisions of section 121 which provide for members' voluntary liquidation, the Act is silent on creditors' voluntary liquidation yet creditors must have a voice especially where the assets of the financial service provider will not adequately pay in full the liabilities.

Even if the winding up is a members' one, a licensed insolvency practitioner will have to be appointed as liquidator.[28] In essence a company cannot appoint one of the directors as liquidator. This is the challenge that section 122 of the BFSA creates by assuming that the financial service provider itself will execute the liquidation function.

[26] Section 122 (1) (a) of the Banking and Financial Services Act No. 7 of 2017

[27] Ibid section 122(1)(b)

[28] Paul L Davies, Gower and Davies' Principles of Company law(2003), Sweet and Maxwell, London P860

A members' voluntary liquidation may become a compulsory liquidation if it is found that the assets will not be sufficient to discharge all obligations.

The Bank of Zambia may take possession of a financial service provider being voluntarily wound up or dissolved if it subsequently finds that the assets of a financial service provider are not sufficient to fully discharge all obligations or if the completion of the winding up or dissolution has been duly delayed.[29] This action by the Bank of Zambia is supposedly meant to protect the interests of depositors and other creditors. However, the Act is silent as from whom the Bank of Zambia possesses the financial service provider from. Further the Act does not provide mechanisms that the Bank of Zambia will use in monitoring the members' voluntary liquidation process. This is largely due to the fact that the Act does not expressly provide for the duties, powers and responsibilities of the liquidator in the manner the companies Act provides. The Act reposes the responsibility in the company itself.

Apart from just providing that where there is undue delay in completing the voluntary liquidation the Bank of Zambia will take over the process, what constitutes undue delay has not been defined. The Act should have provided in very unequivocal terms the timeframe within which the voluntary liquidation is to be completed beyond which would constitute undue delay thereby triggering invocation of section 126 of the Act.
Despite financial service providers being companies and therefore subject to the companies Act, by their nature, are special and require to be regulated differently because of their fragility, hence upon obtaining a financial service license, they are subject to the Banking and Financial Services Act. Therefore, the provisions of the

[29] Section 126 of the Banking and Financial Services Act No. 7 of 2017

Banking and Financial Services Act must be thorough to avoid shuttling between the companies Act and itself.

2.4 DEPOSITOR PROTECTION MECHANISMS IN THE BANKING AND FINANCIAL SERVICES ACT NO. 7 of 2017

Deposit protection schemes are designed, in part, to maintain public confidence in the banking system during times of institution-specific or broader systemic stress by reassuring depositors that their funds, or at least the insured maximum, will be protected even if their bank is closed.[30] While insured banks remain reliant on public trust, that trust is supported by public trust in the efficacy and reliability of governmental promise of payment in a winding up, whether voluntary or involuntary. Therefore, a deposit scheme that is not supported by an effective insolvency regime can increase the risk of moral hazard and impair economic efficiency. The concept of moral hazard will be discussed in detail in chapter four. The Banking and Financial Services Act does not provide for an explicit deposit insurance mechanism aimed at cushioning the loss to the depositors that would be occasioned by a winding up. The Act only provides for special reserve or liability insurance. Section 159 provides that:

A financial service provider shall-

(a) Maintain a special reserve account, with an amount that the board considers adequate, which shall be reserved exclusively for making good any loss resulting from the negligence or dishonesty of any director, chief executive officer, chief financial officer, manager or other employee of the financial service provider;

(b) Insure itself against loss, to an amount that the board considers adequate; or

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[30] Michael H. Krimminger, Deposit Insurance & Bank Insolvency in a changing World: Synergies & Challenges, IMF Conference, May 2004, P3

(c) Undertake a commitment that the Bank may consider acceptable for the purpose of this section.

It is clear that section 159 only covers operational risks and not necessarily the depositors' interest. The protection of depositors is only to the extent of the Bank of Zambia's regulatory power to prudentially manage financial institutions to avoid a financial crisis and to play the role of lender of last resort. This, however, does not guarantee depositor protection.

2.5 SHORTCOMINGS OF NOT HAVING DEPOSITOR PROTECTION MECHANISMS IN THE BANKING AND FINANCIAL SERVICES ACT No. 7 of 2017

It is acknowledged that granting of a financial services licence is preceded by a very rigorous scrutiny process to ensure that no individuals or companies of doubtful character enter the financial services sector. Hence the Banking and Financial Services Act no. 7 of 2017 reposes vast amount of regulatory power[31] on the Bank of Zambia aimed at ensuring that financial institutions are run in a sound manner and minimize instances of failure. Bank of Zambia has the power to suspend from office a director or senior officer of a financial service provider who fails to take reasonable steps to secure compliance by the financial service provider with the requirements of the Banking and financial services Act.[32]

However, failure of one financial service provider can sometimes be inevitable with far reaching consequences on the sector. Because financial service providers are highly leveraged institutions, depositors have a strong incentive to show up at the bank first, to withdraw their funds in case they doubt the financial health of a

[31] Section 64 of the Banking and Financial Services Act No. 7 of 2017

[32] Ibid section 40(1)

particular financial service provider. The obvious implications is that those at the end of the line may get little of their savings or nothing at all.[33]

The risk of runs either due to loss of confidence in one financial service provider can have greater impact on the entire financial service industry due to the inherent interconnectedness.

The loss of savings can inflict untold misery on the depositors which in many instances entail loss of pension money and working capital for small and medium enterprises. There is also the negative impact on large savers like insurances companies and pension houses. In short, failure of financial service providers in the absence of a deposit protection mechanism can have negative repercussions on a country's payment system and the economy at large.

2.6 CONCLUSION

The objective of this chapter was to examine the effectiveness of voluntary liquidation and depositor protection provisions in the Zambian Banking and Financial Services Act no. 7 of 2017. From the foregoing it is very clear that the provisions of the Act may not be said to provide sufficient guidelines on the voluntary liquidation process of a financial service provider, the duties and other accountabilities of the liquidator as the Act presupposes that the directors or members of the financial service provider itself will undertake the liquidation process. The inadequacy emanates from the vested interest that the directors and members have which may likely prejudice the interests of the depositors. Section 121 (1)[34] refers to the Insolvency Act which Act has not yet been enacted thereby posing a further challenge in terms of actualizing the intention of this section. Section 121(1)

[33] John Chikura, Role of Deposit Protection Systems, May 2013, P 2
[34] Banking and Financial Services Act No. 7 of 2017

contradicts section 121(2) in terms of what should precede the other: Bank of Zambia approval or special resolution of the financial service provider to voluntarily wind up. The chapter has also concluded that the Act does not provide for protection of depositors in a winding up, be it voluntary or involuntary. The non-provision of depositor protection in the Act has given incentive to bank runs in the event of any adverse information about a financial service provider. The chapter has demonstrated the need to provide clarity on the voluntary liquidation process and depositor protection to address systemic risk that is reminiscent in the financial services sector.

The next chapter is intended to look at voluntary liquidation provisions and depositor protection mechanisms in other jurisdictions, particularly Kenya and Nigeria and assess how the law has been reformed in these jurisdictions and identify what lessons could be learnt from them.

CHAPTER 3

ANALYSIS OF VOLUNTARY LIQUIDATION AND DEPOSITOR PROTECTION MECHANISMS IN NIGERIA AND KENYA AND SOUTH AFRICA

3.1 INTRODUCTION

Chapter two critically evaluated the effectiveness of voluntary liquidation and depositor protection provisions in the Zambian Banking and Financial Services Act. The chapter sought to examine the procedure involved in the voluntary liquidation of financial service providers and how interests of depositors are protected. The chapter concluded that there is no clarity regarding procedures for voluntary liquidation of financial services providers. Further the chapter concluded that the Banking and Financial Services Act no. 7 of 2017 does not provide for protection of depositors in the event of a wind up.

This chapter will analyse the legal regimes on voluntary liquidation and depositor protection mechanisms in Nigeria, Kenya and South Africa and to identify what lessons could be leant. The selection of these countries for comparative analysis is deliberate. Nigeria and Kenya are some of the big economies in commonwealth Africa and are common law jurisdictions. Hence they present a very good case for comparative analysis. South Africa has proximity to Zambia apart from it being a big market. Most importantly, it is a mixture of civil law and common law jurisdiction and as such presents a good case for comparative analysis in terms of how the law has been reformed to meet civil law and common law requirements.

3.2 THE CASE FOR NIGERIA

Deposit protection mechanism in Nigeria can be traced back to 1988 following the decision by the Federal Republic of Nigeria to establish the Nigeria Deposit Insurance Corporation (NDIC). This decision was precipitated by a number of factors

including the country's bitter experience of bank failures, the lessons of other countries' experiences with deposit insurance schemes, increased competition in the industry, the need for effective supervision/prudential regulation and change in government bank support policy.[35]

3.2.1 HISTORY OF DEPOSIT PROTECTION SCHEMES IN NIGERIA

The period between 1947 and 1952 witnessed a rapid growth of local banks in Nigeria. The increase in the number of these indigenous banks was also followed by a high rate of failures of such banks. The failures were attributed largely to mismanagement of assets, lack of adequate capital and inexperienced personnel on one hand and lack of regulation on the other hand since during this time the Central Bank of Nigeria (CBN) was not yet in place.[36] The Central Bank of Nigeria was only established in 1952 following enactment of the Banking ordinance of 1952 which came into force in 1954.

Since the mid 60's the Federal Government had ensured through direct support of banks, that the Nigerian banking public was no longer exposed to the hazards of bank failure.[37] The Central Bank of Nigeria (CBN) had implemented certain measures to curtail recurrence of bank failures. These included the requirement for every licensed bank to create and maintain a statutory non-distributable reserve fund from yearly profits before dividend payments; stipulation of minimum liquidity ratio and capital requirements as well as the rendition of statutory returns.[38] Despite all these measures, capital for some banks was eroded by non-performing assets due to poor underwriting standards. At this point the Federal Government of Nigeria

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[35] Ogunleye G. A, *Deposit Insurance Scheme in Nigeria: Problems and Prospects*, a paper presented at the first annual conference of International Association of Deposit Insurers (IADI), Basel, Switzerland, May 2002 P1
[36] Ibid
[37] Ibid
[38] Ibid

considered it necessary to establish a Deposit Insurance Scheme (DIS) as a final solution to address bank failures.

3.2.2 ORGANISATION OF DEPOSIT PROTECTION IN NIGERIA

Unlike Zambia which operates an implicit deposit protection scheme that is based on the Bank of Zambia to prudentially supervise financial institutions and forestall a crisis as well as playing the role of lender of last resort, Nigeria operates an explicit Deposit Insurance Scheme. Nigeria established the Nigeria Deposit Insurance Corporation (NDIC) in 1988 as an explicit deposit insurance scheme. In 2006, the Act of 1988 was repealed and the 2006 Act enacted. The scheme was created to provide a further layer of protection to depositors and complement the Central Bank of Nigeria's supervisory activities in ensuring a safe and sound banking system.[39] The 2006 Act created the Nigeria Deposit Insurance Corporation as a body corporate[40] with the following responsibilities:

> ***(a) insuring all deposit liabilities of licensed banks and such other deposit-taking financial institutions (hereinafter referred to as "insured institutions") operating in Nigeria within the meaning of sections 16 and 20 of the Act so as to engender confidence in the Nigerian banking system;***
>
> ***(b) giving assistance to insured institutions in the interest of depositors, in case of imminent or actual financial difficulties particularly where suspension of payments is threatened to avoid damage to public confidence in the banking system;***

[39] Ganiyu Adewale Ogunleye, Perspectives on the Nigerian Financial Safety-Net, NDIC (2010) P154
[40] Section 1(2)(a) of the Nigerian Deposit Insurance Act of 2006

(c) guaranteeing payments to depositors, in case of imminent or actual suspension of payments by insured institutions up to the maximum amount as provided for in section 20 of the Act;

(d) assisting monetary authorities in the formulation and implementation of banking policy so as to ensure sound banking practice and fair competition among insured institutions in the country; and

(e) pursuing any other measure necessary to achieve the functions of the Corporation provided such measures and actions are not repugnant to the objects of the corporation.

The Nigeria Deposit Insurance Corporation is the only body with the mandate to insure deposit liabilities or guarantee payments to depositors of insured institutions operating in Nigeria.[41] It is a criminal offence for any person to engage in deposit protection business in contravention of the NDIC Act.[42] It is a mandatory requirement of the law that all licensed financial institutions in Nigeria that are engaged in the business of receiving deposits to insure their deposits with the corporation.[43] Any licensed institution that contravenes the above section commits a crime and liable to a maximum fine of 500,000 naira for each day the offence subsists. Section 16 provides that all deposits of a licensed bank or financial institution shall be insured with the corporation except the following:

a) Insider deposits, that is deposits of staff including directors of the insured institution;
b) Counterclaims from a person who maintains both deposit and loan account, the former serving as a collateral for the loan or

[41] Section 32 of the Nigeria Deposit Insurance Corporation Act of 2006
[42] Ibid Section 31
[43] Ibid Section 15(1)

c) Such other person as may be specified from time to time by the Board

All licensed institutions in Nigeria are obliged to make contributions to the corporation. Premiums are calculated as a percentage of the insured institution's liabilities. Section 17(1) of the NDIC provides that:

> ***Every insured institution being a licensed bank or deposit-taking financial institution to which this Act relates, shall be obliged to pay to the Corporation, a premium which shall not exceed (15/16) fifteen-sixteenth of one percent per annum for licensed banks and (8/16) eight-sixteenth of one percent per annum for other deposit-taking financial institutions of the total deposit liabilities standing in its books as at 31st December of the preceding year in the following manner:***
>
> ***(a) the deposit liabilities shall be as certified by the approved auditor of the li- censed bank or such other deposit-taking financial institution;***
>
> ***(b) the certified deposit liabilities shall be forwarded to the Corporation on or be- fore 31st January of every year; and***
>
> ***(c) the annual premium shall be payable not later than 2 months from the date of the demand notice.***

Further, the Deposit Insurance scheme as an explicit scheme, has specified maximum insured sum, a clearly defined ex-ante funding arrangement and specified administrative structure.[44]

3.2.3 POWER TO SUPERVISE INSURED INSTITUTIONS

Under a Deposit Insurance Scheme (DIS), the supervision of insured institutions is one of the major burdens that falls squarely on the insurer. This arises from the fact

[44] Ganiyu Adewale Ogunleye, Perspectives on the Nigerian Financial Safety-Net, NDIC (2010) P155

that it is of paramount importance that the administrator of the scheme knows the extent of risk it is assuming and to monitor the changes in the composition and extent of such risks through close supervision of insured institutions.[45] Therefore, legislation that creates explicit deposit insurance schemes normally confers legal power on such bodies to closely supervise insured institutions. The NDIC Act empowers the Nigeria Insurance Corporation to supervise insured institutions. Such supervisory responsibility is carried out through on-site and off-site surveillance of insured financial institutions.

3.2.4 OPERATIONAL ACTIVITIES OF THE NIGERIA DEPOSIT INSURANCE CORPORATION[46]

(a) Deposit guarantee

As a deposit insurer, the NDIC guarantees payment to insured banks' depositors in the event of bank failure. When the deposit insurance scheme was first introduced, the maximum insurance limit was set at N50,000. The limit has since been revised upwards and continues to be revised upwards to reflect the prevailing economic conditions.

(b) Deposit protection

Financial service providers are supervised to protect depositors, ensure financial stability, evolve efficient and competitive system and protect depositors. In addition to these reasons, the NDIC supervises insured financial institutions to gauge the health of the financial service providers, as no deposit insurer would wait to be told by another party that its insured

[45]Ogunleye G. A, *Deposit Insurance Scheme in Nigeria: Problems and Prospects*, a paper presented at the first annual conference of International Association of Deposit Insurers (IADI), Basel, Switzerland, May 2002 P6

[46] Ogunleye G. A, *Deposit Insurance Scheme in Nigeria: Problems and Prospects*, a paper presented at the first annual conference of International Association of Deposit Insurers (IADI), Basel, Switzerland, May 2002 P7

institutions have failed.[47] Supervision of insured institutions remains an integral part of the mechanism for ensuring safe and sound operating practices. Operationally, this entails on-site examination and off-site surveillance, both of which are mutually reinforcing. The off-site supervision provides early warning signals which are useful in prioritizing on-site examinations and assessing potential problem areas.

(c) Distress Resolution

The NDIC is conferred with powers to control and manage financial institutions in distress upon being appointed by the Central Bank of Nigeria

3.2.5 VOLUNTARY LIQUIDATION PROVISIONS IN THE BANKING AND OTHER FINANCIAL INSTITUTIONS (BOFI) ACT OF NIGERIA

Section 36 of the Act[48] gives power to the Central Bank of Nigeria (CBN) to appoint the Nigeria Deposit Insurance Corporation (NDIC) to control and manage failing banks and financial institutions where regular supervisory efforts by the Central Bank of Nigeria (CBN) have failed. In extreme cases, the NDIC may be appointed as a receiver or liquidator. Section 40 of the Nigeria Deposit Insurance Corporation Act provides thus:

(1) Whenever the licence of an insured institution is revoked by the Central Bank of Nigeria, the Corporation shall act as liquidator of such failed insured institution with powers conferred on a liquidator under the Companies and Allied Matters Act, 1990 and

[47] Section 27 of the Nigeria Deposit Insurance Corporation Act
[48] Banks and Other Financial Institutions Act of the Laws of Nigeria

shall be deemed to have been appointed a provisional liquidator by the Federal High Court for the purpose of that Act.

(2) Immediately following the publication in the Gazette of the revocation of the licence of a failed insured institution the Corporation shall apply to the Federal High Court for an order to wind up the affairs of the failed insured institution.

(3) This section shall have effect and sections 408 and 410 of the Companies and Al- lied Matters Act, 1990 shall be construed as if the revocation of the licence of the failed insured institution had been included as a ground for winding-up by the Federal High Court, and as if the Corporation has been included as one of those that can present a winding-up petition before the Federal High Court under those sections.

(4) Section 427 (1) and (2) and section 428 (l) and (2) of the Companies and Allied Matters Act, 1990 shall not apply to the Corporation when acting as liquidator of a failed insured institution.

(5) The Companies' Winding-up Rules and any amendment thereto shall not apply to the winding-up of a failed insured institution by the Corporation as liquidator.

(6) The provisions of this Act shall apply without prejudice to the provisions of the Companies and Allied Matters Act, 1990 in so far as they relate to insured institutions and to winding-up by the Federal High Court and where any of the provisions of the

Companies and Allied Matters Act, 1990 are inconsistent with the provisions of this Act, the provision of this Act shall prevail.

(7) Where in any action challenging the revocation of the licence of an insured institution or a petition for winding up the affairs of an insured institution or the appointment of the Corporation as liquidator, an application for an interim or interlocutory injunction is brought against the Corporation seeking to restrain the Corporation from paying de- positors of a failed or failing institution, the trial court shall refer such application to the Court of Appeal for determination; provided that such a referral to the Court of Appeal shall not on its own operate as a stay of proceedings at the trial court; provided further that such application for interim interlocutory injunction shall be determined by such Appeal Court within 60 days of such referral, failing which it shall lapse.

It is to be observed that section 55 of the Banking and Other Financial Institutions Act (BOFIA)[49] shall apply to the Companies and Allied Matters Act (CAMA) in so far as they relate to financial institutions and winding up. However, provisions of BOFIA will prevail in the event of a conflict between the two Acts. The challenge though, is that the BOFIA does not expressly provide for voluntary liquidation of financial service providers. Therefore, for purposes of comparison, it does not provide a good case.

3.3 THE CASE FOR KENYA

[49] Chapter xxx of the Laws of Nigeria

Kenya did not have any form of deposit insurance until 2012. The period prior to 2012, the financial services industry in Kenya was faced with excessive insider lending, non-performing assets, inadequate or non-existent credit documentation and securities, poor underwriting standards, liquidity problems and general poor management of financial institutions.[50] The collapse of many financial institutions had a negative impact on the depositors, bondholders, creditors and customers. This situation made the Central Bank of Kenya (CBK) and other regulatory bodies to rethink the approach towards the regulation of the financial services industry. Hence in 2012, the Kenya Deposit Insurance Corporation (KDIC) was established under section 4 of the Kenya Deposit Insurance Act of 2012.[51]

3.3.1 ORGANISATION OF DEPOSIT PROTECTION IN KENYA

Kenya, like in Nigeria, operates an explicit and compulsory deposit protection scheme. Membership to this corporation is compulsory for all institutions licensed to carry on deposit taking business such as commercial banks, financial institutions, mortgage finance companies, building societies and micro finance institutions. Section 24 of the Kenya Deposit Insurance Act[52] provides that:

(1) ***Any institution licensed by the Central Bank shall become a member of the Fund from the date it is granted the licence***

(2) Notwithstanding subsection(1), every institution which at the time commencement of this Act is licenced by the Central Bank shall be deemed to be a member of the Fund.

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[50] Nolla C. Lubano, Testing the safety net in banking: Is deposit insurance adequate? July, 2016 (Article viewed on 18/08/2017

[51] Chapter 487C of the Laws of Kenya

[52] Ibid

The Kenya Deposit Insurance Corporation (KDIC) is mandated on an annual basis to publish in the Gazette a list of all institutions whose deposits are insured. The publication helps the members of the public in making an informed decision as to which financial institution to take their deposits. The key objective and purpose of the Kenya Deposit Corporation (KDIC) is to provide a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind up any institution in respect of which the Corporation is appointed receiver or liquidator.[53] Section 5(2) provides the following other functions of the KDIC:

a) ***Levy contributions for the fund from licensed financial institutions***
b) ***Hold, mange and apply the Fund in accordance with the provisions of the Kenya Deposit Insurance Act.***
c) ***Provide incentives for sound risk management and generally promote the stability of the financial system.***
d) ***Perform such other functions as may be conferred on it by the Act or any other written law.***

Clearly, unlike the Banking and Financial Services Act of Zambia which vests power in the Bank of Zambia to be liquidator or receiver of insolvent financial institutions, section 35 of the Banking Act of Kenya provides that:

(1) If a financial institution becomes solvent, the Central Bank may appoint the KDIC as liquidator and such appointment has the same effect as appointment of a liquidator by the court under the Kenya's Companies Act.[54]

[53] Ibid Section 5(1)
[54] Section 35(1) of the Banking Act of Kenya Chapter 488 of the Laws of Kenya

(2) ***No liquidator of a financial institution shall be appointed under the provisions of the Companies Act of Kenya if the KDIC has already been appointed as liquidator and no liquidator of a financial institution shall be appointed in any event without approval of the High Court which shall not grant such approval unless the CBK has certified that it does not intent tom exercise its powers.***[55]

(3) ***In the event that a liquidator of a financial institution has been appointed, the Central Bank of Kenya may, at any time apply to the court for an order that such liquidator be removed and the KDIC appointed as liquidator in his place.***[56]

This section of the Banking Act of Kenya does not vest power in the Central Bank of Kenya (CBK) to automatically assume the role of the liquidator. The Act only empowers the CBK to either exercise its powers to appoint the KDIC as liquidator within a period of three months beyond which its power to do so lapses or allow any other liquidator appointed in line with the Kenya's companies Act as provided in section 35(3) of the banking Act of Kenya. This is a remarkably different position from what obtains in Zambia. The challenge with the Zambia's situation is that due to lack of capacity by the Bank of Zambia to effectively perform the liquidation or receivership role, many liquidation or receivership assignments take long to be concluded with very negative repercussions on the depositors more so that there is no explicit deposit protection.

3.3.2 CONTRIBUTION TO THE DEPOSIT PROTECTION FUND

[55] Ibid Section 35(2)
[56] Ibid Section 35(3)

All financial institution licensed by the Central Bank of Kenya are obliged to make contributions to the deposit insurance fund run by the KDIC. Section 27 of the Kenya Deposit Insurance Act provides that an institution licensed by the CBK shall contribute to the fund such annual amount, and at such times, as the Corporation may determine taking into consideration the risk profile of an institution.[57] The minimum contributions payable by a financial institution is 0.4 percent of the average of the financial institution's total deposit liabilities during the period of twelve months prior to the date of the notice served on the institution by the KDIC.[58] The Corporation has the right to increase the contribution of a financial institution where it deems that the financial institution is conducting its affairs in a manner prejudicial to the interests of the depositors.[59]

The KDIC insures all deposits placed with a an financial institution provided that the maximum amount payable to a customer in respect of the aggregate balance of any deposit accounts maintained by the customer with a financial institution does not exceed one hundred thousand shillings or such higher amount as the Corporation may from time to time determine from time to time.[60] This provision provides clarity to the depositing public and because of this, there is likely to be less panic in an event of a bank crisis.

3.3.3 VOLUNTARY LIQUIDATION PROVISIONS IN THE BANKING ACT OF KENYA

Just like under the banking and Financial Services Act of Zambia, Section 34A of the Banking Act of Kenya provides for voluntary liquidation of financial institutions. This

[57] Section 27(1) of the Kenya Deposit Insurance Act Chapter 487C of the Laws of Kenya
[58] Ibid Section 27(3)
[59] Section 27(4) of the Kenya Deposit Insurance Act Chapter 487C of the Laws of Kenya
[60] Ibid Section 28(1)

is sharply different from its Nigerian counterpart. The Kenya Deposit Insurance Act empowers the Central Bank of Kenya to appoint the KDIC as the liquidator of a financial institution irrespective of whether it is a voluntary or involuntary liquidation. Section 54 of the Banking Act[61] provides as follows:

(1) The Central bank shall appoint the Corporation as the liquidator of an institution where-

(a) A recommendation to liquidate has been made under this Act; or

(b) In any other case-

(i) The institution is deemed to be unable to pay its debts;or

(ii) A winding-up order is made or a resolution for voluntary winding-up is passed against the institution; or

(iii) The institution is unable to pay sums due and payable to its depositors; or

(iv) The Central Bank determines that the value of the institution's assets is less than the amount of its liabilities; or

(v) If the in the opinion of the Central bank, the institution has engaged in malpractices or activities that are contrary to the provisions of any Kenyan or other applicable law.

The Act further provides that appointment of the KDIC as liquidator has the same effect as appointment of a liquidator under the Kenyan Companies Act, and once the KDIC has been appointed as liquidator no liquidator of such an institution can be appointed.[62] Further no liquidator other than the KDIC can be appointment without

[61] Chapter 487C of the Laws of Kenya

[62] Sections 54(2) and (3) of the Kenya Deposit Insurance Act Chapter 487C of the Laws of Kenya

approval of the High Court and the High Court shall not grant such order unless the CBK has certified that it would not invoke its powers under subsection 54(4).[63]

In Kenya a financial institution may, with the approval of the Central Bank, voluntarily liquidate itself if it is able to meet all its liabilities.[64] The Central Bank of Kenya will only grant approval for voluntary liquidation if it is satisfied that a financial service provider is solvent. Just like in involuntary liquidation, the Central Bank shall upon approval of a voluntary liquidation, appoint the Kenya Deposit Insurance Corporation to undertake the approved voluntary liquidation. Unlike section 121 of the Zambia banking and Financial Services Act which presumes that the directors or shareholders will execute the voluntary liquidation exercise, the banking Act of Kenya provides for appointment of an independent liquidator, in this case, the KDIC. This provision in the Kenyan Banking Act appears to address the vagueness and challenges under 121 of the BFSA alluded to in chapter two of this study. It will be noted that section 35 of the Banking Act of Kenya provides in very unequivocal terms the powers, duties and responsibilities and accountabilities of the KDIC as liquidator. It can be inferred that Kenya has well reformed their legal regime in this area unlike in the Zambia's case where one would have to juggle between the BFSA and the Companies Act to effectively interpret the law despite the recognition of financial service providers as special and requiring special and clear legislation being common cause.

3.4 THE CASE FOR SOUTH AFRICA

South Africa has had no explicit deposit protection system apart from an implicit system that is embedded in the South African Reserve Bank (SARB) as lender of

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[63] Ibid Section 54(4) and (5)

[64] Ibid Section 34A(1) of the Banking Act of Kenya Chapter 488 of the Laws of Kenya

last resort. As of May 2017, there have been discussions around setting up an explicit Deposit Insurance Scheme. The main objective of a Deposit Insurance Scheme (DIS) for South Africa is to protect less financially sophisticated depositors in the event of a bank failure, thereby contributing to customer protection and enhancement of the stability of the South African financial system.[65] South African Reserve Bank (SARB) has made proposal for various design features of a DIS which include the following[66]:

1) ***The design of the DIS should not place an excessive cost on the banking system, distort the competitiveness in the banking sector, or cause moral hazard to the extent that it would become a threat to financial sector stability.***
2) ***The proposed public policy objective of the DIS is to protect covered deposits in the event of a bank failure, thereby contributing to enhanced customer protection, and the protection and enhancement of the stability of the South African financial system.***
3) ***The DIS should have a paybox-plus mandate, which would allow for the reimbursement of the covered deposits if a bank failed and which should also support other forms of resolution, provided that it would cost the DIS less than what it would have had to pay out in the event of a liquidation of a bank.***
4) ***The DIS should be established as a subsidiary of the SARB, making it a separate legal entity with its own legislative framework and governance requirements, but physically located in the SARB.***

[65] Designing a deposit insurance scheme for South Africa- a discussion paper, May 2017
[66] South Africa Reserve Bank, **Financial Stability Department: Designing a Deposit Insurance Scheme for South Africa-** A Discussion paper. May, 2017

5) ***Membership of the DIS should be compulsory and in fact automate for all registered banks, and the DIS should be consulted whenever an application for a new banking licence is received.***
6) ***Qualifying deposits should include all the deposits held by banks, except deposits by banks, deposits by non-bank private sector, deposits by government, including local, provincial and national government, public financial sector entities, public investment corporation and bearer deposit instruments such as negotiable certificates of deposits and promissory notes.***
7) ***Maximum coverage of ZAR100,000***
8) ***Pre-funded approach for the DIS***

If the above design features are to be implemented as proposed, the South African DIS may not operate as an independent board notwithstanding the DIS having its own legislative framework. For purposes of this study, no comparison would be made since the DIS in South Africa is not yet in place.

3.4.1 VOLUNTARY LIQUIDATION PROVISIONS IN THE SOUTH AFRICAN BANKS ACT OF 1990

The South African Banks Act[67] provides for voluntary liquidation of financial services providers. Section 68 of the Act provides as follows:

Notwithstanding the provisions of section 69 of this Act and anything to the contrary contained in the Companies Act -

[67] Act no. 94 of 1990 as amended in Act no. 20 of 2007

(a) the Registrar shall have the right to apply to a competent court for the winding-up of any bank in terms of the Companies Act, and the Registrar shall have the right to oppose any such application made by any other person;

(b) no person other than a person recommended by the Registrar shall be appointed by a Master of the High Court as provisional liquidator or liquidator of a bank; and

(c) the Master shall appoint a person designated by the Registrar, who shall be a

person who in the opinion of the Registrar has wide experience of, and is knowledgeable about the latest developments in, the banking industry, to assist a provisional liquidator or liquidator referred to in paragraph (b) in the performance of the functions of such provisional liquidator or liquidator in respect of the bank in question.

During voluntary winding-up of a financial service provider the liquidator shall furnish the Registrar with such return or statement which the bank or financial service concerned would have been obliged to furnish to the Registrar in terms of the Act, were such financial service provider not being would up, as the Registrar may require.[68] Further section 68(3) of the Banks Act of South Africa provides that :

In the application, in relation to the winding-up of a company which is a bank -

(a) of section 346 of the Companies Act, subsection (4) of that section shall be deemed to have been amended to read as follows :

(a) Before an application for the winding-up of a company which is a bank is presented to the Court, a copy of the application and of

[68] Ibid section 68 (2)

every affidavit confirming the facts stated therein shall be lodged with the Registrar of Banks and with the Master, or if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the Gazette.

(b) The Registrar of Banks or the Master or any such officer may report to the court any facts ascertained by such Registrar, Master or officer which appear to such Registrar, Master or officer to justify the Court in postponing the hearing or dismissing the application, and shall transmit a copy of that report to the applicant or the agent of such applicant and to the said company.";

(b) of section 357 of the Companies Act, subsection (3) of that section shall be deemed to have been amended to read as follows :

A copy of every special resolution for the voluntary winding-up of any company which is a bank, passed under section 349, and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1), as well as to the Registrar of Banks.".

Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while

such bank, as a result of an application brought by the Registrar, is being wound up in terms of this section, shall not affect –

(a) any order or appointment made, direction issued or any other thing done under this section or in terms of the Companies Act, in respect of such bank; or

(b) any power to be exercised, duty to be executed or right to be enforced in respect of such bank by the Registrar, the Master of the High Court or the provisional liquidator or liquidator, respectively, by virtue of the provisions of this section or the provisions of the Companies Act,

and the Registrar, the Master of the High Court, the provisional liquidator or liquidator, respectively, shall until the affairs of the public company of which the registration as a bank has been so suspended, cancelled or terminated have been completely wound up as contemplated in section 419(1) of the Companies Act or until the winding-up is stayed or set aside by an order of a competent court continue to exercise their respective powers and to perform their respective duties under this section or in terms of the Companies Act, in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.

Clearly, in comparison to the Zambia BFSA, apart from providing for appointment of an independent liquidator in a voluntary winding up, section 68(2) of the Banks Act of South Africa also places in clear terms certain obligations, responsibilities and accountabilities on the liquidator. It will also be observed that the Banking Act of South Africa adequately addresses challenges that are evident in the Zambia's BFSA on the possible conflict that would arise if directors or members of a financial

service provider are conferred with the power to execute a voluntary liquidation process.

3.5 CONCLUSION

The objective of this chapter was bring to the fore possible lessons that Zambia could learn from Nigerian, Kenyan and South African legal regimes on voluntary liquidation of financial service providers and depositor protection mechanisms. The chapter has clearly demonstrated the need to have clarity by way of adequately providing for the voluntary liquidation provisions in the Zambia Banking and Financial Services Act. The chapter has also underscored the inevitable need to have explicit deposit protection mechanisms that enhance financial sector stability.

The review of the legislative regimes in the three jurisdictions has also indicated how deposit protection systems operate and the interplay between regular prudential functions of central banks and risk management functions of deposition protection corporations. Nigeria and Kenya have undertaken very positive legislative reforms, particularly in the area of deposit protection. Both countries have enacted specific legislation that create establishment of independent deposit protection corporations with very clear mandates. On voluntary liquidation process however, the Nigerian regime is somewhat vague as it does not infact provide for voluntary liquidation.

The next chapter will outline the challenges in the current voluntary liquidation of financial service providers and deposit protection mechanisms.

CHAPTER 4

CHALLENGES OF ZAMBIA’S VOLUNTARY LIQUIDATION PROVISIONS FOR FINACIAL SERVICE PROVIDERS AND DEPOSITOR PROTECTION MECHANISMS

4.1 INTRODUCTION

Chapter 3 analysed the voluntary liquidation provisions and deposit protection mechanisms in Nigeria, Kenya and South Africa. The chapter sought to examine what legislative reforms have been undertaken by the three countries and whether Zambia could draw some lessons. The chapter concluded that Nigeria and Kenya

have explicit deposit protections mechanisms in place. Kenya, unlike Nigeria has a very clear voluntary liquidation regime for financial services providers. Nigeria does not have. Although Zambia has provision on Voluntary liquidation, the legal provisions lack clarity. This chapter will outline the challenges in the Zambia's current voluntary liquidation process and the challenges in protecting the interests of the depositors.

4.2 RATIONALE FOR DEPOSIT PROTECTION

The rationale for Deposit protection is that it is an increasingly common response to the problem of bank runs and systemic risks.[69] Financial institutions, particularly banks are uniquely susceptible to runs largely because they borrow 'short' (by taking deposits) and lend 'long' (by making loans with longer maturities). This inevitably results into a mismatch that makes the balance sheets inherently unstable.[70] Therefore, when depositors insist on withdrawing more cash than the bank has in its vault, the bank will not liquidate its illiquid assets fast enough to satisfy the demands of the depositors. The failure by one financial institution is what triggers spill over to other financial institutions. However implementation of deposit protection schemes in Zambia would not be without a challenge. A deposit insurance system can contribute to the stability of the financial system and protect small depositors.[71] Well construed deposit insurance system would significantly reduce the risk of financial institution failures and the disruptive breakdown of essential financial institution activities that often accompany such runs. Therefore a well-designed deposit insurance system should advance the vitality and stability of the financial sector while minimising

[69] Patricia A McCoy, The Moral Hazard Implications of Deposit Insurance: Theory and Evidence, Seminar on Current Developments in Monetary and Financial Law, Washington, D.C, October 23-27, 2006
[70] Ibid
[71]Kenneth Kaoma Mwenda, Legal Aspects of Banking Regulation: Common Law perspectives from Zambia, Pretoria, Pretoria University Press, 2010, P70

informational asymmetries that are associated with insurance systems.[72] Some of the notable challenges in Zambia's legal framework on voluntary liquidation and depositor protection are discussed below.

4.3 CHALLENGES IN THE VOLUNTARY LIQUIDATION PROVISIONS

As indicated in chapter two of this study, the Banking and Financial Services Act (BFSA) no. 7 of 2017 does not provide in explicit terms the voluntary liquidation process in terms of who carries out the liquidation process and the duties, responsibilities and accountabilities associated with such a function. Zambia has had no incidence of a financial service provider going into voluntary liquidation. The efficacy of the legal framework in this area has therefore not been fully tested. Consequently no much attention has been given by legislators to enact clear laws that would address instances of voluntary liquidation. In its current form, the law would provide serious challenges notably the following:

4.3.1 Conflict between Companies Act and Banking and Financial Services Act provisions.

Section 121 (1) of the BFSA provides that a financial service provider should pass a resolution in accordance with the Insolvency Act or any other law. The first challenge is that currently the insolvency law has not yet been passed. Secondly, financial institutions being companies first before they become financial service providers, are governed by the Companies Act.[73] Relying on the Companies Act would entail invoking divisions 13.3 and 13.4 which relate to voluntary liquidations of companies and members' voluntary winding up in particular. However, reliance on the Companies Act would not be possible since the provisions of the companies Act

[72] Ibid
[73] Chapter 388 of the Laws of Zambia

cited above would contract section 122 of the BFSA. While section 310 under the Companies Act provides for appointment of a liquidator in a voluntary winding up, section 122 of the BFSA presumes that the company itself through either directors or members will carry out the voluntary liquidation. Inevitably section 122 of the BFSA would have to prevail in order to give effect to section 4 (1) of the BFSA which provides that :

> ***“Where any written law relating to, or impacting on, banking business or financial services is inconsistent with this Act, the provisions of this Act shall, to the extent of the inconsistency, prevail”***

The obvious implication is that the provision of section 122 notwithstanding their lack of clarity will prevail rendering the execution of the voluntary winding very challenging.

4.3.2 Prejudice to the depositors and creditors

In chapter two, it was observed that the directors, by the nature of their duties, are bound to be conflicted because on one hand they have a fiduciary duty as agents of the company while on the other, they ought to protect the interest of the depositors. Therefore, if a voluntary liquidation exercise is to be executed as provided by section 122 of the BFSA, the rights of the depositors and creditors would seriously be prejudiced contrary to the intention of section 124 of the BFSA which provides that:

> ***(1) “An approval by the Bank of Zambia for the voluntary winding-up or dissolution of a financial service provider as provided in this part, shall not prejudice the right of a depositor or creditor to payment in full, or to the return of funds or property held, by the financial service provider.***

(2) All lawful claims shall be paid promptly and all funds and property held by financial service provider shall be returned to the rightful owners within such maximum period as the Bank of Zambia may direct in writing.

It will be observed that while in one breath the BFSA provides for protection of depositors and creditors, in another, it removes the mechanism for actualizing it. Although the BFSA in section 124(2) advocates for the prompt payment to the depositors and creditors, the Act only stipulates that such payment must be done within a maximum period stipulated by the Bank of Zambia. What constitutes maximum period has not been defined in the Act. The Act should have provided for what constitutes maximum period as opposed to leaving it open ended. Clearly this provision, although it means well, it is not progressive. In comparative terms, section 33 (6) of the Kenya Deposit Insurance Act[74] obliges the liquidator appointed under it to effect payments to the depositors within 30 days of being appointed. This provision removes the uncertainty that depositors under the Zambian BFSA would have to face. Although depositors are ranked second in terms of priority of payments[75], they may not be guaranteed if the voluntary liquidation is being carried out by a person whose duties, accountabilities are not well defined. This would prove to be a real challenge.

4.4 CHALLENGES IN THE DEPOSITOR PROTECTION IN ZAMBIA

Section 132 (5) of the BFSA provides that the Bank of Zambia shall establish a scheme for the protection of depositors. Although the Act provides desire for the establishment of a deposit protection scheme, such scheme is not yet in place. There has been increasing concern by stakeholders on the need to have a deposit

[74] Chapter 487C of the Laws of Kenya

[75] Section 132(1) of the Zambia Banking and Financial Services Act No. 7 of 2017

protection scheme. This has been a recurring theme at various for a. The stability of the financial system in Zambia cannot therefore be guaranteed due to systemic risks. Due to the inadequacy in the legal framework regarding protection of depositors, Zambian depositors are not covered and face the real risk of losing their deposits.

4.4.1 HIGH COST OF BANKING PRODUCTS

The deposit protection mechanism comes with a cost. For explicit deposit protection schemes, particularly, financial service providers will require to contribute towards the scheme according to their risk profile in terms of the magnitude of their deposits. The financial service providers will be inclined to pass on such costs to the depositors by way of imposing a premium on the banking products. This would particularly affect the depositing public in terms of high transaction costs

4.4.2 MORAL HAZARD

Deposit protection schemes, just like any other form of insurance bring about moral hazard. Moral hazard arises when the presence of insurance reduces the incentives for depositors to monitor the safety of their savings.[76] Depositors stop monitoring the behaviour of bankers, and no longer bother to move deposits from worse to better institutions owing to the fact that they are guaranteed payment should their financial institution fail. One manifestation of moral hazard involves excess risk-taking by insured banks. Another manifestation of moral hazard arises when bank managers engage in actions that serve themselves at the expense of their bank.[77] For example, managers may fail to exert efforts to collect bad debts or may show leniency towards friends knowing that deposits are covered by insurance.

4.4.3 POOR REGULATORY REGIME FOR DEPOSIT PROTECTION

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[76]Gary Richardson**,** Deposit Insurance and Moral Hazard: Capital, Risk, Malfeasance, and Mismanagement, **A comment on: Linda Hooks and Kenneth Robinson, "Deposit Insurance and Moral Hazard:**

[77]Ibid

Effective deposit insurance schemes thrive on the back of strong regulatory and monitoring regimes. In Zambia, evidence indicates that Bank of Zambia has had challenges in prudential supervision of financial service providers going by the high ratios of non-performing assets. It must be warned that countries with weak informational, legal and supervisory environments should not adopt explicit deposit insurance systems until they assess and remedy any weaknesses in their environments.[78] When large banks become troubled and threaten the stability of the financial system, the government often intervenes thereby undermining market discipline. In countries where deposit protection schemes are operational, the insuring institutions are legally empowered to institute supervisory and monitoring activities independent of the usual prudential supervision by central banks. For example, section 39 of the Kenya Deposit Insurance Act provides that:

> ***(1) Notwithstanding section 38 (Inspection by Central Bank), the Corporation shall have power to make any examination of any institution whenever the Corporation deems it fit that such examination is necessary to determine the condition of such institution for purposes of this Act.***
>
> ***(2) Without prejudice to the generality of sub section (1), the scope of examination may include—***
>
> ***(a) whether proper and adequate deposit records are maintained by an institution;***
>
> ***(b) whether reports made by an institution are correct;***
>
> ***(c) compliance with terms and conditions or any other requirements of membership; and***

[78] A Dermiguc-Kunt and E J Kane, Deposit Insurance around the globe: Where does it work? (Washington D C World Bank Policy Research Working, 2001

(d) such other areas as may be deemed necessary.

(3) For purpose of this section, the officers of the Corporation or any other person appointed by the Corporation shall have powers to require an officer, auditor, agent or any other person of the institution to furnish such document, material, information or explanations as the Corporation may require.

(4) Upon an inspection under this section-

(a) the books, accounts, and other documents required to be produced shall not, in the course of the inspection, be removed from the premises of the institution or other premises at which they are produced;

(b) the person making the inspection may make copies of any books, accounts and other documents required for the purposes of his report.

(5) Upon completion of a special examination under this section, the Corporation shall make a report of the examination to the Central Bank.

(6) The Corporation may recover any cost of special examinations from the institution examined as a debt due and payable to the Corporation.

Further the Kenya Deposit Insurance Corporation (KDIC) is empowered to increase the premiums payable by a financial service provider where it deems that the risk profile of such an institution has increased. The KDIC also has power to terminate membership of financial service providers that are not operating in a sound and safe manner and where the Central Bank of Kenya (CBK), upon receipt of recommendations from the KDIC fails to take corrective action. This power by the KDIC helps to address the challenge of moral hazard. If Zambia were to implement public deposit insurance mechanism, the political inference evident in the supervisory work of the central bank would prove to be another challenge. The

central bank in Zambia does not enjoy regulatory and operational autonomy. Regulatory autonomy entails that a regulator has wide autonomy in setting, at a minimum, prudential regulations that follow from the special nature of financial intermediation.[79]

4.5 CONCLUSION

The objective of this chapter was to highlight the challenges that would be associated with the execution of a voluntary liquidation process and implementation of a deposit protection scheme. The chapter has demonstrated the likely challenges that would be encountered in executing a voluntary liquidation process based on the current legal framework as provided for in the Banking and Financial services Act no. 7 of 2017. Specifically, the chapter identified the conflict between the companies Act and the BFSA as well as the prejudice that would be occasioned to the creditors and depositors if the company is allowed to execute the voluntary liquidation exercise. Further, the chapter has identified the associated challenges of implementing a deposit protection scheme, namely high costs of banking products, moral hazard and poor supervisory regime which likely erode the expected benefits of a deposit protection mechanism. The next chapter is a conclusion of the study. It will highlight the findings of the study and provide recommendations.

[79] Kenneth Kaoma Mwenda, Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator, Washington, World Bank, 2006, P20

CHAPTER 5

CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

5.1 CONCLUSIONS AND FINDINGS

The objectives of this study were to analyse the adequacy of the provisions of the Banking and Financial Services Act no. 7 of 2017 with regard to voluntary liquidation process of financial services providers, mechanisms for the protection of depositors as well as the challenges associated with effective execution of voluntary liquidation process and depositor protection. In answering the research questions, a review of

the various provisions in the Banking and Financial Services Act No. 7 of 2017 that govern voluntary liquidation of financial service providers and depositor protection was carried out. Further, a comparative study with other jurisdictions namely Nigeria, Kenya and South Africa was done with a view of ascertaining how the named countries have reformed their laws in this regard and how Zambia could learn from their experiences.

In Chapter two of the study it was concluded that the provisions of the Act[80] do not provide sufficient guidelines on the voluntary liquidation process of financial service providers. The Act does not state in clear terms who should carry out the liquidation process for a financial service provider that opts for voluntary liquidation. Further, the Act does not spell out the duties, responsibilities and other accountabilities of the liquidator as the Act presupposes that the directors or members of the financial service provider itself will undertake the liquidation process. The inadequacy in the Act emanates from the vested interest that the directors and members have, which may likely prejudice the interests of the depositors. The risk of not stating the person who should carry out the liquidation process and not providing for statutory duties and accountabilities is that it poses a challenge for the stakeholders to ascertain whether the process has been done according to the law let alone demonstrate how they have been prejudiced. This leaves the various stakeholders to rely on the provisions of the companies Act. It was also concluded that the Act does not provide for protection of depositors in a winding up, be it voluntary or involuntary. The non-provision of depositor protection in the Act has given incentive to bank runs in the event of any failure or adverse information about a financial service provider.

[80] Banking and Financial Services Act No. 7 of 2017

Because of these inadequacies, the Act does not address systemic risk that is reminiscent in the financial services sector.

In chapter three, a comparative study of the Nigerian, Kenyan and South African jurisdictions has generally revealed that the three jurisdictions have reformed their legal regimes to reflect international trends. The study has concluded that Nigeria and Kenya have robust legal frameworks which clearly indicated how deposit protection systems operate and the interplay between regular prudential functions of central banks and risk management functions of deposition protection corporations. Nigeria and Kenya have undertaken very positive legislative reforms, particularly in the area of deposit protection. Both countries have enacted specific legislation that create establishment of independent deposit protection corporations with very clear mandates.

The study has further concluded that there are many lessons that Zambia could learn from Nigerian, Kenyan and South African legal regimes on voluntary liquidation of financial service providers and depositor protection mechanisms. The study has clearly demonstrated the need for legal reforms in the financial services sector so that clarity by way of adequately providing for the voluntary liquidation provisions in the Zambia Banking and Financial Services Act. The study has also underscored the inevitable need to have explicit deposit protection mechanisms that would adequately address contagion risks and enhance financial sector stability.

In chapter four of the study it was concluded that the current provisions on voluntary liquidation of financial service providers and implementation of a deposit protection mechanism would not be without challenges. The chapter has made findings of what would likely to be the challenges to be encountered in executing a voluntary liquidation process based on the current legal framework as provided for in the

Banking and Financial services Act no. 7 of 2017. Specifically, the chapter identified the conflict between the companies Act and the BFSA as well as the prejudice that would be occasioned to the creditors and depositors if the company is allowed to execute the voluntary liquidation exercise itself. The study has also identified the associated challenges of implementing a deposit protection scheme, namely high costs of banking products, moral hazard and poor supervisory regime which likely erode the expected benefits of a deposit protection mechanism.

5.2 RECOMMENDATIONS

Arising from the study, the following recommendations are being made:

5.2.1 The need for the review of the Banking and Financial Services Act No. 7 of 2017

As was noted in chapter two of the study, the there is need to urgently review the BFSA in order to provide for clarity regarding voluntary liquidation of a financial services provider. Section 121, particularly should be amended to remove the contradiction between sections 121(1) and 121(2) and ensure that it is clear in terms of what precedes the other between a financial institution passing a resolution to voluntarily liquidate itself and obtaining Bank of Zambia approval. It is also recommended that section 122 be amended to provide for appointment of a liquidator whose powers, duties and responsibilities should be clearly spelt out so that stakeholders know when and how to hold the liquidator accountable. On the resolution for voluntary winding up, it is recommended that section 121(1) be amended to provide for passing of a special resolution for winding up as opposed to an ordinary resolution.

The study has concluded that the section 159 of the Act[81] does not address spill over risks that are reminiscent of financial services providers apart from providing for only operational risks arising from negligence or dishonesty of officers of financial services providers. There is need to provide for express provisions targeted at protecting depositors so as to lessen systemic risk likely to be accessioned by runs on financial services providers as witnessed in the past.

5.2.2 The Need to introduce legislation for Depositor protection Schemes

The Study has concluded that other jurisdictions have reformed their laws to incorporate specific depositor protection mechanisms in order to address the risks of runs on financial services providers. It is recommended that the legislation should be passed that will create establishment of a Deposit Protection Corporation. Zambia may learn from Nigeria and Kenya. The two countries have independent Depositor Protection Corporations that were created by an Act of parliament with the responsibility of paying out depositors in a situation of failure of a financial services provider. The deposit corporation may either be public or private institutions that will be empowered to levy contributions from all licensed deposit taking financial service providers. The corporation should also have power to provide parallel supervision to financial service providers. It is further recommended that management of financial service providers, whether in voluntary or involuntary liquidations should vest in the deposit protection corporation. It is envisaged that this change will relieve the Bank of Zambia of the onerous task of managing liquidations which take too long to be concluded to the detriment of the depositors.

[81] Banking and Financial Services Act No. 7 of 2017

However, caution needs to be exercised in terms of the coverage and funding of the deposit insurance scheme. The World Bank report notes that the adverse effect of deposit insurance on bank stability tends to be stronger the more extensive is the coverage offered to depositors, and where the scheme is funded and run by the government rather than the private sector.[82]

5.2.3 The need to improve accountability of officers of financial service providers

As observed in chapter four of the study, introduction of deposit protection schemes, just like any other form of insurance, carries the risk of moral hazard. There is need to strengthen legislation regarding accountability of people entrusted with running of financial services providers. The law should provide for serious consequences on officers of financial service providers who engage in unwarranted risk taking to the detriment of depositors due to the presence of deposit insurance schemes. The consequences should carry both civil and criminal liability. This is particularly important so that the benefits of deposits protection schemes are not undermined. It is further recommended that Implementation of deposit protection mechanisms should be accompanied by broad sensitization of the public on the need by the depositors to continuously monitor the behavior of financial service providers despite a guarantee of payment of their deposits should a financial service provider fail.

5.2.4 The need to urgently bring into effect the Insolvency Act of 2017

The study has concluded that although the BFSA in section 121 provides that a financial services provider should pass a resolution for voluntary liquidation in

[82] Kenneth Kaoma Mwenda, Banking Supervision and Systemic Bank Restructuring: An International and Comparative Legal Perspective, London, Cavendish Publishing (2000), PP 123

accordance with Insolvency Act of 2017. As at the time of this study, the Insolvency Act of 2017 was not yet in effect yet the BFSA refers to it. There is likely to be a legal dilemma if a financial service provider was seized with a situation of voluntary liquidation before the Insolvency Act of 2017 comes into effect. This study recommends that the Insolvency Act of 2017 should urgently be brought into effect so that the intention of section 121(1)[83] is actualised.

5.2.5 The need for adequate protection to consumers of banking financial services products.

The deposit protection mechanism comes with great cost to the providers of financial services products. As observed in chapter four of the study, the contribution that is required to be made by licensed financial services providers towards the deposit protection fund is likely to trigger an increase in the cost of financial services. It is recommended that safeguards should be provided in the Banking and Financial Services Act No. 7 of 2017 so that financial service providers should not exploit the public in the quest to recover the costs of insuring their deposits.

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