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THE ZAMBIAN CONTINUOUS DISCLOSURE LEGAL REGIME—ADEQUATE TO ENSURE EFFICIENT DISCLOSURE?

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ABSTRACT

Continuous disclosure of price-sensitive information, serves to ensure accuracy in the price of the securities of an issuer and credit ratings of those securities and the issuer, transparency and fair-play in securities markets, and as such, critical to investor confidence and the overall integrity of the market. The study assesses the legal framework for public distribution of securities locally and across international borders so as to establish whether or not it has provided adequate incentives for efficient continuous disclosure of material information which is not generally available by listed issuers at minimum cost. The study employs the doctrinal approach to evaluating legal rules. The main findings of the study were that (a)the law does not impose a stream-lined continuous disclosure obligation on listed issuers (b) the law does not exempt listed issuers from continuous disclosure of (i) generally-available material information, (ii) confidential information, and (iii) detrimental information, (c) the law does not provide for mutual recognition of continuous disclosure documents approved in home country of the issuer, (d)the law does not provide for civil remedies or compensation for loss occasioned by breach the continuous disclosure obligation. The article makes necessary recommendations for law reform as a possible way of remedying these shortcomings in the law.

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INTRODUCTION

The fundamental regulatory objective of imposing continuous disclosure is:

a) ensuring availability of accurate information about the listed issuer, its business and listed securities—in line with the efficient market theory—so as to enable the investing public to appraise the financial position of the issuer and its subsidiaries before they can engage into any dealings in securities; and

b) avoiding the establishment of a false market in securities of listed issuers.

Against this regulatory objective, this article sets out to examine the adequacy of the Zambian legal framework for the regulation of continuous disclosure to ensure efficient continuous disclosure by listed issuers at minimum cost.[2]It examines legal constraints on efficient regulation of continuous disclosure of material information by issuers. An argument is made that continuous disclosure of price-sensitive information, in-so-far-as it serves to ensure accuracy in the price of the securities of an issuer, transparency and fair-play in securities markets, is critical investor confidence and the overall integrity of the market. Thus, it may be said that continuous disclosure of non-public material facts relating to the issuer or its listed securities is the life-blood of securities markets. The article also gives an international comparative analysis by considering parallel developments in other COMESA region as well as developed jurisdictions such as the United States and Australia.

Well-functioning securities markets serve as an alternative to banks and insurance companies in ensuring efficient allocation of financial resources in the economy. They are thus, critical to the success of country's financial system and the economy as a whole. Empirical evidence provided by a study by Levine (1997) shows that, even after controlling for many other factors influencing economic growth, economies of countries which have more active stock markets tend to grow

[2]The edifice of this article is a segment of my PhD research work on "Legal Aspects of Cross-border Trade in Listed Securities in Eastern and Southern Africa. The segment examines constraints relating to 'Inadequacies Inherent in the Continuous Disclosure Regime of Common Market for Eastern and Southern Africa (COMESA) Members'. In my PhD research work, an argument has been made that unless the continuous disclosure obligation is streamlined, it is likely to exacerbate compliance costs for issuers in the face of an already-existing periodic disclosure obligation; this is more so for foreign issuers who have cross-listed their securities in the host state—the home country having already subjected them to both periodic and continuous disclosure of information relating to them and their listed securities.

faster than those of countries which have less active stock markets or no stock market activity at all.[3]

1.1. MEANING OF AN EFFICIENT LEGAL FRAMEWORK FOR CONTINUOUS DISCLOSURE

An efficient legal framework for continuous disclosure is one that facilitates and enhances disclosure of non-public material information to the public by issuers at minimum cost—the cost of compliance, and savings in avoided unnecessary litigation. Such a legal framework must also provide civil remedies for investors who suffer loss as a result of selling or purchasing securities at under value or over-value.

1.2.DISTINGUISHING CONTINUOUS DISCLOSURE FROM PERIODIC DISCLOSURE

Continuous disclosure can be defined as an obligation to promptly disclose material new non-public information concerning a listed issuer as and when it becomes known to the officers of the issuer. This obligation may be contrasted, in the Zambian context, with periodic disclosure which requires preparation and filing of annual disclosure documents.[4] In distinguishing continuous disclosure from periodic disclosure, Golding and Kalfus (2004) observe:"[A] key distinction between periodic disclosure and continuous disclosure is that periodic disclosure is episodic and permits information to be refined and disclosure issues to be assessed over an appropriate period following the relevant closing date of the financial statement, while continuous disclosure is prompt, resulting in the need to make speedy disclosure decisions."[5]

[3] Ross Levine, 'Financial Development and Economic Growth: Views and Agenda, ' (1997) 35 J Economic Literature, p. 688

[4] See, section 185 of the Companies Act 1994 which imposes an obligation on public companies to make annual returns. A public company is under an obligation to lodge with the Registrar such return within one month after the Annual General Meeting, and if the AGM is held within three months after the end of the financial year, within three months from the end of the financial year: Section 184(1)(a)(b) of the Companies Act 1994.

[5] Greg Golding and NatalleKalfus, 'The Continuous Evolution of Australia's Continuous Disclosure Laws,' Company & Securities Law Journal, Vol. 22 of 2004, p. 385, at pp. 385-386

II

2. BACKGROUND TO THE PROBLEM

Both periodic and continuous disclosure of information by listed issuer is a cost to those issuers. Thus, the continuous disclosure obligation imposes additional costs on listed issuers. Given the increasing number of cross-border cross-listings in Eastern and Southern Africa, and the high cost associated with cross-border cross-listings, the compliance cost for cross-listed issuers may even be prohibitive.[6] In light of the benefits associated with increased local listings and cross-border cross-listings—such as increased capitalization, liquidity, reduced risk, and lower cost of capital—the call for an efficient and cost-effective continuous disclosure obligation could be justified.

2.1. STATEMENT OF THE PROBLEM

Continuous disclosure of material information by listed issuers ensures that the information available in a securities market reflects the correct position of the issuer and its listed securities. This enhances transparency, fairness in the pricing of securities, investor protection and integrity of the securities market. In light of this position and the background to the problem under investigation, the problem under investigation may be stated as follows:

"Has the legal framework for the public distribution of securities locally and across international borders provided adequate incentives for effective continuous disclosure of material information by listed issuers at minimum cost?"

III

3. METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach evaluating the legal framework for continuous disclosure of material information by listed issuers. This method was used in

[6] For empirical evidence on the steady increase in cross-border cross-listings in Eastern and Southern Africa, see Samamba, Lennox Trivedi, 'Legal Constraints on the Growth of Cross-border Cross-listings in the COMESA Region—The Case of Zambia,' African Law Journal, Vol. 4, 2018

analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal framework for the public distribution of securities has provided adequate incentives for efficient continuous disclosure of material information that is not generally available by listed issuers at minimum cost. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.
The research questions used were:

a) Does the law and policy impose a streamlined continuous disclosure obligation on listed issuers?
b) Does the law provide for disclosure exemption recognized in international best practice?
c) Does the law provide for mutual recognition of disclosure documents approved in one COMESA jurisdiction for continuous disclosure purposes in the jurisdiction of cross-border cross-listing?
d) Does the law provide for civil remedies or compensation for loss occasioned by breach of the continuous disclosure obligation?

IV

4. RESULTS

The results of the study may be summarized in tabular form as follows:

QUESTION	ANSWER	
	National law	**Regional Law**
1. Does the law impose a streamlined continuous	NO	NO

disclosure obligation?		
2. Does the law exempt listed issuers from disclosure of:-		
(a) Generally-available information	NO	NO
(b) Confidential information	NO	NO
(c) Detrimental information	NO	NO
3. Does the law provide for mutual recognition of continuous disclosure documents?	NO	NO
4. Does the law provide for civil remedies or compensation for breach of the continuous disclosure obligation?	NO	NO

V

5. DISCUSSION

5. LEGAL CONSTRAINTS ON EFFECTIVE REGULATION OF CONTINUOUS DISCLOSURE IN ZAMBIA

This article has identified a number of legal constraints on effective regulation of continuous disclosure of price-sensitive information by listed issuers in Zambia. The following subsections briefly examine these constraints, in turn.

5.1. CONSTRAINTS RELATING TO AN INFORMATIONALLY-UNRESTRICTED CONTINUOUS DISCLOSURE OBLIGATION

The central premise of this subsection is that both continuous and periodic disclosures are a cost on listed issuers. As such, imposing continuous disclosure obligation as a complement to the existing periodic disclosure obligation, without means of determining what kind of information should be disclosed or should not be disclosed, is likely to increase operating costs for listed issuers. Consequently, the increasing costs for listed issuers are likely to discourage future listings or cross-border cross-listings.

Section 81(1) of the Zambian Securities Act 2016 imposes a duty on listed issuers to continuously disclose matters which affect the value of registered listed securities.[7] 'Affect' has not been defined in the Securities Act nor the Companies Act 1994 nor the Banking and Financial Services Act as a fall-back.[8]There is Supreme Court authority to the effect that where a statute or common law does not give guidance on the meaning of a particular word or term or phrase, dictionaries serve as a fall-back.[9] In this regard, the Oxford Dictionary of English defines 'affect' as "have an effect on".[10]Thus, the provision does not spell out how much the information must affect the value of the securities before it can be disclosed. This state of affairs raises the question, 'should issuers then disclose all information which affect the value of securities however insignificant the movement in the price may be?'

An argument is made that given the co-existing periodic disclosure obligation on listed issuers, they should be left to disclose only information which may cause a material movement in the value or price of the securities. 'Material movement' should be taken to mean 'a change in the price of securities which a reasonable investor and their advisors might consider necessary for their investment decision.[11] A corollary argument is made that in the absence of such an informational cap, the publication and litigation costs of the listed issuers are likely to sky-rocket since just about any kind of information would be disclosable and actionable.[12]

[7] Value of a security is the underlying monetary worth of a security. Once the security is listed on a stock exchange, its value may be its initial price in which case its value would be equal to its initial price (V=P). As information starts to flow, driven forces of demand and supply in a free market, the price of the security may rise above or fall below its underlying value (V). Thus, (V) or (P) would be greater or less than P_1 or ($P > P_1$ or $P < P_1$) or ($V > P_1$ or $V < P_1$). Thus, reference to change in value of a security listed on a securities exchange connotes movement in the price of the security by reference to P. Consequently, reference to value in section 81(1) of the Zambian securities Act 2016 should for all intent and purpose of regulation be construed as reference to change in the price of the security as well.

[8] By section 5 of the Securities Act 2016 words and expression used in the Securities Act but not defined therein, unless the context otherwise requires, have the meaning assigned to them in the Companies Act or the Banking and Financial Services Act—Chapter 387 of the Laws of Zambia.

[9] Stallion Motors Ltd and African Cargo Services vs Zambia Revenue Authority, Supreme Court Appeal No. 11 of 2012

[10]Oxford Dictionary of English, (Oxford: Oxford University Press (2003), 2nd Ed), at p. 26

[11] See, the definition of 'material change' in section 2 of the Zambian Securities Act 2016

[12] Listed issuers are already under an obligation to make periodic disclosures under various regulating statutes. This is a cost in itself. Imposition of an informationally-unrestricted continuous disclosure obligation on them would just serve to exacerbate their costs. As for cross-border cross-listed issuers, they have to bear the cost of continuous and periodic disclosure in their home country and the country of cross-listing. Since non-disclosure of just about any kind of information is likely to ground an action, imposition of an unrestricted disclosure obligation is likely to increase litigation costs for the listed issuers: See Michael D. Guttentag, 'An Argument For Imposing Disclosure

Regarding the danger of adopting a low standard of disclosure, United States Supreme Court in Basic Inc. vs Levinson[13] observes:

"The Court in TSC Industries Inc. vs Norway Inc[14] acknowledged that certain information concerning corporate developments could well be of 'dubious significance'; it was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management 'simply to bury shareholders in an avalanche of trivial information—a result that is hardly conducive for informed decision-making."[15]

The United States of America has set quite a high threshold for disclosable information. Thus, only 'material information' raises the duty on the part of an issuer to continuously disclosure such a matter.[16] Regarding materiality, the Supreme Court in Basic Incadopted the definition given by the court in TSC Industries Inc. In the latter case it was held that a matter 'is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'[17] Thus, the United States Supreme Court in Basic Inc established the disclosure threshold as follows:

"Disclosure is mandated when information becomes material for a reasonable investor's decision."[18]

The court in TSC Industries Inc further explained that in order to fulfil the materiality requirement, 'there must be a substantial likelihood that the disclosure of the omitted fact would

Requirements On Public Companies,' Florida State Law Review, Vol. 32, No. 123 of 2004, pp. 124-194, pp. 140-141

[13] 485 US 224 (1988)

[14] 426 US 438; See Justice Marshall's speech at p. 449 of the judgment

[15] Basic Inc case at pp. 231-232

[16] See, Rule 10b-5 of the United States Securities Exchange (Duties of Issuers, etc) Rules 1942 made pursuant to section 10b of the Securities Exchange Act 1934.

[17] Ibid

[18] Basic Incvs Levinson (1988), at pp. 231-232.Information becomes " material " when it relates to a change in the business, operations, assets or ownership of an issuer that could reasonably be expected by a reasonable investor to have a significant effect on the market price or value of the securities of the issuer, including a decision to implement a change made by the issuer: Collected from the definition of 'material change' in section 2 of the Securities Act 2016.

have been viewed by a reasonable shareholder as having significantly altered 'the total mix' of information made available.[19]

It is submitted that the materiality test excludes trivial information from the disclosure net thereby reducing the publication and litigation costs of the listed issuers. Such a provision is likely to ensure a balance between the desire to ensure market integrity and transparency through full disclosure and the desire to keep listed issuers financially afloat.

The need for a causal connection between the fraud or non-disclosure and the loss sustained by the investor could be satisfied by imposition of a rebuttable presumption of reliance by application of the 'fraud on the market doctrine'. Thus, the United States Supreme Court in Basic Inc observes that:

"The fraud on the market theory is based on the hypothesis that, in an open anddeveloped securities market, the price of a company's stock is determined by the available material information regarding the company and its business. …Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. …

The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations."[20]

Similarly, Australia has placed a cap on what sort of information should be the subject of continuous disclosure by listed issuers. Section 672 of the Australian Corporations Act 2001 gives legislative force to the Listing Rules of the Australian Securities Exchange (ASX). By Listing Rule 3.1, 'once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of that entity's securities, the entity must immediately make such information available to the ASX.' Section 674(2)(c)(ii) of the Corporations Act 2001 establishes the requirement ofmateriality based on the reasonable person standard as part of the overall test in s 674(2). The section provides that if:

(a) this subsection applies to a listed disclosing entity; and

[19] Ibid

[20] Ibid, at pp. 242-242

(b) the entity has information that those provisions require the entity to
notifyto the market operator; and
(c) that information:
(i) is not generally available; and
(ii) is information that a reasonable person would expect, if it were
generallyavailable, to have a material effect on the price or value of ED
securities of the entity;
the entity must notify the market operator of that information in accordance
with those provisions.

Constraints Relating to Disclosure of Generally-Available Information

In an attempt to improve the Zambian continuous disclosure regime, it would not be enough to stop at disclosure of price-sensitive information only. There is also need to exempt issuer—especially cross-listed foreign issuers—disclosure of information which is in public domain such as high-value litigation concerning the issuer. Would not disclosure of generally available information be unfair and discouraging to a cross-listed foreign issuer which is already under a continuous disclosure and periodic disclosure obligation in their home country? An argument is made that such over-regulation is likely to increase the cost of compliance for cross-listed foreign issuers, hinder growth of cross-border cross-listing and reduce the supply of securities to Zambian securities exchanges. As a possible solution to this shortcoming in the law, proposals are made for the amendment of section 81 to ensure that 'generally-available information—information which is in public domain and could be accessed with reasonable diligence—be excluded from disclosure.

Thus, in Australia, as apossible way of avoiding such defects in the law, only information which is not generally available and has a material effect on the price or value of the securities is disclosable. Information is generally available if it is readily observable.[21] A matter is readily-observable if it is available and accessible to a significant portion of the public even though unlikely to be known by the Australian investing community.[22] The materiality test is satisfied if

[21] See, section 1002B(2)(a) of the Corporations Act 2001
[22] R vsFirns [2001] NSWCCA 191, at pp. 193-196

the information would or is likely to influence persons who commonly invest in securities.[23] Thus, materiality in Australia is established by using an objective criterion. For this purpose, the United States TSC Industries Inc and Basic Inc materiality test has been received with approval in Australia.[24]

The benefits of regulating the nature of information that should be the subject of continuous disclosure have already been discussed in respect of Zambia and the United States above. As possible solution to the shortcoming identified in respect of the Zambia legal framework, proposals are made as follows:

Firstly, section 81(1) of the Zambian Securities Act 2016 should be amended to read as follows: s. 81(1) An issuer shall, once registered securities are listed,keep the public informed of all matters <u>which materially affect or are likely to materially affect the value or price of the securities</u> immediately upon their becoming known to the directors of the issuer, by placing an advertisement in a newspaper of general circulation or in other media approved by the Commission and shall submit reports to the Commission and to the securities exchange on which those securities are listed. (2) For the purposes of sub-section (1), material change includes a change in the business,operations, assets or ownership of an issuer that could reasonably be expected to have a significant effect on the market price or value of the securities of the issuer, and includes a decision to implement a change made by the issuer. It is submitted that such a measure is likely to bring the Zambian legal framework in conformity with international best practice. It is also likely to bring the Zambian provisions on continuous disclosure in harmony with LuSE Listing Rule 3.4(a) which requires that only information which may lead to material movements in the reference price of the issuer's securities be disclosed.[25]

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[23] See, definition of 'material' in section 677 of the Australian Corporations Act

[24] See, Pancontinental Mining Ltd vs Goldfields Ltd (1995) 16 ACSR 463, at p. 466; AAPT Ltd vs Cable and Wireless Optus Ltd (1999) 32 ACSR 219, at p. 227

[25] Similarly, Rule 11(c) of the Registration of Securities Rules, Statutory Instrument No. 164 of 1993, made under the repealed Securities Act 1993, places an obligation on listed issuers to disclose to the listing exchange, the Commission and the investing public any information that comes up relating to its operations which could reasonably be expected to have a material effect on the price or value of its listed securities. However, this and the LuSE Listing Rules 2012 are simply statutory instruments which could not be expected to override or amend the position of the parent Act of Parliament. The proposed amendment is thus, justified.

Constraints Relating to the Vagueness Of The Concept Of 'Materiality' And The Need For More Certainty

What criteria should the SEC adopt in determining which information is material and which one is not? And how does the SEC determine whether or not certain kinds of information will cause an 'appreciable' movement in the price or value of the securities if it were generally available? These questions serve to highlight the vagueness inherent in the concept of 'materiality'. Since'materiality' is too vague a concept to serve as the standard that governs the day-to-day conduct of issuers in the real world, and adoption of a categorical approach to determining what kind of information is material and as such disclosable. This could be achieved by introducing a defined category of event that will trigger the duty to disclose. It is proposed that the list of trigger events [includes] the following, namely:[26]

(i) Mergers;

(ii) Substantial acquisitions;

(iii) entry into or termination of a material agreement or letter of intent outside of the ordinary course of business;

(iv) termination of a business relationship that results in a loss of at least 10% of the company's revenue;

(v) an event triggering a material direct or contingent financial obligation;

(vi) default or acceleration of a financial obligation;

(vii) passing of a resolution for or an order for winding up;

(viii) appointment of receivers.

(ix) any decision to declare, recommend or pay any dividend or to make any other distribution on its listed securities and the rate and amount thereof;

(x) any decision not to declare, recommend or pay any dividend which would

otherwise have been expected to have been declared, recommended or paid in due

[26]In the United States of America, the SEC brought more certainty to the concept of materiality by promulgating Regulation Fair Disclosure 2000 (Regulation FD). By way of Regulation FD, the SEC responded to critics' concerns that "materiality is too vague a concept to serve as the standard that regulates the day-to-day business of issuers in the real world," and adopted a definite approach whereby it identified categories of material events requiring disclosure on Form 8-K. The trigger events include (i) entry into or termination of a material agreement or letter of intent outside of the ordinary course of business, (ii) termination of a business relationship that results in a loss of at least 10% of the company's revenue, and (iii) an event triggering a material direct or contingent financial obligation, including any default or acceleration of an obligation.

course;

Constraints Relating to '<u>Immediate</u>' Disclosure of Information

Another weakness in the law consists in requiring of disclosure of information 'immediately' in section 81 of the Zambian Securities Act 2016, since 'immediacy' is another vague concept. Immediacy depends on circumstances of a particular case. Therefore, what may be immediate under a certain set of facts may not be so under another set of facts. An argument is made that such a weakness in the law is likely to breed fertile ground for insider dealing between the time the information becomes known to officers of the issuer and the time it is actually disclosed to the public. As a possible way of avoiding this weakness in the law, proposals are made for the introduction of a definite period within which information should be disclosed once it comes to the knowledge of the officers of the issuer. It is proposed that such a definite period be arrived at after consultation with departments of listed issuers which are responsible for disclosure.

5.2. CONSTRAINTS RELATING TO INADEQUATE REMEDIES FOR BREACH OF THE CONTINUOUS DISCLOSURE OBLIGATION IN THE REGION

This sub-section departs in the notion that effective enforcement of continuous disclosure obligations in respect of listed securities is critical to protection of investor interests, ensuring transparency, maintaining investor confidence and the overall integrity of the stock market. The integrity and transparency of the stock market depends on effective enforcement of criminal and civil penalties, and availability of damages for investors who suffer loss as a result of non-disclosure.

At common law, misstatements or half-truths in prospectuses, on account of subsequent partial disclosure, are only actionable by subscribers against the issuers. The content of the prospectus or statements are directed at the subscribers and not the subsequent investors. Consequently, the subsequent investors who purchase securities from subscribers and suffer loss cannot successfully maintain civil actions for damages for loss sustained on account of misleading statements in prospectuses.[27] However, what the continuous disclosure obligation does is to impose a statutory disclosure obligation (a duty to keep the investing public [fully] informed

[27]Peek s Gurney (1873) LR 6 HL 377

about its position and that of its issued securities) on issuer in favor of the public. The continuous disclosure obligation survives the subscription stage into the secondary trading phase. Therefore, any person who suffers pecuniary loss in relation to a purchase or sale of securities as a result of breach of continuous disclosure obligation can effectively sue for damages notwithstanding that they are not an original allottee.

Since the duty to disclose is imposed on the issuer for the protection of the investing public, it would help realizing the object of the imposition if civil remedies were actually imposed and effectively enforced as a complement to criminal sanctions by the legal system. Effective enforcement of the disclosure regime is likely to ensure compliance. Compliance is in turn likely to encourage future investment. AsManne (2007) observes:[28]

"In the main, disclosure regulation is explained in three interrelated ways. First, investors will make better investment decisions (and managers will more likely act in investors' interest) when those decisions are considered in the light of otherwise undisclosed, relevant information. Second, required disclosures will cause stock prices better to reflect underlying firm value, thereby enhancing market accuracy. And third, fraud will be deterred because "[s]unlight is said to be the best of disinfectants."[29]

An argument is made that enhancing investor protection and confidence through continuous disclosure of price-sensitive information in a particular stock market is likely to incentivize increased local and foreign investment in listed or cross-listed securities on that market. Consequently, both local and cross-border trade in securities listed or cross-listed on that particular stock market is likely to increase in the region.

With the underlying objective of protecting the interests of potential and actual investors alike, section 81 of the Zambian Securities Act 2016 provides as follows:

s. 81(1). "An issuer shall, once registered securities are listed, keep the public informed of all matters which affect the value of securities immediately upon their becoming known to the directors of the issuer, by placing an advertisement in a newspaper of general circulation or in

[28] Geoffrey A. Manne, 'The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure,' Alabama Law Review, Vol. 58, No. 3 of 2007, pp. 473-511.

[29] Ibid, at pp. 479-480

other media approved by the Commission and shall submit reports to the Commission to any securities exchange on which they are listed.

(4). An issuer that fails or neglects to comply with this section or the rules made for the purpose of this section, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand penalty units." The continuous disclosure provisions of the Securities Act 2016 are supplemented by the LuSE Listing Rules 2012. To this effect, Listing Rule 3.4(a) of the LuSE Listing Rules provides: "With the exception of trading statements, an issuer must, without delay, unless the information is kept confidential for a limited period of time in terms of paragraph 3.6, release an announcement providing details of anydevelopment(s) in such issuer's sphere of activity that is/are not public knowledge and which may, by virtue of its/their effect(s), lead to material movements of the reference price of such issuer's listed securities."

The following have been identified as shortcomings inherent in section 81 above, namely (i) restricting to directors the class of persons whose knowledge of price-sensitive information is attributable to the issuer, (ii) the very-low value of the fine for failure or neglect to disclose price-sensitive information as required by sub-section 1, (iii) non-enforcement of non-disclosure by foreign issuers, and (iv) lack of civil remedies for failure or neglect to disclose price-sensitive information.

The following sub-section look at these shortcomings in a little more detail, in turn.

(i).Constraints Relating to the Narrowness of the Class of Persons whose Knowledge is Attributable to the Issuer

It is firm to state that local and foreign companies, other body corporates and associations can list or cross-list their securities on the LuSE. Thus, it would follow that knowledge of price-sensitive information coming to a director of any one of these entities is attributable to the issuer for the purposes of criminal liability under section 81 of the Zambian Securities Act 2016. However, as far as company issuers are concerned, the matter seems to be a little different. Under section 2 of the Securities Act 2016, 'an issuer' could either be a local company as incorporated under the Zambian Companies Act 1994 or indeed a foreign company registered under the said Act. No definition of 'director(s)' as used in section 81 is given under the Securities Act 2016. Defining the term is important for purposes of ascertaining the scope of the class of persons whose knowledge is attributable to the issuer. In the absence of a definition of what is meant by 'director' a question may be asked, "is it every employee of the issuer who is charged with the responsibility of directing and administering business of a company whose knowledge of price-sensitive information is attributable to the issuer?" Would not such a broad definition claw in supervisors at different levels of management? Should not the class be restricted to persons whose decisions are traditionally regarded as 'decisions of the company' at general law? For the purposes of clarity, the Companies Act 1994 serves as a fall-back.[30] Under the Companies Act 1994, there is a distinction between a director of a Zambian company and that of a foreign registered company. A director of a Zambian company is defined as a "a person appointed under section 206 as director of a company incorporated under the Companies Act."[31] Thus, 'director' includes de facto director[32], shadow director[33] and alternate director[34] of a Zambian company issuer.

Thus, knowledge of price-sensitive information on the part of any one or more of the said categories is attributable to a Zambian company issuer for purposes of criminal liability under section 81 of the Securities Act 2016. By sharp contrast, a local director appointed to the management of a foreign registered company is defined as a "an officer of the foreign registered company."[35] From the definition of 'officer' in section 2 of the Zambian Companies Act a director of a Zambian company as well as a local director of a foreign registered company are both officers. However, they are not both directors for the purposes of the Zambian Companies Act—the status being restricted to director of Zambian companies, it appears.

An argument is made that on strict construction, the use of the term 'directors' in section 81 of the Securities Act 2016 with regard to company issuers is, in light of the said distinction, strict

[30]Unless the context otherwise provides, words and expressions which have been used in the Securities Act 2016 but are not defined therein, but are defined in the Companies Act or Banking and Financial Services Act, shall have the meaning assigned to them in those Acts: section 5 of the Zambian Securities Act 2016
[31] See the definition of 'director' and 'company' under section 2 of the Zambian Companies Act 1994
[32] Section 203(3) of the Zambian Companies Act 1994
[33] Sections 203(4) and 212(1) of the Zambian Companies Act 1994
[34] 213(1)(a) and (4) of the Zambian Companies Act 1994
[35] See definition of 'officer' under section 2 of the Zambian Companies Act 1994

reference to directors of a Zambian company to the exclusion of local directors foreign registered companies. It would follow therefore, that knowledge of price-sensitive information on the part of local directors of foreign registered company is technically not attributable to the foreign registered company for the purposes of criminal liability under section 81 of the Securities Act 2016. An argument is made that this technical exclusion of foreign market-participants from the continuous disclosure obligation in respect of LuSE-listed securities is likely leaves investors vulnerable to loss resulting from suppression of price-sensitive information by foreign issuers. As a consequence of this negative feature, investor confidence and the overall integrity of LuSE are likely to suffer.

Even if the use of phrase 'directors of an issuer' were construed as reference to both Zambian and foreign registered company issuers, such a construction would still express a narrow view of possible phases of administration that a company subject to the laws of Zambia can undergo. As a matter of fact and law, a company may be under the direction and administration of directors or placed under receivership and management or indeed liquidation. In this respect a question may be asked, "in the event that a receiver and manager or liquidator is appointed with continuing trading to the exclusion of the role of directors, whose knowledge of price-sensitive information should be attributed to the Zambian company issuer? As can be collected from the definition of 'director' under sections 2 and 203 of the Zambian Companies Act 1994, receivers and liquidators fall outside the definition. An argument is made that during receivership or liquidation, both local and foreign issuers are technically relieved from the continuous disclosure obligation in respect of LuSE-listed securities.[36]

[36] The appointment of receiver does not *ipso facto* remove directors and other officers from office or necessarily terminate their contracts of employment: Sipad Holding DDPO vsPopovic (1995) 19 ACSR 108. However, a receiver with powers of management would be entitled to terminate contracts of employment between the issuer and any of its officers in their capacity as employees subject to industrial and labour relations laws: Airlines Airsparesvs Handley Page [1970] Ch 193. In each case, the capacity of directors and other officers of the corporation to function as such bears an inverse relationship to the validity and scope of the receivership and management: Hawkesbury Development Co Ltd vs Land mark Finance Pty Ltd (1969) 92 WN (NSW) 199. Thus, a receiver and manager appointed to the whole of the property and undertaking of an issuer would have the effect of supplanting the Board of Directors (BoD). To this effect the English Court of Appeal has held that "the appointment by the court of a receiver and manager operates as dismissal of the company employees: Reid vs Explosives Co. (1887) 19 QBD 264, CA; on his appointment they—the employees—do not become his employees: Re Marriage, Neave& Co, North of England Trustee, Debenture and Assets Corpnvs Marriage, Neave& Co [1896] 2 Ch 663, CA.. It is submitted that in either case, the duty to disclose price-sensitive information for the purpose of complying with section 81(1) of the Zambian Securities Act 2016 rests with the receiver and manager. Appointment of a liquidator equally displaces the BoD thereby effectively making the liquidator or provisional liquidator the one responsible for disclosure: see,

As a possible solution to these shortcomings, the following proposals are made:

- First, the term 'directors' as used in section 81(1) of the Zambian Securities Act should be replaced with the term 'officers'.
- Secondly, the term 'officer' should be defined as follows:

'Officer' means—

a) a director, secretary, executive officer of a body corporate or an un-incorporated issuer;

b) a local director of a foreign company;

c) a receiver or receiver and manager of a body corporate or an un-incorporated issuer, however whether appointed pursuant to an instrument or by the court;

d) a liquidator of a body corporate whether appointed by a court or creditors or members in a voluntary winding up.

Such a provision is likely to claw in both directors and secretaries of Zambian and foreign companies additionally to executive officers and secretaries of other bodies-corporate and un-incorporated bodies. It also brings takes care of other phases of company administration by bringing in receivers and liquidators. Consequently, the disclosure net is widened. Such a wide net disclosure net is likely to ensure that just about every issuer participating on the LuSE is subject to the continuous disclosure obligation at every stage of company administration. With enhanced protection of interests of investors, those developed and emerging market investors who are interested in eastern and southern African frontier stock markets for diversification purposes are likely to turn to the LuSE. With increased foreign participation, cross-border trade in securities in the region is likely to increase.

Jurisdictions such as Australia, the United States and the United Kingdom have avoided such shortcomings by imposing the duty to disclose on the listed entity.[37] This way whether the entity is under the administration of directors or receivers, the person who for all intent and purposes may be regarded under the circumstances as agent of the entity assumes responsibility to disclose.

sections 203(2)(a), 215(1)(3), and 286(1)(2) and 289(1)(2)(a)-(f) of the Zambian Companies Act 1994. See also, Halsbury's Laws of England, 4th Edition, para 543, at p. 321

[37] See, section 672 and Australian Securities Exchange Listing Rule 3.1, SEC's Rule 10b-5 and section 81(1)(5) of the United Kingdom Financial Services and Markets Act 2000

(ii).Constraints Relating to the Very-Low Fine for Breach of the Continuous Disclosure Obligation

The underlying purpose of imposing a penalty on an erring market participant is to deter undesirable conduct. Thus, a penalty intended to deter certain behaviour should be as high as is likely to deter the conduct. Contrary to this philosophy, the maximum penalty for neglect or failure to inform and keep informed the public of price-sensitive information is fifty thousand penalty units. This translates to a paltry Fifteen Thousand Kwacha.[38] Given the ever-increasing volumes and value of securities that are traded locally and across international borders today, the fine is quite inconsequential and as such devoid of venom to bring about the desired deterrent effect. An argument is made that in cases where the value of the benefits derived from suppression of price-sensitive information exceeds the value of the fine (K 15, 000=00), the erring issuer is likely to suppress the necessary information. Take for instance an issuer who is to gain Hundred Thousand Kwacha from a price-sensitive-information-suppressed deal; would they not simply gain the hundred thousand kwacha and pay out a fifteen thousand kwacha in fines?

As a possible solution to this shortcoming, proposals are made for an upward revision of the fine imposed for breach of the continuous disclosure obligation under section 81(4) of the Securities Act 2016. The revised fine could be based on the average value of daily or monthly or quarterly or indeed yearly trades subject to revision when need be. There is also need to impose disgorgement of monies gained or losses averted by non-disclosure as one of the civil penalties imposed on the un-disclosing listed entity.

(iii).Constraints Relating to Non-Enforcement of Non-Disclosure by Foreign Issuers

Let us assume that knowledge of price-sensitive information on the part of a local director of a foreign company is competently attributable to a foreign issuer company. Let us also assume that knowledge of such information comes to the knowledge of foreign directors to the exclusion of local directors of the foreign issuer which information remains undisclosed. In the event that a LuSE investor suffers loss as a result of such non-disclosure, would that foreign issuer be prosecuted and fined in Zambia for a crime wholly committed outside Zambia? With regard to

[38] 50, 000 penalty units multiplied by 0.30 (the multiplier): see Regulation 3 of the Fees and Fines (Fees and Penalty Units Value) Regulations of 2014 as amended by Statutory Instrument No. 41 of 2015; Regulations made under the Fees and Fines Act, Chapter 45 of the Laws of Zambia

questions of this sort, it is submitted that, due to the territorial character of criminal law in the region, improper market practices committed wholly outside a COMESA country but having effect in that country cannot be competently tried and punished in the country where the harmful act takes effect.[39]

(iv).Constraints Relating to Unavailability of Civil Remedies for Breach of the Continuous Disclosure Obligation

At the time of research for the purpose of this thesis, due diligence revealed no decided Zambian case on whether or not a private civil right of action for damages is available to investors who suffer pecuniary loss as a result of breach of the continuous disclosure obligation.[40] Therefore, arguments made in this sub-section are based on the judicial position in other common law jurisdictions.

It must be noted here that in cases where the local directors of a foreign issuer have knowledge of price-sensitive information but neglect or fail to disclosure to the detriment of a LuSE investor, the foreign issuer would be liable to prosecution. Upon conviction, the fine would be payable. In this context, let us assume that a LuSE investor suffers a loss of Hundred Thousand

[39] See, Samamba, Lennox Trivedi, 'Non-Criminalization of Extra-Territorial Securities Market Misconduct as a Constraint on the Growth of Cross-border Trade in Securities in the COMESA Region,' The International Multi-Disciplinary Journal, 2017

[40]The Securities Act 2016 makes provision for civil remedies (damages) for loss sustained by a seller purchaser of securities as a result of a misrepresentation in a prospectus or other document under which the securities are distributed or sold: See, sections 166(1) and 167of the Securities Act 2016. It does not, however, cover loss occasioned by pure breach of the continuous disclosure obligation not rendering the already-disclosed information false or misleading. This in itself presents a technical hurdle. The content of a prospectus forms part of the express terms of the contract between the issuer and the subscriber, or the allottee and subsequent purchasers, as the case may be. Subsequent purchasers past these stages cannot rely on misrepresentation arising out of a contract to which they are not party. The doctrine of *privity* of contract would operate to defeat their claim for damages. Consequently, 'breach' as used herein refers to failure to make continuous disclosure of information so as to correct the representations made in a continuous disclosure document as opposed to a prospectus or other document. It also covers pure non-disclosure which causes loss to vendors or purchasers of securities or indeed other market participants though not rendering already disclosed information misleading or false. At subscription stage, if non-disclosure renders the content of a prospectus false or misleading, the remedies available for misrepresentation can only be enjoyed by the subscribers which are the rightful offerors or offerees as the case may be. The subsequent purchasers cannot invoke these remedies on account of *privity* of contract. The remedies for loss occasioned by non-disclosure in subsequent purchases can only be found in the post subscription continuous disclosure provisions. The Zambian regime makes blanket provision for continuous disclosure—no distinction is made between the subscription and post-subscription stages. Remedies are only provided for the subscription stage and only for misrepresentation. Developed jurisdictions like the United Kingdom have made a difference between the said phases: see section 81(1)(a)(b) and (5) of the Financial Services and Markets Act 2000 and Listing Rule 9.3 of United Kingdom Listing Authority ListingRules.

Kwacha (K 100, 000=00) as a result of suppression of price sensitive information by a foreign issuer. Would the K 100, 000 loss be made good by the erring foreign or local issuer for that matter in addition to paying the fine?

Apart from imposing a fine for breach of the section 81 continuous disclosure obligation, the Zambian Securities does not expressly spell out any other penalty breach of the continuous disclosure obligation in respect of a subsequent continuous disclosure document. A question may be asked, does that then preclude an injured market participant from instituting civil proceedings against the erring issuer for damages for breach of statutory duty? In Zambia, imposition of a penalty or fine under the authority of any written law, in the absence of an express stipulation to the contrary, does not relieve any person from liability to answer for damages to any person injured.[41] It would follow therefore, that any person injured as a result of non-disclosure contrary to section 81(1) of the Securities Act 2016 has a right to bring a civil action for damages against an issuer since there is no express provision to the contrary. The question that begs an answer is, "should such a right be judicially recognized in the absence of express provision for such a private right? If judicial recognition of such a private right did not depend on express stipulation of such a right, would that not increase the risk of imposing liability which is wider than the legislature actually contemplated?

In a bid to provide answers to the questions posed above, it is necessary to establish the legal character of a claim for breach of statutory duty. Is it a claim in negligence or a specific common law right distinct in character from the former? Lord Wright put the matter this way in L.P.T.B. vsUpson[42]:

"A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with negligence…There is always a danger if the claim is not sufficiently specific that the due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with a claim in negligence."[43] Although a claim for damages for breach of a statutory duty is anchored in statute, it has its origin in common law. Judicial recognition of the right to sue

[41] Section 40 of the Zambian Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
[42] [1949] A.C. 155
[43] L.P.T.B vsUpson [1949] A.C., at pp. 168-169

depends on established judicial practice at common law. Whereas any person within foreseeability can bring an action for damages for breach of the duty of care, only persons within the class expressly stipulated can bring an action for damages for breach of statutory duty. In the same manner the doctrine of foreseeability arrays floodgate fears in negligence even so does express stipulation of the right to bring civil actions, and class of persons entitled to such a right, in breach of statutory duty.

Prior to the 19th century, judicial tendency was to recognize the right of action for damages for breach of statutory duty in favour of a plaintiff whenever a particular statute imposed a duty of the defendant.[44] However, at the dawn of the 19th century, in a bid to quell floodgate fears and imposition of wider liability on the defendant than contemplated by parliament, judicial practices started shifting in favour of express provision of a civil right of action and scope of the same. As the current authors of 'Winfield and Jolowicz on Tort' (2010) observe: "Until the 19th century the view seems to have been taken that whenever a statutory duty is created, any person who can show that he has sustained harm from its non-performance can bring an action against the person on whom the duty is imposed. During the first half of that century, however, a different view began to be taken, and in Atkinson vs Newcastle Waterworks Co. (1877) 2 Ex.D 441, the Court of Appeal's doubts about the old rule were so strong as to amount to disapproval of it. With the vast increase in legislative activity, the old rule was perceived to carry the risk of liability wider than legislature could have contemplated…Since that time, the claimant has

generally been required to point to some indication in the statute that gives rise to a civil action. If there is no such indication, the claimant is thrown back on such common law right of action as he may have."[45] Similarly, Foster (2011) observes:[46] "It is true to say that in recent years the action for breach of statutory dutyhas more often been denied than accepted in areas outside that of workplace safety. While for some years courts could state that the general starting point when considering a statutory breach was that a person injured by a breach should have a civil

[44] See, Ashby vs White (1703) 2 Ld.Raym 938, and Couch vs Steel (1854) 3 E. & B. 402

[45] W.V.H Rogers, Winfield and Jolowicz on Tort, 18th ed 2010 (London: Sweet & Maxwell), at para 7-3, pp. 385-386.

[46] Neil Foster, 'The Merits of Civil Action for Breach of Statutory Duty,' Sydney Law Review, Vol. 33, No. 67 of 2011, pp. 67-93

remedy,[47] more recently the presumption now usually applied is the opposite one, at least in cases where a penalty is prescribed by the statute: that the criminal penalty alone is deemed to be the main means of enforcement of the statutory right, unless good reasons can be offered for believing
otherwise."[48]

Form the learned authors' position above, it is submitted that in the absence of an express provision for the right to an action for damages for breach of statutory duty under section 81 of the Zambian Securities Act 2016, such a right is unlikely to be judicially recognized and enforced. In this vein, there is need for express provision for the same. This modern approach has been embraced by developed jurisdictions like the United Kingdom, the United States and Australia.[49]

Further, on the need for express stipulation as a prerequisite to judicial recognition of the right of action for damages for breach of statutory duty, the court in **Doe d Bishop of Rochester (Murray)vs Bridges**[50] has observed that:

"[W]here an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."[51]

Similarly, the current authors of'Winfield and Jolowicz on Tort' (2010) observe:[52] "Statutes which are silent on civil liability frequently impose criminal pen alties. In principle, the starting point is said to be the same as in the case of administrative remedies, that is to say the criminal penalty is presumed to be the sole means of enforcement."[53]

No mention, either express or by necessary implication, of civil redress has been made in Section 81 of the Zambian Securities Act 2016. Further, there is no implied reference to recovery for pure non-disclosurenot (rendering the already issued information misleading or false)has been

[47] The earlier approach was that "where-ever a statute enacts anything or prohibits anything, for the advantage of any person, that person shall have a remedy to recover the advantage given to him, or to have the satisfaction of the injury done to him contrary to the law by the same statute for it would be a fine thing to make a law by which one has a right but no remedy in equity": per Lord Holt CJ in Anon (1704) 6 Mod. 26 Com.Dig.it; For action upon statute, see Lord Campbell CJ's speech to the same effect in Couch vs Steel (1854) E. & B. 402, at 411; See also Ashby vs White (1703) 2 Ld. Raym 938: W.V.H Rogers (2010), at p. 386, fn 14, op.cit

[48] Neil Foster (2011), at p. 73, op.cit

[49] See latter parts of this section of the thesis for this position

[50](1831) 1 B. & Ad. 847

[51] At p. 859

[52]W.V.H. Rogers (2010), op.cit

[53] Ibid, at para7-7, pp. 390-391

made in sections 166 and 167of the Securities Act 2016.[54] Consequently, nothing can be imported into section 81 so as to rebut the exclusionary presumption or indeed ground an exception to the general rule in the **Doe d Murray case**. It is therefore, submitted that civil remedies for loss resulting from pure breach of the continuous disclosure obligation under section 81 are not available to an injured investor.[55]

(v) Constraints Relating To Limited Right Of Action For Damages Or Compensation For Misstatements Under Company Law

Under the Zambian Companies Act 1994, a prospectus issued for the purpose of an invitation to the public to take up securities in the issuer must not contain untrue or misleading statements.[56] If a true statement contained in a prospectus becomes false or misleading before it is acted upon, it must be corrected. If not corrected, it may ground an action for misrepresentation if it was meant to be acted upon by a person who suffers loss.[57] Conversely, if a statement which was false or misleading when it was made in a prospectus is corrected by subsequent information or supervening events before it is acted on, no action for recovery of subsequent loss can properly be maintained.[58]

[54]Lord Simonds in answering the question whether or not a statute gives rise to a civil right of action stated that "the only rule which in all circumstances is valid is that the answer must depend on the consideration of the whole Act, and the circumstances, including the pre-existing law, in which it was enacted.": Cutler vsWandsworth Stadium Ltd [1949] A.C. 398, at p. 407. It is worth noting in light of Lord Simonds observation that section 38 of Part V of the repealed Securities Act of 1993 did not make expressly provision for a civil right of action for recovery of pecuniary loss occasioned by breach of the continuous disclosure obligation in respect of any kind of document or indeed pure non-disclosure. We are therefore persuaded to hold a view that a civil right of action is not available for recovery of pecuniary loss occasioned by failure or neglect by an issuer to disclose information so as to correct the representations made in subsequent continuous disclosure documents.

[55] Civil liability introduced under Part XV of the Zambian Securities Act 2016 is restricted to loss resulting from misrepresentations in prospectuses and other documents related to primary issues of securities. It must be noted also that not all material facts are contained in the prospectus or have the effect of rendering statements made in the prospectus half-truths if suppressed by the issuer. By the *expressiounius expression alterius*rule of statutory interpretation the express mention of misrepresentation in prospectuses and related documents without general reference to entire family of improper market practices raises a presumption that the other improper market practices such as insider dealing, market manipulation, false trading and suppression of price-sensitive information have been excluded: see R vs Immigration Appeals Adjudicator, ex parte Crew, *The Times, 26 November*, 1982. Further, the prospectus and related documents are directed by the issuer to the offeree—the initial subscriber who subscribes to the securities on the strength of statements made in the said documents. It is not directed to subsequent investors. During secondary trading, the subscriber does not sell the securities acquired on the strength of statements made to him by the issuer for the purposes of the Initial Public Offer (IPO). Thus, this regime should not be construed as introducing civil liability for [all] improper market practices falling under Part XVIII of the Securities Act 2016, let alone loss resulting from suppression of material facts by an issuer in secondary trading.

[56] Section 124(1) of the Zambian Companies Act 1994

[57] See, the Anderson's case (1881) 17 ChD 373

[58] See, Ship vsCrosskill (1870) LR 10 Eq. 73, at pp. 85-86

If, however, a prospectus contains an untrue or misleading statement or omits any material matter, the issuer or allottee making the invitation is liable to pay compensation to any person who acquires any shares or debentures on the faith of the prospectus.[59]

It is worth noting that unlike under section 166 of the Securities Act 2016, the right of action provided under section 129 of the Companies Act 1994 is much broader. It falls also to vendors and other persons who may suffer pecuniary loss as result of purchase or sale of securities to which the misrepresentation relates. However, this right of action to sue on misrepresentation made in a prospectus is limited to the subscription period. It does not subsist into the post-subscription period—the secondary trading phase. As the House of Lords observes in Peek vs Gurney:[60]

> "The function of a prospectus is, as a rule, exhausted when the shares are issued; but if it contains a material false statement, and is intended to be acted upon by a person other than the original allottees of the shares, that person if deceived and injured can maintain an action of deceit."[61]

The case of Peek vs Gurney establishes that the duty to avoid making false or misleading statements or indeed omitting material matters in prospectus is delimited to persons to whom the prospectus is addressed unless an intention to the contrary can be collected from the document. It would follow that the right of action by both vendors and purchasers of securities for recovery of loss occasioned by misrepresentations in prospectus is limited to the subscription stage. It is not available in the secondary trading phase. It is submitted that the provisions of the Companies Act 1994 do not help matters much. There is need to ensure that adequate civil remedies for breach of the continuous disclosure obligation, which survives the subscription stage into the secondary trading phase, are expressly provided in the Securities Act 2016.

[59] Section 129(1)(a)(b) and (2) of the Zambian Companies Act 1994. If the issuer or allottee making the invitation is a body corporate every person who is a director or has authorized himself to be named in the prospectus as such or promoter is also liable

[60] (1873) LR 6 HL 377

[61] Ibid, at pp. 396-400

5.3 CONSTRAINTS RELATING TO LACK OF PRVISIONS FOR EXEMPTION FROM DISCLOSURE OF DETRIMENTAL INFORMATION

The underlying objective of imposing continuous disclosure obligation on issuers is to ensure that at any given time, from the date registration of the prospectus and registration statement, the registered disclosure documents keep reflecting the true and correct position of the issuer and its securities. Against this backdrop, this sub-section departs in the notion that unrestricted disclosure of information may in some instances chock or threaten the life of the disclosing entity. Thus, there is need to strike a balance between the desire to keep the investors fully informed and the desire to protect issuers from harmful effects of disclosing certain information.

By section 4(2) of the Zambian Securities Act 2016, the Zambian SEC has power to exempt any person or any kind or class of securities from the application of this Act (and we suppose from the application of any part thereof). Thus, the SEC may exempt certain issuers from complying with the continuous disclosure obligation imposed by section 81(1) of the Securities Act 2016. However, no express or implied provision has been made for exempting disclosing issuers (un-exempted issuers) from disclosure in the event that disclosure of certain information is likely to be detrimental to the issuer. A question may be asked, 'on what basis can a disclosing issuer omit detrimental information from listing particulars or continuous disclosure documents in the absence of prior exemption by the SEC?' Would not such shortcomings in the law only serve to profit the investing public at the expense of the issuer? Is not such a negative feature likely to drive listed issuers out of the listing exchange as an act of self-preservation? On the need to ensure that detrimental information is not disclosed by issuers, Donald (2000) observes:

"Information is redistributive if all it does is enable a party to a transaction who possesses the information to make trading gains or speculating profits at the expense of the other party. Disclosure is productive if it reduces the costs to shareholders as a group of monitoring management (also called agency costs) and the cost of all shareholders of disposing of or acquiring the firm's shares in the capital market (also called liquidity costs). As such, it is the mutual interest of shareholders as a group to reach an agreement with the managers, who control the process of producing and disclosing information, whereby managers provide disclosure of information that reduces agency and liquidity costs."[62]

[62] Christopher J.H. Donald, 'Civil Remedies For Breach of Continuous Disclosure Obligation Under Ontario Securities Act,' McGill Law Journal, Vol. 45 of 2000, pp. 609-644, at p. 612

An argument is made that the agreement between the shareholders and managers on omission of detrimental information can only be sanctioned by a statutory power on the part of the Zambian SEC to exempt a disclosing issuer from disclosing such information. The exemption should be actually sort and obtained. Absent that, the issuer is not absorbed from criminal penalties for failure or neglect to make continuous disclosure of such information the agreement been illegal (and therefore void) for being contrary to a statute.[63]

Providing for such a strict rule of continuous disclosure obviously shuts the window provided by the LuSE Listing Rules 2012 to the issuer to suppress information which is likely to be prejudicial to the legitimate interests of the disclosing issuer. To this effect, LuSE Listing Rule 3.10 provides that:

"If the directors of an issuer consider that disclosure to the public of Informationin accordance with paragraph 3.4 will or probably will prejudice the issuer'slegitimate interests, the LuSE, may grant a dispensation from the requirement to make such information public."

In the face of lack of statutory backing for such contractual exemption from disclosure of detrimental price-sensitive information, a question may be asked: In the event that an investor suffers pecuniary loss as a result of non-disclosure and sues the issuer, would it not be improper for the issuer to plead a matter which is illegal for being contrary to statute? During misconduct proceedings, would it not be open to the Zambian SEC to argue that since a statutory instrument is void for being contrary to the parent Act (to the extent of the inconsistency), the issuer is not relieved by the listing rules from the disclosure obligation?[64]

5.4. CONSTRAINTS RELATING TO LACK OF PROVISIONS FOR EXEMPTION FROM DISCLOSURE OF CONFIDENTIAL INFORMATION

Part VIII of the Zambian Securities Act 2016 does not give power to the SEC to exempt an issuer from disclosing information which has been supplied to a sponsoring broker in strict confidence for transactional or financing purposes. No distinction between non-confidential detrimental

[63] See *Marlesvs Phillip Transport & Sons (No. 2) [1953] ALL ER 651*, Lord Denning's speech at pp. 654-659, for the consequences of illegality of contracts for being contrary to provisions of statues.

[64]LuSE Listing Rules 2012 are a statutory instrument. See, the definition of 'statutory instrument' in Article 266 of the Zambian Constitution as amended by Act No. 2 of 2016, and section 67(1)(2) of the Zambian Securities Act No. 41 of 2016

information and confidential information detrimental information, either. The LuSE Listing Rules make this distinction.[65] The listing rules also provide for exemption of confidential information for disclosure provided the information is supplied to the sponsoring broker for the purposes of improving the financial position of the issuer.[66] To this effect, Listing Rule 3.6 provides:

"An issuer may provide price sensitive information in the strictest confidence toits sponsoring brokers, advisers and/or any person(s) with whom it is negotiating with a view to effecting a transaction or raising finance; which persons may include prospective underwriters of an issue of securities, providers of funds or loans or potential placees of the balance of a rights issue not taken up by shareholders. In such cases, the issuer must advise, in writing, the recipients of such information that it is confidential and constitutes inside information as defined in the Act."

An argument is made that such a provision is likely to serve as a rescue regime for financially embarrassed issuers who would otherwise be seriously prejudiced by disclosure of price-sensitive confidential information. It is also likely to ensure that only issuers who are suppressing confidential information for purposes of improving their financial position make use of this regime as the last straw.

It is submitted that the LuSE Listing Rules 2012 are more progressive in ensuring a rounded continuous disclosure than does the Securities Act 2016. It would be beneficial to both local and foreign issuers if the Zambian Securities Act were amended to reflect the progressive stance of LuSE Listing Rules on continuous disclosure.

An argument is made that requiring issuers to make disclosure of information even when such disclosure would be detrimental to them is likely to discourage foreign issuers from cross-listing their securities on Zambian exchanges. Given the cost of complying with the regime in the home country and that of the country of cross-listing, foreign issuers are unlikely to keep up with un-restricted continuous disclosure. The plight of cross-listing foreign issuers is likely to be

[65] See, Rules 3.4(a) and 3.6 of the LuSE Listing Rules 2012

[66] The confidential information must be supplied to the sponsoring broker pursuant to a confidentiality agreement which agreement must forbid disclosure of the information by the broker to third parties: Rule 3.5 of the LuSE Listing Rules 2012

exacerbated by non-recognition of disclosure document approved in the home country for listing purposes or continuous disclosure purposes, by authorities of the cross-listing country for cross-listing or continuous disclosure purposes. Since increased cross-border cross-listing increases cross-border trade in securities, an argument is made that these negative features are likely to hurt growth of cross-border trade in securities in the region.

As a possible solution to the aforesaid shortcomings, the following proposals are hereby made: Firstly, there is need to amend section 81 of the Zambian Securities Act 2016 by introducing subsection (5) as follows:

81(5). The Commission may authorise the omission from disclosure listing particulars of any information, the inclusion of which would otherwise be required by section 75, 76 or 81(1), on the ground—

(a) that its disclosure would be contrary to the public interest;

(b) that its disclosure would be seriously detrimental to the issuer;

(c) that the information is confidential in terms of the Listing Rules;[67]or

(d) in the case of securities of a kind specified in listing rules, that its disclosure is unnecessary for persons of the kind who may be expected normally to buy or deal in securities of that kind.

Secondly, there is need to include in the proposed Protocol On Mutual Recognition of Disclosure Documents in the region an express provision for mutual recognition of continuous and periodic disclosure subject of course to inclusion only of country-specific information.

VI

CONCLUSION

The general conclusion reached in this article is that the Zambian legal framework for the regulation of continuous disclosure of price-sensitive information by listed issuers has not provided adequate incentives to fosterefficient continuous disclosure of information by listed issuer—disclosure of material information which is not generally available at minimum cost.

[67] By Rule 3.6 of the LuSE Listing Rules 2012, price-sensitive information supplied to a sponsoring-broker in strict confidence with a view to effecting a transaction or raising finance is exempt from disclosure under Listing Rule 3.4(a) which imposes continuous disclosure obligation on listed issuers.

A number of legal constraints have been identified as constraining effective continuous disclosure of material information by listed issuers. The following have been fished out as such, namely:

a) provision for an informationally-unrestricted continuous disclosure obligation;

b) provision for inadequate remedies for breach of continuous disclosure obligation;

(i) provision for a narrow class of persons whose knowledge is attributable to the issuer;

(ii) provision for a very low fine for breach of continuous disclosure obligation;

(iii) non-enforcement of breach of the continuous disclosure obligation by foreign issuers;

(iv) unavailability of civil remedies for breach of the continuous disclosure obligation; and

(v) provision for a limited right of action for damages or compensation for misstatements under company law.

c) lack of provision for exemption of issuers from disclosure of generally-available, confidential or detrimental information.

As a possible way of remedying these shortcomings in the law, necessary proposals for reform have been made herein above.