

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2009/HP/1287

BETWEEN:

ALFRED MKONDA

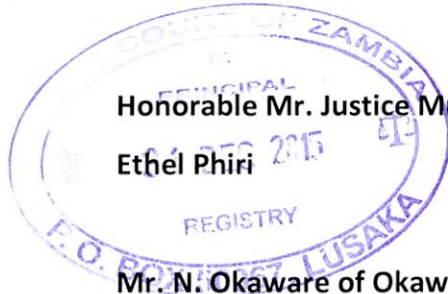
PLAINTIFF

AND

BARCLAYS BANK ZAMBIA PLC

DEFENDANT

CORAM : Honorable Mr. Justice Mubanga Kondolo, SC
MARSHAL : Ethel Phiri



FOR THE PLAINTIFF: Mr. N. Okaware of Okaware and Associates

FOR THE DEFENDANT: Mr. L. Zulu of Tembo Ngulube and Associates

JUDGMENT

AUTHORITIES

CASES

1. Attorney-General v D.G. Mpundu (1984) Z.R. 6 (S.C.)
2. Barclays Bank Plc v Quincecare (1992) 4 ALL ER 363
3. The Attorney -General v D.G. Mpundu (1984) Z.R. 6 (S.C.),

TEXT

1. Mark Hapgood. Paget's Law of Banking. 13th Edition

2. Ross Cranton. Principles of Banking Law.

This is a matter in which the Plaintiff commenced proceedings by way of Writ of Summons and the accompanying Statement of Claim seeking the following reliefs:

- i) Special damages amounting ZMK29,672,902.63;(ZK29,672.9)*
- ii) Damages for breach of trust and confidence;*
- iii) Damages for negligence;*
- iv) Damages for inconvenience;*
- v) For a declaration that the purported treatment of the ZMK14,300,000; (ZK14,300) refund as a loan on the Plaintiffs account is illegal and null and void.*

For avoidance of doubt all Zambian Kwacha (ZMK) amounts herein shall be represented in ZK rebased currency.

PW1 – The Plaintiff, Alfred Mukonda

PW1 was the Plaintiff who claimed that in or about February 2009, he travelled to South Africa for official duties and was given USD9,000 imprest. He deposited the money in his Barclays Bank account 043027557 at the Bank's Lusaka International Airport Branch and it brought his account balance to K54, 672.90.

PW1 further claimed that whilst in South Africa he accessed his money by using his international VISA card (ATM card). He made a total of 14 withdrawals totaling ZAR 38,000.00 which was equivalent to ZK19,000.00.

He told the Court that he returned to Zambia on or about 16th February, 2009 and he tried to draw cash from the Barclays at the ATM at the Lusaka International Airport. The system showed that he had exceeded the daily withdraw limit for the day and displayed his account balance as K40,103.36 and the available balance as K26,609.24. PW1 had expected an account balance within the range of K33,000.00 to K35,000.00

He immediately reported the matter to Barron Mafuta the banks representative at the Barclays Bank agency located at the airport. Mr. Mafuta said he would take the necessary action to protect the account and initiate investigations. He followed up the matter and was told that investigations were underway and that his complaint had been escalated to senior officers. PW1 made a balance inquiry and found that his current balance now stood at K26,000.00 with an available balance of K15,000.00. At that moment he realized that fraudulent activities were occurring on his account.

The Plaintiff was referred to Barclays Matero Branch where the branch Manager, Mrs. Nomsa Lupunga, informed him that his balance now stood at K11,000.00 with an available balance of K6,000 because there were some uncleared effects on the account. She explained to him that the 'uncleared amounts' might be monies withdrawn by the fraudsters but not yet appearing on his account. He was advised that the account would be blocked to ensure that there were no further transactions on the account.

On 16th March, 2009, the Bank informed PW1 in writing that VISA International had recovered K9,894.96. Ms. Lupunga told him that she would need to temporarily unblock his account to enable her credit his account with the K9,894.96. PW1 tried to withdraw money from the account the next day but found the account empty. He informed Ms. Lupunga and she told him that she had forgotten to block the account after she had unblocked it earlier.

PW1 was then referred to Mr. Nathan Zulu at the Defendants Card Centre who told him that there had been a fraud on his account and that the manner in which he withdrew his funds was different from the manner the fraudsters withdrew it.

PW1 said that he was later advised that Visa International had recovered a further K14,300.00 and that in order to access the funds he needed to open a new account into which recovered monies would be deposited and he did.

On 25th April 2009, PW1's salary went into his old account and he was unable to access it. Mrs. Lupunga told him that the K14,300.00 would be treated as a loan whose deductions were approximately K7,251.48. He further testified that on 4th May, 2009 Mrs. Lupunga wrote to him advising that the Bank was not negligent in any way and would not refund any money that he had lost due to fraudulent activities on his account. According to PW1 he lost a total of K29,672,902.

When cross examined PW1 said this was the first time he'd used his Visa card outside the country but was aware of his responsibility or its safe keeping. He said he made a total of 14 withdrawals but had not exhibited any of the withdrawal slips. He pointed out that the Defendant should be able to tell that monies were withdrawn from his account just by looking at the account statement.

Under further cross examination PW1 denied having withdrawn the the disputed amounts and alleged that he was back in Zambia on the dates the monies were withdrawn. He accepted that even though he had made Rand withdrawals in multiples of 1000 the amounts reflected as kwacha would not necessarily reflect in multiples of 1000. When pressed, the Plaintiff accepted that he was responsible in the event his pin was compromised.

The Plaintiff responded further by saying he did not conduct any investigation because he had no capacity to do so and was not aware that Visa cards were operated by VISA International. He insisted that he that he obtained the card from the Defendant. The Plaintiff admitted that the Defendant Bank informed him that they could not close the account because it was earmarked for transactions.

When pressed further, the Plaintiff said that even though the Defendant's Report used the word "enquire", he had actually complained at the airport branch. He further stated that he was not told that the sum of K14,300.00 was being treated as a loan and he did not understand

the notion that the said sum was money which was recovered to pay the earmarked transactions.

In re-examination, the plaintiff maintained that he did not make any withdrawals after he returned from South Africa on the 16th February, 2009 and that he did not share his PIN number with any one and that the card was in his possession at all times. He insisted that he had reported his complaint, verbally, to the Bank official at the airport, one Mr. Baron Mafuta on the said day and later put his complaint in writing on 18th February 2009. Upon reporting a fraud on his account, he gave instructions to the Defendant Bank to block his account and as such the Bank should have taken measures to ensure that the frauds on his account did not continue.

At this juncture, the Plaintiff closed his case.

The Defence called two witnesses

DW1 - NOMSA CYNTHIA LUPUNGA

DW 1 was Nomsa Cynthia Lupunga, the Defendant's Operations Manager. She testified that sometime in 2009 the Plaintiff visited Matero Branch and enquired from her on the progress regarding the anomalies on his account following his complaint to the agency staff. She said she checked his account and noticed a lot of earmarks which related to suspended transactions on his account. She explained that the earmarks meant that some transactions made on his account had not yet matured and as soon as they did the Plaintiffs actual balance would reflect those transactions.

DW 1 confirmed that the Plaintiff had asked the staff at the airport agency to block his account. She said that she informed the Plaintiff that the design of the computer system did not permit accounts with pending earmarks to be blocked but that the card could be blocked and she immediately instructed her staff to block the card.

DW1 explained that the complaint was referred to Visa International who duly effected Charge Backs which are advance payments equivalent to what a customer has disputed and which payments are paid out pending investigations. The Plaintiff's account was credited with the said advance payment which only covered a portion of the Plaintiffs claim and his account remained in an overdrawn state. The Plaintiff was however, allowed to withdraw money from the overdrawn account. She said that the Plaintiff was told to open another account for use whilst his present one was being investigated.

DW1 told the Court that Visa International completed their investigation and reported that the disputed transaction were performed using the Plaintiff's visa card. Visa International consequently reversed the charge backs and the Defendant Bank advised the Plaintiff accordingly and informed him that because of that, the Defendant had decided not to refund him.

DW1 said that other than the system limitation, blocking the Plaintiffs account would have made the Visa International investigation difficult because the pending earmarks had to mature. She maintained that the Account was never blocked and that no payments were made to 3rd parties.

Under cross examination, DW1 admitted that the Plaintiff reported suspicious activity on his account but denied that a fraud had been committed on it. She said the Plaintiff's ATM card was blocked at his request, and added that because he had reported suspicious activity on his account they would have blocked it even if he hadn't requested.

DW1 agreed that the Plaintiff lost money from the suspicious activity but that Visa International concluded that it was the Plaintiff's card that was used and that is why the Bank refused to refund him. She also said that the Plaintiff was responsible for transactions on his account even after it had been blocked. She denied any knowledge that the charge backs were treated as a loan to the Plaintiff.

When pressed DW1 agreed that the whole event was stressful to the Plaintiff but she maintained that there was no breach of faith and trust on the part of the Defendant as it was the Plaintiffs duty to protect his card and PIN at all times as the Bank had no control over a customer's card. She closed her cross examination by saying that the earmarks related to transactions carried out by the Plaintiff some of which related to the suspicious transactions he had reported.

When pressed further, DW1 admitted that some of the earmarks related to transactions the Plaintiff had complained about but the Bank allowed them to go through because they had no control over the transactions. DW1 was asked who had control over an account after a report of suspicious activity and she said when a customer is given a card it has terms and conditions which he informed about and that the bank will investigate when it receives a complaint.

In re-examination, DW1 said that there was no fraud on the Plaintiffs account because it was proved that it was his card that was used and once a transaction is earmarked the assumption is that the client has already enjoyed the funds or services. She further stated that the Defendant Bank assumed that the Plaintiff used the card even after he complained and she clarified that it was the Plaintiffs card and not his account which was blocked. She closed by saying that there was nothing the Bank could do between the date a transaction hits the account and the date on which an earmark matures.

DW2 - ALBERT SIKAPIZYA

DW2 was Albert Sikapizya who was at the material time, the Defendants Country -Fraud and Risk Security Manager. He recalled that sometime in March 2009 Matero Branch submitted a report regarding the Plaintiffs complaint together with a Complaint Action Form (CAF). He explained that the CAF is a form completed by a customer with regards to any issue over the Banks service. The Plaintiff was claiming that he had found a discrepancy on his account upon his return from South Africa and requested the Bank to review and reimburse Him.

DW2 said that he examined the Plaintiff's account and it showed a number of earmarks. DW2 explained that earmarks meant that funds had already left the customer's account but the Bank is simply holding onto the funds awaiting processing by the acquiring Banks, which are Banks against whom the funds were drawn. He further stated that a transaction can remain earmarked for up to 3 weeks.

He further told the Court that the Card Centre was subsequently advised of the transpiring events and charge backs were processed by the Bank and at this point the acquiring Banks were notified. The charge backs were however reversed because the acquiring Banks advised that the Plaintiffs card and PIN were used in all the allegedly suspicious transactions. DW2 further said that the earmarked transactions occurred whilst the Plaintiff was in South Africa. He added that only the actual cards, and not accounts, are blocked over card related issues and in any event the system did not allow earmarked accounts to be blocked.

DW2 said he was unaware whether the card was used after it was blocked. He stated that the Plaintiff could not prove fraud and had never reported his card as missing or stolen. It was therefore the Plaintiff who was best placed to know who withdrew the funds using his card. DW2 said that in a lot of similar complaints, customers had compromised their PIN by willingly or inadvertently giving out the PIN or card to 3rd parties. He further added that contrary to the PW's claim, his report showed the reversal of a charge back as opposed to a loan recovery.

Under cross examination, DW2 indicated that he did not directly speak to the Plaintiff during the investigation because there was no need for him to do so. When pressed he admitted that the Plaintiff's Account statement reflected withdrawals on dates after the Plaintiff's return to Zambia. He however insisted that, nonetheless, the withdrawals related to transactions which occurred whilst the Plaintiff was still in South Africa but he had no idea of the exact dates when they were made. He agreed that information relating to those dates he had no idea about would have immensely helped the court.

When pressed further, DW2 stated that he was not aware of whether or not Mr. Mafuta or anyone else asked the Plaintiff to surrender his card. He further admitted that he had not produced the Bank's ATM Terms and conditions before Court but insisted that the Plaintiff signed them when applying for the ATM Card.

In re-examination DW2 said there was no need to speak to the Plaintiff because the CAF and all the necessary information was at his disposal and the issues raised by the Plaintiff's were taken into consideration. He stated that the investigation could not be likened to a criminal investigation and that he had discharged his duty fairly and that his testimony was true.

Counsel for the Plaintiff, Mr. Okware, filed written submissions in which he argued that the relationship between a banker and a customer is contractual in nature¹ and further cited **Ross Cranston** in his book **Principles of Banking Law at page 73** as follows;

'having an account with a bank indicates a contractual relationship which can obviously found remedies, but so too can the myriad of other contracts which banks make with customers.'

He cited the case of **Foley v Hill and Others**² which held that the banker-customer relationship was essentially a debtor-creditor relationship and contractual in nature. The relationship imposes certain rights and duties on both parties giving birth to an agency from which arises a duty of care; that is, in addition to obeying the instructions of the customer (the principal), the bank (agent) must also use reasonable care and skill in carrying them out with a view to protect the customer and his money. It was further submitted that a Bank's duty of care may arise in tort as well as in contract where it is proven that a bank has been negligent and has failed to carry out the instructions of a customer with reasonable skill and diligence.

¹ *Paget's Law of Banking, Mark Hapgoodat, 10th edition at page 49*

² *Foley v Hill and Others*² (1848) 2HLC 289 ER 1002

Mr. Okware argued that the Bank was a fiduciary and quoted from **Ross Cranston's Principles of Banking Law**³ as follows;

'a bank is obliged to act with reasonable care and skill..... Negligence is defined to mean the breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract or of any common law duty to take reasonable care or exercise reasonable skill, for instance, as an agent.'

Learned Counsel for the Plaintiff further relied on the case of **Barclays Bank Plc v Quincecare Ltd and Another**⁴ which held that the relationship and duties between a banker and customer were akin to those of debtor and creditor and principal and agent and that the banker owed the customer fiduciary duties.

With respect to the question of what would amount to negligence on the part of a bank, Mr. Okware drew the attention of the Court to the case of **Commissioner of Taxation v English , Scottish and Australian Bank Ltd**⁵ wherein it was stated thus;

'..... apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of factthe question should in strictness be determined with regard to each chequethe test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers mind, and caused them to make an inquiry.'

He further cited several other cases in support of the Plaintiffs case; **London Joint Stock Bank Limited v MacMillan and Arthur**⁶; **Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited**⁷; **Brighton Empire and Syndicate v London and County Bank**⁸.

³Principles of Banking Law, Ross Cranston, page 156

⁴Barclays Bank Plc v Quincecare Ltd and Another (1992) 4 ALL ER

⁵Commissioner of Taxation v English , Scottish and Australian Bank Ltd (1920) AC (683) PC

⁶London Joint Stock Bank Limited v MacMillan and Arthur (1918) AC 777

⁷Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited (1986) AC 80

He placed further reliance on **Paget's Law of Banking**⁹ where the author states that a banker must not be negligent and could not charge his customer with money lost through his negligence and that as a general rule he has himself to bear loss accruing from his negligence.

Mr. Okware argued that the Plaintiff had duly taken care of his ATM card and that for whatever reason, the Defendant had no system in place to protect the account from fraudulent transactions. The Bank was therefore liable for the losses that ensued as a result of those fraudulent transactions, and not the customer.

He drew the Courts attention to DW 2's report in which he stated that:

'The activities above suggest that the VISA card which was in the customer's custody according to the Bank records was used to perform transactions in South Africa. Only two possibilities are feasible; firstly the actual customer's card used for the transaction and secondly the card was skimmed whilst he was in South Africa.'

Learned Counsel for the Plaintiff pointed out that the nature of the Plaintiff's complaint required that transactions using the Plaintiffs card be blocked but the Bank breached the trust and confidence thus placed in it by the Plaintiff and should pay damages for so doing.

Mr. Okware stated that according to the cases of **Zambia State Insurance Corporation v Serios Farms Limited**¹⁰ and **The Attorney -General v D.G. Mpundu**¹¹ a Plaintiff was entitled to damages for such things as distress, hardship, inconvenience and mental stress and that a Plaintiff would be entitled to these damages from breach of contract. He argued that on the strength of these cases the Plaintiff is entitled to damages for negligence and for breach of trust and confidence.

⁸*Brighton Empire and Syndicate v London and County Bank (1904), Times, 24th Marchis*

⁹*Paget's Law of Banking, page 232*

¹⁰*Zambia State Insurance Corporation v Serios Farms Limited (1987) Z.R. 93 (S.C.)*

¹¹*The Attorney -General v D.G. Mpundu (1984) Z.R. 6 (S.C.),*

He submitted that the Plaintiff was inconvenienced in his work as some of the money lost belonged to his employers at the time and that he was not able to put his money into use during the time the complaint was handled. He argued that the Plaintiff must be placed in the position he would have occupied had the contract been carried out and he relied on the the case of **Werthei v Chicoutimi Pulp Co.**¹²

The Defence represented by the learned Mr. Zulu, also filed written submissions stating that this was a novel matter touching on modern legal principles of a very important nature to the Banking industry. He submitted that the Defendant was not negligent at all and that the ATM card in issue had at all times been in the Plaintiffs possession and he was responsible for its safe custody.

Mr. Zulu stated that there was no instruction to block the account and, in any event, the account had earmarks and could therefore not be blocked. He said there was no negligence because the Bank actually blocked the ATM card after the Plaintiffs complaint. He postulated that the Law relating to ATM transactions was only now developing and in other jurisdictions unlike in ours, is largely supplemented by legislative interventions which have not yet happened here and as such the law is largely based on the common law.

Mr. Zulu relied on the Learned Authors of **Pagent's Law of Banking**¹³, as follows on countermanding an ATM transaction:

"where a customer withdraws cash from his account using an ATM the transaction will be irrevocable once he has entered his transaction instructions into the machine. Once the transaction has been entered the customer will receive payment as long as his account is not overdrawn or the withdrawal is within his overdraft limit. Although the payment may not be debited from his

¹²*Werthei v Chicoutimi Pulp Co. (1911) AC 301 at 307.*

¹³*Pagent's Law of Banking*¹³, 12th edition page 381

account until sometime later, countermand is not possible after the customer's instructions are entered into the ATM".

Mr. Zulu submitted that the Plaintiffs allegation of negligence against the Defendant was based on the Defendants failure to block his account after he notified them of suspicious transactions on it. He submitted that the Plaintiff had conducted transactions using his ATM card and PIN whilst in South Africa meaning that those particular transactions were complete. The account could not be blocked because the transactions were earmarked It was therefore not possible to countermand those withdrawals, even after the Plaintiff lodged his complaint with the Defendant. He contended that under these circumstances there was no negligence.

Mr. Zulu further submitted that the reversal of the charge backs was not on account of the Defendants' failure to block the account, but because the investigations proved that the ATM withdrawals were genuinely made using the Plaintiff's ATM card.

He cited the case of **Barclays Bank Limited v WJ Simms, Sons and Cooke**¹⁴ and **Pagent's Law of Banking**¹⁵ in which it was respectively held and stated that a Bank may only debit its customer's account where it has his mandate to do so and that a customer's mandate for debiting his account is using an ATM card together with the PIN. He opined that under the circumstances the Plaintiff was liable for his loss because the Defendant had proved that all the said unauthorised withdrawals were made using the Plaintiffs ATM card.

As regards the allegation that the Defendant had converted the debit it gave the Plaintiff into a loan, he contended that the Plaintiff had failed to adduce any evidence to show that the Defendant had treated the debits on the account as a loan. He suggested that the debits on the Plaintiffs account were treated as an overdraft and the Bank was entitled to recover such monies and charge simple interest on them without any prior agreement. In support of this he

¹⁴ *Barclays Bank Limited v WJ Simms, Sons and Cooke* [1980] QB 677 at 699

¹⁵ *Pagent's Law of Banking* at page 376

cited **Halsbury's Laws of England**¹⁶ and **Union Bank Zambia Limited v Southern Province Cooperative Marketing Union Limited**¹⁷.

Lastly, Mr. Zulu observed that most of the authorities cited by the Plaintiff arose from cheque payments whereas this matter was in relation to ATM Withdrawals.

I have considered the evidence on record and commend Counsel for both Parties for their gallant arguments. I shall begin by addressing the issue of whether or not the Defendant was negligent in failing to block the Plaintiff's account No. 043027557.

To avoid the risk of losing sight of the actual dispute I shall repeat the basic facts of the case and they are indeed quite basic.

The evidence shows that the Plaintiff notified the Defendant of suspicious transactions on arrival at Lusaka international Airport on 16th February 2009. Despite asking the Defendant to block his account, his account continued losing money over the following weeks until it was overdrawn. The account remained overdrawn even after the account was credited with a charge-back from Visa International.

The Defendant said that their computer system did not allow earmarked accounts to be closed which is why only the Plaintiffs ATM card was blocked and not the account. The Defendant also said that Visa International investigated the matter and established that the alleged suspicious withdrawals were with respect to transactions in which the Plaintiffs ATM card and PIN were used and the charge-back was consequently reversed.

The long and short of this matter is that monies were withdrawn from the Plaintiff's account allegedly by the use of his ATM card and PIN details. The Plaintiff said he did not give his ATM card or PIN to anybody whilst the Defendant stated that it is either the Plaintiff withdrew the

¹⁶*Halsbury's Laws of England vol3, 4th edition, Paragraph 160.*

¹⁷*Union Bank Zambia Limited V Southern Province Cooperative Marketing Union Limited (1997) S.C*

sums himself or he failed to secure his ATM card and/or PIN, in which case he would still be liable for his loss.

It is settled law that the relationship between banks and their customers is contractual and captured by the general law of contract. According to the authors of **Paget's Law of Banking**¹⁸;

"The essential distinction is between obligations which come into existence upon the creation of the relationship and those which were subsequently assumed by specific agreement. Or from the standpoint of the customer, between services which a bank is obliged to provide if asked and services which many bankers habitually do, but are not bound to, provide."

A Bank's authority to act on behalf of a customer is usually referred to as a mandate. **Ross Cranston** in his book, **Principles of Banking Law**¹⁹ says the customer has a duty to give clear and unambiguous mandates to a bank so that the bank will not suffer loss while executing such mandate with reasonable care and skill. Authority given to the bank by a customer to act on a PIN is also a mandate and the requirement for authentication of the PIN is a reasonable method of security against unauthorized orders. Customers suspecting their mandate is being abused must notify the bank so that preventive action can be taken.

In the earlier cited case of **Barclays Bank Plc v Quincecare**²⁰ **Steyn J** said as follows;

"Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent ...Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal ...There is no logical or sensible reason for holding that bankers are immune from such an elementary obligation. In my judgment it is an implied term of the

¹⁸Mark Hapgood. *Paget's Law of Banking*, p.135, 13th Edition:2007, Butterworths

¹⁹Ross Cranston in his book, *Principles of Banking Law*

²⁰*Barclays Bank Plc v Quincecare* (1992) 4 ALL ER 363

contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders.

Moreover a banker may in a case such as the present be sued in tort as well as in contract the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort."

As rightly pointed out by learned Counsel for the Defendant, the cited case involved cheques and not ATM transactions, however, whilst warning that each case should be considered within its own peculiar circumstances, the case emphasizes certain principles, which in my view, cut across the board. **Steyn J** provided further counsel as follows;

"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. Ex hypothesis one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer ...

The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers."

Further in the judgment, **Steyn J** borrows from and points to the fact that due consideration must be given to circumstances where a customer suffers loss after the bank was “put on enquiry”.

In my view, the principles and rationale pronounced by **Steyn J** in **Barclays Bank Plc v Quincecare**²¹ generally apply to all transactions between banks and their customers and the obligations remain largely unchanged regardless of whether claims arising from the relationship lie in contract or in tort. Disputes involving ATM transactions may be novel but the obligations of fiduciaries are cast in stone; fiduciaries must at all times operate in the best interest of their principal.

According to **Black’s Law Dictionary**²², a ‘fiduciary’ is a person who must exercise a high standard of care in managing another’s money or property while a ‘fiduciary duty’ is a duty of utmost good faith, trust, confidence and candor owed by a fiduciary to the beneficiary. It is a duty to act with the highest degree of honesty and loyalty towards another person and in the best interest of that other person.

The Plaintiff testified that shortly after arrival from Johannesburg he observed an anomaly on his account and informed Mr. Baron Mafuta, the Defendant’s employee at its airport agency. He further testified that Mr. Mafuta assured him that he would take measures to protect the account. This testimony was not challenged and neither was Mr. Mafuta called to testify.

DW1 informed the Court that when the Plaintiff visited her at the Defendant’s Matero Branch, he told her that he had asked the people at the airport agency to block his account on 16th February, 2009. She said that the account could not be blocked because it had earmarks but she immediately instructed her staff to block the ATM card. I therefore find as fact that the

²¹*Ibid* 21

²²Black’s Law Dictionary, 8th Edition,

Plaintiff notified the bank of an anomaly on his account on 16th February, 2009 and was assured that his account would be protected.

I have perused the **Barclays Security & Fraud Management Report (BSI&FM Report)**²³ compiled by the Defendant and referred to by both Parties during the proceedings. It reads as follows on page 6;

"The activities above suggest that the VISA card which was in the customer's custody according to the Bank records was used to perform transactions in South Africa. Only two possibilities are feasible; firstly the actual customer's card was used for the transaction and secondly the card was skimmed whilst he was in South Africa.

Our position as a bank is that events pre-requisite to card skimming are external to the bank. Only the customers have control with the risks associated; i.e. where they travel and what ATM's they use. In addition, given that the PIN is required for ATM transaction, the customer compromised the PIN, either willingly or inadvertently. Therefore no liability accrues to the Bank.

The other possibility is that the customer compromised his PIN with a third party who intended (sic) used the card in South Africa and returned it thereafter and gained pecuniary advantage. We note even this possibility require that the PIN is made available to the user thus no liability rests on the Bank.

In view of the foregoing, our recommendations are as follows,

- a. That the Bank resists the claim on account of the compromise of PIN and insecure custody of the card in the customers' possession.*
- b. Lastly, that with the aid of Legal, Matero Branch management formerly/in writing advises the customer the Banks position."*

²³ Defendants Notice To Produce, p.3-9, (7th March, 2013)

Notable in all of this is the fact that apart from DW1 who received the complaint, neither DW2 nor any other individual directly involved in investigating this matter ever interviewed or even met the Plaintiff, who was in fact a complainant in an alleged fraud. Over and above that fact, he was a customer to whom a fiduciary duty was owed and therefore deserving of detailed documentary information as to why his claim was being denied. The Plaintiff was entitled to see the correspondence and documents from Visa International upon which the Defendant acted in denying the Plaintiffs claim and upon which the charge- back was reversed.

Not only was the said documentation or report from Visa International, which led the Defendants to the conclusions they arrived at in the **BSI & FM Report**, not shown to the Plaintiff, but it was also not produced in Court. The BSI & FM report was an internal Bank document summarizing the findings and recommendations of the investigators, it did not contain copies of and neither did it have an appendix of raw data such as original detailed bank statements displaying the actual time at which the contested withdrawals were made and copies of correspondence or reports from Visa International providing the reasons as to why the claim was declined and the charge-back reversed.

The BSI & FM Report indicates that one of two possibilities occurred;

1. *The Plaintiffs ATM Card & PIN were used;*
2. *The Plaintiffs ATM Card was skimmed but in that case his PIN would still be required to withdraw cash from an ATM.*

Despite being the Defendant's expert in this area, DW2 did not bother to explain what skimming involves and whether a PIN can be retrieved by skimming or whether a skimmed card can access cash from an ATM without a PIN. His findings did however imply a lot; on the whole I understood his report to imply that the Defendant Bank does not compensate or reimburse customers who lose cash on account of skimming because "*Only the customers have control with the risks associated; i.e. where they travel and what ATM's they use*" and further, in this

particular instance, in his view, since cash was drawn from an ATM, it meant that the Plaintiff had failed to secure his PIN and the Bank could not be held liable for the Plaintiffs own negligence. DW2 basically implied that a PIN cannot be retrieved by skimming.

During the course of my research I came across the term "ATM skimming" and it was defined as follows;

*"A type of fraud which occurs when an ATM is compromised by a skimming device, a card reader which can be disguised to look like part of the machine. The card reader saves the users' number and pin code, which is then replicated into a counterfeit copy for theft."*²⁴

Isought further education on this activity from a website of the **USA Federal Bureau Of Investigation (FBI)**²⁵ under a story entitled, **"Taking a Trip to the ATM? Beware of 'Skimmers'"** from which I gleaned the following information:-

"ATM skimming" – basically placing an electronic device on an ATM that scoops information from the bank cards magnetic strip whenever a customer uses the machine The devices planted on ATM's are usually undetectable by users ...

In addition, skimming typically involves the use of a hidden camera, installed on or near an ATM, to record customers' entry of their PINs into the ATM's keypad. We have also seen instances where, instead of a hidden camera, criminals attach a phony keypad on top of the real keypadwhich records every keystroke as customers punch in their PINs.

Skimming devices are installed for short periods of time – usually just a few hours."

²⁴ Businessdictionary.com

²⁵ Fbi.gov - "Taking a Trip to the ATM? Beware of 'Skimmers'"

These articles make it clear that skimmers can fraudulently obtain a customer's PIN without him even realising it. I refuse to believe that DW2 the Defendants expert in this area is unaware of the phenomena of ATM skimming and I find that he deliberately tried to mislead the Court into thinking that a PIN cannot be retrieved from a customer by skimming.

The BSI & FM Report makes very worrying reading because it categorically implies that customers are responsible for the ATM's that they use. In other words, the customer carries the risk for ATM's designated for use with ATM cards issued to the customer by the Defendant Bank. I have not encountered a proposition more preposterous; that the customer would be responsible for security failures on designated ATM's. I would opine that the risk lies with the Defendant Bank and its associates who own and operate the ATM from which they derive benefit every time the customer uses it.

The incidence of skimming invariably raises the attendant possibility that the customer was part of the fraud and that may, perhaps, be the reason why certain banks are reluctant to reimburse customers where skimming is alleged.

In *casu*, the Defendant has categorically stated that the customer either withdrew the money himself or willingly or negligently gave a third party access to his ATM card and/or PIN. The Defendant has not explained how that conclusion was arrived at, apart from stating that according to Visa International the Plaintiffs ATM card and PIN were used to withdraw the money. No explanation was provided as to why ATM skimming was discounted as a possibility in this particular instance.

As indicated earlier, DW2 did not interview the Plaintiff, who was the complainant. This was quite odd because his enquiry could have yielded valuable information. Further, DW2 did not allude to any degree of investigation that might have been conducted at or around the ATM where the contested withdrawals were made. Such investigations might have included examining CCTV footage or any other investigations that investigators conduct at such scenes.

As Steyn J said in the earlier cited case of **Barclays Bank Plc v Quincecare**²⁶ ...*"it is an implied term of the contract between the Bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders"* and further that due consideration must be given to circumstances where a customer suffers loss after the bank was *"put on enquiry"*.

The Defendant Bank was "put on enquiry" the moment the Plaintiff reported the anomalies on his account to Mr. Mafuta at the Defendant's airport agency on 16th February, 2009. By so doing the Plaintiff discharged his responsibility to notify the Defendant if he believed that his mandate (PIN) was being abused. Whether or not the Plaintiff asked the Defendant to block his account is irrelevant. The Bank was under an immediate duty to observe reasonable care and skill in attending to the Plaintiffs complaint and protecting his account from further pillage. The Defendant was obliged to execute its fiduciary responsibility.

The evidence shows that the Plaintiff's account continued to hemorrhage cash even after the Plaintiff had advised the Defendant that something was amiss. DW2 testified that all the contested withdrawals reflecting on the Plaintiff's account on and after 16th February, 2009 were with respect to transactions that occurred before that date and whilst the Plaintiff was in South Africa and that the Plaintiffs ATM Card and PIN were used. I understand his argument as being that the ATM transactions were done on earlier dates but only matured on the dates appearing on the Plaintiff's statement.

When asked exactly when those transactions occurred, DW2 said he didn't have that information available with him. One might have imagined that such important information would have been in the BSI & FM report. Relying on the DW2's evidence would lead this Court down a path of speculation. I am duty bound to avoid that route and therefore find as a fact

²⁶ *Ibid* 21

that the contested transactions reflecting on the Plaintiffs account on the 16th February 2009 and on later dates were transacted on the dates appearing on the Plaintiffs statement.

The evidence shows that the Plaintiff was already in Zambia when the contested withdrawals were made in Johannesburg, South Africa. The evidence also shows that the Plaintiff had his ATM card in his possession when he came back from Johannesburg. I find as a fact that the withdrawals were made by a third party and with an ATM card other than the one issued to the Plaintiff by the Defendant.

Of further note in this matter is that both DW1 and DW2 insisted that the Plaintiff was aware of the conditions accompanying the use of his ATM Card and PIN. The Plaintiff on the other hand said that nobody in the Defendant's employ had ever explained anything of that sort to him. The Defendant's witnesses further said that all the Bank's customers sign forms that contain the terms and conditions regarding the use of ATM Cards and the PIN. They were however unable to produce any forms signed by the Plaintiff and did not even produce a sample form that would at least provide some idea as to what information or instructions are contained on the form.

Having considered all the facts of this matter, I find that the Defendant has not shown that the Plaintiff negligently compromised his ATM card and/or PIN. I also find that the Defendant conducted inadequate investigations to establish what happened and thereby discount the possibility that ATM skimming had occurred. In addition, the Defendant failed to provide the Plaintiff with adequate information as to how it arrived at the conclusions that it did.

In the premises, I find that the said failures amount to the Defendant failing to exercise reasonable care and skill in protecting the Plaintiff's account from unauthorized withdrawals. I therefore find the Defendant liable for all the contested transactions appearing on the Plaintiff's Bank Statement after he reported the matter to the Defendant because it was the Defendant's responsibility to protect the account. The Defendant shall reimburse the Plaintiff

the unauthorized sum withdrawn from his account from 16th February, 2009 onwards with interest thereon.

Over and above seeking reimbursement of the monies illegally withdrawn from his account, the Plaintiff seeks further relief as follows;

- ii. Damages for breach of trust and confidence;*
- iii. Damages for negligence;*
- iv. Damages for inconvenience*
- v. A declaration that the purported treatment of K14,300,000 refund as a loan on the Plaintiffs' account is illegal and null and void.*

As regards the claim for a declaration that the K14,300.00 ,000 not be treated as a loan, learned counsel for the Defendant explained that the figure arose after the charge backs were reversed resulting in the Plaintiffs account being overdrawn and interest was charged thereon, therefore the said amount cannot be treated as Loan.

Having found the Defendant liable for the monies illegally withdrawn from the Plaintiffs account, such a declaration would amount to unfair enrichment of the Plaintiff because the said sum of 14,300.00 is embedded in the sum of the monies withdrawn from his account and which sums I have awarded to the Plaintiff. However, any interest or other charges arising from the reversal of the charge back shall be paid back to the Plaintiff with interest thereon.

As regards the claims for negligence and breach of trust and confidence I have this to say. I have already found that the Defendant has failed to discharge its duty to protect the Plaintiffs account. The Defendant was negligent in the way it handled the Plaintiffs complaint. I agree that there was a serious breach of trust and confidence on the part of the Defendant, being a fiduciary, but that is precisely what forms the particulars of the negligence and should therefore not come as a separate head.

As regards the claim for inconvenience, I did say earlier in this judgment that the relationship between a customer and a bank is essentially contractual. In the case of the **Attorney-General v D.G. Mpundu**²⁷ the Supreme Court held that Damages for mental distress and inconvenience may be recovered in an action for breach of contract. The Court in the instant case had this to say:

"We are at large to consider whether the respondent is entitled to compensation under general damages for mental distress and inconvenience. Addis v Gramophone Company Limited, (11) was for many years authority to bar, for instance, a servant wrongfully dismissed from his employment, for recovering damages for injured feelings or loss sustained from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. This case has since been qualified and there is now a chain of authorities to support the recovery of damages for mental distress or inconvenience, for example, damages for frustration annoyance and disappointment could be recovered in an action for breach of contract."

The negligent handling of the Plaintiff's account by the Defendant resulted in the Plaintiff losing all the money in his account and thereby being deprived of access to his money. He was further subjected to an unwarranted overdraft all as a consequence of the Plaintiff failing to exercise due care and skill in this incident. I find that the Plaintiff was put to great inconvenience and I therefore grant the claim for inconvenience and in that regard award a global sum of ZK30,000 plus interest.

The Plaintiff is therefore granted the following reliefs;

- 1. The Defendant shall reimburse the Plaintiff the following sums;**
 - a. All the unauthorized sums withdrawn from his account from 16th February, 2009 onwards and which withdrawals have been claimed as special damages.**

²⁷Attorney-General v D.G. Mpundu (1984) Z.R. 6 (S.C.)

b. All and any interest or charges paid by the Plaintiff arising from the overdraft which arose as a result of the reversal of the charge-back plus interest thereon;

In the event that the Parties fail to agree on the quantum of damages, assessment shall be heard by this Court upon application by either party.

2. The Plaintiff is hereby awarded a global sum of ZK50,000 plus interest for damages for negligence and inconvenience.
3. The awarded sums shall attract interest at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the current bank lending rate as determined by Bank of Zambia.
4. The costs of this action are awarded to the Plaintiff.

Dated at Lusaka this 31st day of December, 2015



M. M. KONDOLO, S.C
JUDGE