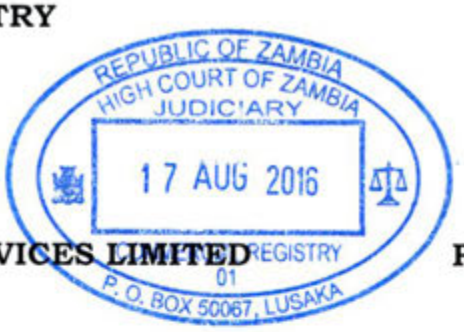
IN THE HIGH COURT FOR ZAMBIA **2014/HPC/0076**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)



BETWEEN:

SAVENDA MANAGEMENT SERVICES LIMITED **PLAINTIFF**

AND

STANBIC BANK ZAMBIA LIMITED **DEFENDANT**

Before the Hon. Mr. Justice Justin Chashi in Open Court on the 17th Day of August, 2016.

For the Plaintiff: *K. Nchito, Messrs N. Makayi & Company*
For the Defendant: *SC Mwanashiku, Messrs M&M Advocates*

JUDGMENT

Cases referred to:

1. *Robinson v Harman (1848) Eng R, 153*
2. *Victoria Lundry (Windsor) Ltd v Newman Industries Limited and Coulson and co. Ltd (Third Party) (1949) CA*
3. *Khalid Mohammed v Attorney General (1984) ZR, 49*
4. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
5. *Donoghue v Stevenson (1932) AC 562*
6. *Blyth v Birmingham Waterworks Co. (1856)11 Exch 781*
7. *Turner v Royal Bank of Scotland (1999) 2 ALL ER (comm.) 664*
8. *Phillips v copping (1935) 1 KB, 15*
9. *Re a debtor (490/SD/91) ex parte The debtor v Printline (Offset) Ltd (1992) 2 ALL ER 664*
10. *Hedley Byrne & Co. Ltd v Heller & Partners Ltd (1968) 2 ALL ER, 575*

Legislation referred to:

11. *The Banking and Financial Services Act, Chapter 387 of The Laws of Zambia- Credit Data (Privacy) Code*

12. The Banking and financial Services Act Chapter 387 of The Laws of Zambia

Other Works referred to:

13. Banking Litigation, 2nd edition, London & Maxwell, 2005

The Plaintiff ***Savenda Management Services Limited*** commenced proceedings herein against the Defendant ***Stanbic Bank Zambia Limited*** by way of a Writ of Summons on 13th February 2014 claiming the following reliefs:

1. ***K192,500,000.00 damages for loss of business.***
2. ***An order that the Plaintiff be immediately de listed from the CRB***
3. ***Damages for loss of business and profits***
4. ***Damages for negligence***
5. ***Damages for injury to business reputation.***
6. ***Any other relief the Court may deem fit.***
7. ***Costs***

According to the accompanying Statement of Claim, the Plaintiff is and was at the material time specialised in global supply chain

management, logistics and project management whilst the Defendant is a financial institution.

The Plaintiff averred that in September 2007, it applied to the Defendant for a lease buy back facility for a printing machine at the cost of USD 540,000.00. That it was expressly and/or impliedly agreed that the lease payments would be serviced through an overdraft facility with the Defendant.

The Plaintiff further averred that it was reasonably expected that the balance of the loan facility would be reducing as the lease payments were made.

That contrary to the expectations, the balance was not reducing despite the Plaintiff having made the repayments by overdraft.

It was the Plaintiff's averment that the Defendant by a letter to the Plaintiff acknowledged that there was default on the Plaintiff's account which was being caused by their system shortfall because the debit Order was running to the credit of the lease account and the debit was instead defaulting to a suspense account. That despite the Defendant having acknowledged the mistake, they did not and have not corrected the mistake and continued charging

interest on the loan and caused the Plaintiff's account to be in default.

According to the Plaintiff, in spite of the Defendant having acknowledged that non reduction of the balance in the lease account was on account of an internal error, they proceeded to negligently list the Plaintiff on the Credit Reference Agency (CRA).

The particulars of the negligence are as follows:

(1) *Listing the Plaintiff as a delinquent debtor when the Defendant had acknowledged that the default was due to their own system error.*

(2) *Listing the Plaintiff for a non functioning facility without giving the Plaintiff necessary notice of the intention to list the Plaintiff as required by law.*

(3) *Despite acknowledging that the default was due to the Defendant's system error, the Defendant has not corrected the mistake and the Plaintiff is still listed on the CRA and have continued charging interest on the account.*

Further according to the Plaintiff, the Defendant negligently listed the Plaintiff on the CRA in total disregard of the Plaintiff's rights

and business reputation as a result of which the Plaintiff has lost out on a lot of funding opportunities because as an entity listed on CRA, they do not qualify for any business lending or any lending at all.

Further that as a result of the listing, the Plaintiff's business reputation has been severely injured and lowered in the estimation of right thinking members of the business community.

The Plaintiff further averred that despite having been listed as a delinquent debtor, the Defendant has gone on to recommend the Plaintiff as being credit worthy and enjoys seven digit facilities with the Defendant domiciled in US Dollar currency.

According to the Plaintiff, the Plaintiff and the Defendant did not reach an agreement or any at all regarding the cause for the default and the matter was referred to arbitration under Cause Number 2013/HP/ARB/14. That on 24th May 2013, the Defendant was awarded K7,535,237.96 (USD 1,363,850.49) as an Arbitral award, in default of which the Defendant was at liberty to foreclose on the secured properties, Stand 1534 and 255595 Woodlands, Lusaka.

That the Defendant has since foreclosed although the Plaintiff has been granted a stay of execution pending the exercise of its right of redemption.

According to the Plaintiff, as a result of the Defendant's negligence

(1) *The Plaintiff was and is still negligently listed on CRA as a delinquent debtor.*

(2) *The Plaintiff has been condemned by an Arbitral award*

(3) *The Plaintiff's property has been foreclosed by the Defendant*

(4) *The Plaintiff has lost out on many funding opportunities.*

In its defence, the Defendant averred that the overdraft facility was not serviced hence the commencement of proceedings against the Plaintiff for recovery of the funds.

According to the Defendant, the Plaintiff was not consistent with its payments and that, that is the reason why there was no significant reduction in the outstanding balance.

That the default on the account was due to the failure to make the agreed upon repayments and not as a result of the system error.

The Defendant denied any negligence on its part in the manner the Plaintiff was reported to CRA and averred that the Plaintiff was reported due to the fact that it was established that the Plaintiff was in default due to its failure to make the agreed upon payments and the reporting was done in conformity with CRA guidelines.

According to the Defendant, the listing on CRA does not preclude a listed party from securing other funding. That according to the CRA guidelines, a party can be listed but still be considered to be credit worthy. That consequently, any purported recommendation allegedly issued by the Defendant would not contradict the Plaintiff's listing on CRA.

The Defendant further averred that if the Plaintiff's default was as a result of a system error and not due to the failure to make repayments, the Arbitrator would have found in favour of the Plaintiff.

In conclusion, the Defendant denied that it acted negligently and that the Plaintiff is entitled to any of the claims.

At the trial, the Plaintiff's witness who for convenience I shall refer to as ***PW, Clever Siame Mpoha,*** the Director of Africa Business

Development at the Plaintiff, proffered his evidence in chief as per his amended Witness Statement dated 7th August 2015 and Supplementary Witness Statement dated 10th March 2016.

In his evidence, PW reiterated the contents of the Statement of Claim and then went on to testify that on 17th November 2008, the Plaintiff was requested to make two deposits of USD 50,000.00 each for November and December 2008 so that a restructured facility would be effective from January 2009. A copy of the said request appears on page 6 of the Plaintiff's Supplementary Bundle of Documents. That the deposits were made as shown on the Statements at page 10 of the same Bundle.

PW, testified that on 3rd December 2008, the Defendant wrote to the Manager, Credit Risk Control at Standard Chartered Bank Plc informing them that the Plaintiff enjoyed facilities in seven digit figures domiciled in USD currency and considered the Plaintiff to be credit worthy. That a copy of the said letter appears on page 7 of the same Bundle.

PW further testified that in April 2009, the Plaintiff discovered that they had been listed on CRA despite not having been in default.

That in responding to a query from the Plaintiff, the Defendant by letter dated 23rd April 2009 stated that there was a default due to a system shortfall. The attention of the Court was drawn to the letter on page 8 of the same Bundle.

It was PW's further evidence that on 2nd March 2010, the Plaintiff wrote to the Defendant by email as per page 9 of the Bundle complaining about the effect the adverse reporting was having on its business. That in response, the Defendant on 6th September 2010 in responding to the Plaintiff's Advocates stated that it was a directive from the Central Bank that a loan that is not performing should be listed on CRA and the Plaintiff was classified as such when it failed to service its loan obligations with the bank for three consecutive months.

According to PW, at the time the Plaintiff was listed, the loan was not non performing for three months as could be seen from the bank statement at page 10 of the Bundle dated 1st April 2010 which shows that as at the date of the listing on 31st October 2008, the Plaintiff had made a payment of USD 16,563.17 by overdraft on 28th October 2008.

That further on 6th and 26th November 2008, the Plaintiff had made the requested deposits of USD 50, 000.00 each for November and December 2008.

It was also PW's evidence that on 21st September 2010, the Plaintiff received a letter from Eco Bank in which they denied to advance credit facilities to the Plaintiff due to the adverse report on CRA. That a copy of the letter appears on page 12 of the same Bundle.

That on 23rd September 2014, the Plaintiff received a letter from Smart Dynasty, in which they refused to refinance the Plaintiff's loan because the Plaintiff had been listed on CRA for non performing loans. A copy of the letter appears on pages 262 of the Bundle.

PW's further evidence was that by the letter dated 23rd April 2009 appearing on pages 8 of the Bundle, the Defendant acknowledged that the lease ceased to be debited to the current account in November 2008.

That in November 2008, the Plaintiff had made deposits of USD 100,000.00 as shown on page 10 of the Bundle.

Further that at the time the Plaintiff was listed on CRA the Plaintiff's bank account was not in default for three months as provided by Bank of Zambia.

According to PW, the Defendant did not avail to the Plaintiff the facility of USD 450,000.00 which appears on pages 1-9 of the Agreed Bundle of Documents as the facility was not signed by the Plaintiff and that therefore only the Defendant knows its relevance to the matter before this Court.

PW also testified that on 10th October 2008, the Defendant wrote a letter to the Plaintiff as appears on page 10 of the Agreed Bundle in which it stated that if the arrears were not repaid and the facility reviewed by 30th October 2008, they shall have no choice but to classify the facility as non performing and seek other avenues to recover the facilities. That in responding to the said letter the Plaintiff wrote several letters to the Defendant dated 10th October, 7th, 11th, and 13th November 2008 which appears on pages 11-18 of Agreed Bundle. That in the letter of 11th November 2008, the Plaintiff thanked the Defendant because as at the time the issues in contention had been resolved.

PW further testified that on 17th November 2008, the Defendant wrote to the Plaintiff acknowledging receipt of the request to restructure the existing facility and that the same was being presented to the Credit Committee for approval. Further that the proposal had received support of the Defendant's Head – Wholesale Banking subject to the Defendant making two deposits of USD 50,000.00 each for November and December 2008 and the restructured facility will be effective January 2009 and that going forward no more increases in the facility would be permitted. That the two deposits were made, but however the facility was never restructured in January 2009.

According to PW, the Plaintiff on 2nd December 2010 received a letter from Bank of Zambia which was inconclusive and forming part of an ongoing discussion between the Plaintiff and Bank of Zambia as shown on pages 19-21 of the Agreed Bundle. That the Plaintiff responded on 7th December 2010 as per the letter on page 22-23 of the same Bundle.

Further that on 11th January 2011 the Plaintiff wrote another letter as appears on pages 21-30 to Bank of Zambia providing further

details on the issue and on 4th February 2011 Bank of Zambia wrote to the Defendant requesting them to address the allegations raised by the Plaintiff by providing information and explanations where necessary. The letter appears on pages 31-35 of the same Bundle.

That as a result of the aforestated correspondence, the Plaintiff on 28th February 2011, wrote a letter as per page 36-42 of the same Bundle to the Defendant advising that the matters raised in the letters written by the Plaintiff had not been adequately addressed by the Defendant.

In concluding, it was PW's evidence that in January 2014, the Plaintiff contracted a financial Consultant, One Merchant House to review the Financial implications of the erroneous listing of the Plaintiff on the CRA. That the Consultants recommended that the Plaintiff had suffered consultancy costs of USD 228,837.00 which would not have been incurred had they not been listed on CRB. Further, the Consultants recommended that the Plaintiff had lost an opportunity to earn profit amounting to K16,843,179.00 and USD 67,513,004.00 and a probable loss of USD 38,250,000.00.

That a copy of the report appears on pages 13 to 262 of the Plaintiff's Supplementary Bundle of Documents.

In cross examination by Counsel for the Defendant, PW asserted that the facilities the Plaintiff got from the Defendant had to be paid back and that the Plaintiff was making the agreed payments at the agreed time and as such never defaulted.

When referred to page 9 of the Plaintiff's Supplementary Bundle of Documents, in particular paragraph 5, PW asserted that it was referring to the effect of the loses which was caused by the credit listing on 31st October 2008 when the Plaintiff was listed as a bad debtor, which caused the effects the paragraph was referring to.

That had the Defendant not created the situation the remedy being explained in the document could not have arisen.

According to PW at the time of obtaining the facility in 2007, it had been agreed that all payments pertaining to the facility were going to be paid directly to the Plaintiff's current account which at the time had authorised overdraft limit. That the Plaintiff religiously paid all the agreed instalments and in October 2008 at a meeting

with the Defendant, the parties agreed a general review of the facility as the Defendant was approaching the financial year end.

That arising from the said meeting, the Defendant wrote to the Plaintiff requesting for a payment in November and December of USD 50,000.00 each which were paid.

According to PW, in April 2009, the Defendant called a meeting which was led by their leader Augustine Chingundu, who had come from Zimbabwe to review the facility.

That on 22nd April 2009, the Defendant informed the Plaintiff that they had reviewed the facility and noticed that the Plaintiff had paid for all the months from inception to 28th October 2008 and that due to the Bank system failure, the instalments at the time of his review which they had set for five months was going to a default or suspense account.

It was PW's assertion that in the meantime, the Plaintiff had already been listed on the CRA on 31st October 2008 as a delinquent customer when as at that date they were not in default.

That also to show that the Plaintiff was a good and credit worthy customer, whilst the Plaintiff was listed on CRA, the Defendant on 3rd December 2008 wrote to Standard Chartered Bank advising them that the Plaintiff was credit worthy.

When referred to page 4 of the same Bundle, PW asserted that it showed the delinquency date as 31st October 2008 and the listing date as 8th June 2009.

When referred to page 8 of the same Bundle, he asserted that there was a Standing Order which was running as a payment. That the Defendant had a system problem. Instead of the Standing Orders being paid to the lease account, it was sending the credit to a suspense account, which anomaly went on for five months before it was rectified.

According to PW, for the Standing Order to be implemented, there had to be funds available in the current account or the overdraft had to go within the approved limits.

When referred to the last paragraph of the letter, PW stated that the Defendant was saying that the reversal did not affect the Plaintiff's overdraft indebtedness to the Bank.

When referred to page 6 of the same Bundle, PW asserted that the Plaintiff had by 13th November 2008 requested for restructuring of the facility. That the restructuring was not because they were having problems servicing the facility. That the restructuring letter appears on page 6 of the Plaintiff's Bundle of Documents.

When referred to Clause 2.1 (purpose), PW insisted that it could only be read together with the letter on page 11 of the same Bundle.

When referred to page 10 of the Plaintiff's 2nd Supplementary Bundle of Documents, PW stated that, that was proof that the Plaintiff was not in default. That the balance was USD 619,173.36.

That the account was in overdraft and had a limit.

PW further asserted that he did lodge a complaint to Bank of Zambia over the listing, who stated that the Defendant was wrong for erroneously listing the Plaintiff on CRA. That the letter from Bank of Zambia was to be reviewed, but that was never done and subsequently an appeal was made to the Deputy Governor.

According to PW, he was subsequently given the code of ethics and the Charter of CRA which he relied upon in bringing the matter to Court.

When referred to the letter on page 50 of the Plaintiff's Bundle of Documents, it was his view that the letter was not conclusive on the issue of whether the Defendant was wrong or not.

As regards, the document on pages 10-16 of the Agreed Bundle, PW confirmed having written to Bank of Zambia.

When further referred to pages 19-21 of the same Bundle, PW asserted that he did not agree with the view that was taken by Bank of Zambia. It was PW's view that there could have been no arrears if Bank of Zambia had put into context the position the Plaintiff was putting to them that there were no arrears at the time of being listed.

In re examination, PW as regards the letter on page 11 of the agreed Bundle, stated that the letter was written after several meetings the parties had. That at the time the Plaintiff was not aware that the Defendant's system was defaulting the standing order payments into the suspense account.

That at the time of writing the letter, they were writing in the spirit of ongoing renewal of the facilities they were enjoying at the time, which were performing in good order and they wanted to look at other options of capital projection in line with their levels of business.

According to PW, the issue on CRA was not addressed at Arbitration.

On its part, the Defendant equally called one witness, ***Reuben Malindi,*** the Team Leader of the Specialised Recoveries Department at the Defendant, whom I shall for convenience refer to as ***DW.***

According to DW, the Defendant in 2007 availed credit facilities in the amounts of USD 540,000.00 and USD 450,000.00 to the Plaintiff as shown on page 1 of the Agreed Bundle. That it was a standard condition of the loan that the Plaintiff would be making monthly repayments towards the loan, but the Plaintiff was however not consistent in its repayments as it did not make the repayments in the manner agreed upon, as a result the account went into default.

The Court's attention was drawn to the documents on pages 9-10 of the Plaintiff's 2nd Supplementary Bundle of Documents.

It was DW's testimony that the Plaintiff was notified of the status of its account and advised to normalize the situation, but there was no positive response. Reference to that effect was made to page 8 of the Plaintiff's 2nd Supplementary Bundle of Documents and page 10 of the Agreed Bundle.

It was DW's evidence that following the Plaintiff's failure to normalize its account, the Defendant had no option but to report the default to CRA in line with the relevant regulations as per page 1 of the Defendant's Bundle of Documents and pages 10-11 of the Agreed Bundle.

According to DW, the Defendant has found no evidence that the default was caused by the Defendant's system error as is being alleged by the Plaintiff.

DW further testified that the listing of the Plaintiff did not preclude other financial institutions from extending credit facilities to it.

That the letter on page 7 of the Plaintiff's 2nd Supplementary Bundle of Documents does not contradict its position as credit worthiness refers to repayment ability and the letter was therefore accurate that the Plaintiff was still in operation and presumably generating income and therefore had the ability to repay its loans.

In cross examination by Counsel for the Plaintiff. DW asserted that he did attend most of the meetings after 2009 which had to do with restructuring and the Arbitral process, although there are no minutes relating to the same. That the Plaintiff was mostly dealing with the Defendant's Relations Manager.

According to DW, he knew Cyprian Mwamba, who was his former workmate as he has since left the Defendant.

When he was referred to page 4 of the Plaintiff's 2nd Supplementary Bundle of Documents, he identified it as the CRA report dated 31st October 2008.

When referred to the Statement of accounts on page 10 of the same Bundle, he stated that there was a debit on 28th October 2008 going to the lease account. Further that there were deposits and a

transfer on 6th, 26th and 30th of November 2008 amounting to USD 100,000.00.

DW confirmed that according to the letter on page 6 of the same Bundle, the amount of USD 50,000.00 was towards the payment of USD 100,000.00.

DW insisted that he had evidence that the Plaintiff borrowed USD 450,000.00 which appears on page 1 of the Agreed Bundle. That also page 10 of the same Bundle shows the funds which were accessed as a result of the said facility.

DW asserted that as at 31st October 2008 the account was overdrawn by USD 736,000.00 and that the all amount was due.

Further that as shown vide letter on page 10 of the Agreed Bundle, meetings were held at which the overdraft was discussed. That the document on page 4 of the Plaintiff's 2nd Supplementary Bundle of Documents shows various accounts which were listed as delinquent and the current account was one of them. It was his evidence that even though the payment came from the current account on 28th October 2008, the Plaintiff was far above the agreed limit of USD 400,000.00.

At the end of the trial, both parties filed written submissions

Counsel for the Plaintiff submitted that at the date of delinquency the Plaintiff was not in default and as such the listing was not done in conformity with the law. That ***The Banking and Financial Services Act***, ***Credit Data (Privacy) Code*** (the code) provides that:

> *"Where the credit provider has provided credit to a person and the account is subsequently in default, the credit provider shall, as recommended practice give to such person within 30 days from the date of default a written reminder stating that unless the amount in default is fully paid before the expiry of 60 days from the date of default, the person shall be liable to have his account data retained by the CRA until the expiry of 7 years from the date of final settlement of the amount in default or 7 years from the date of the person's discharge from bankruptcy as notified to the CRA, whichever is earlier".*

It was contended that the Plaintiff has been able to show that they suffered loss as a result of the Defendant's action and that they should be put back in the position they could have been had the

Defendant not erroneously listed them on CRA. Reliance in that respect was placed on the case of **Robinson v Harman[1].**

On the issue of damages for loss of profit, the Court's attention was drawn to the case of **Victoria Laundry v Newman[2]** and submitted that the Plaintiff has lost an opportunity to earn profits as the Defendants as reasonable persons ought to have known that the erroneous listing of the Plaintiff on the CRA would lead to loss of business and profits.

In concluding, Counsel submitted that the Plaintiff has been able to show the following:

1. That they were not in default on the date listed as the delinquency date and there was no notification in accordance with Clause 2.3 of the Code under ***The Banking and Financial Services Act[12]***.
2. That there is evidence to show that there was a system error in the Defendant's system as confirmed by the Defendant and that the last debit order was on 28th October 2008.
3. That the Plaintiff has shown evidence in which they were denied credit facilities on account of adverse report on the

CRA which has resulted in the loss of the business and profits.

4. That the Plaintiff has shown by their report on the financial implications of being listed, that they have suffered consultancy costs, lost opportunities to earn profits which includes probable losses.

On the Defendant's part, Counsel for the Defendant submitted that the Plaintiff's allegation that they were not in default at the time of listing is clearly untrue as the Plaintiff has not provided any evidence to show that they were actually making regular monthly payments to their current account to sustain payments to the lease account.

Further that, prior to the Court action, the Plaintiff reported the issue of the listing to Bank of Zambia who investigated the issue and did not find the Defendant liable in any way.

As regards the allegation that the Defendant did not warn the Plaintiff in writing prior to the listing on CRA, the Court's attention was drawn to page 10 of the Agreed Bundle, letter dated 10th

October 2008 and submitted that, the same is evidence of a written warning to the Plaintiff.

On the issue of whether the Plaintiff did suffer any loss that can be attributed to the Defendant as a result of the listing on CRA, Counsel drew the attention of the Court to page 1 of the Defendant's Bundle of Documents, guidance note from Bank of Zambia on the Credit Reporting System, in particular paragraph 2 of Clause 2 which states that:

> *"Credit providers are, therefore reminded that the credit reporting system is not a blacklisting system and that negative credit reports are not meant to lock out those listed but to ensure full disclosure to potential lenders by minimizing information asymmetry on borrowers. The use of credit reports is part of the credit appraisal process which inculcates credit discipline on the part of the borrowers".*

According to Counsel, the Plaintiff has not suffered loss as the letters from Eco Bank and Smart Dynasty were merely of an inquiry nature in order to enable them process the facilities.

On the issue of damages, Counsel has submitted that the same have not been particularized and itemized in detail.

In concluding, Counsel submitted that the Plaintiff has failed to prove its case on a balance of probabilities.

Reliance in that respect was placed on the case of **Khalid Mohammed v Attorney General**[3] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[4] where it was stated that if the Plaintiff fails to prove its case against the Defendant to the required standard, that is on the balance of probabilities, Judgment will not be entered in its favour even if the Defendant's case fails.

In determining this matter, I have carefully taken into consideration the parties respective evidence and submissions.

From the outset, let me state that with the parties filing of the Agreed Bundle of Documents, which was only done on 18th April 2016, after trial had commenced, which culminated in PW filing a Supplementary Witness Statement and the amendment of DW Witness Statement, other issues which were not pleaded were brought to the fore, though in my view they were not really relevant for determination of the main issue.

From the endorsement on the Writ of Summons the Plaintiff's claim is premised on the tort of negligence, as per the fourth relief being sought by the Plaintiff.

The other reliefs are ancillary and their success is dependent on the Plaintiff succeeding on negligence.

Understandably, none of the parties have addressed the Court on the requisite ingredients of negligence, as the parties did not find it necessary to do so as in my view the parties seem to have a common understanding of the same.

However, whilst it is the Plaintiff's contention that the reporting of the Plaintiff to the CRA by the Defendant as delinquent on 31st October 2008 which culminated into the Plaintiff being listed on 8th June 2009 was negligently done, on the other hand, the Defendant is contending that it was not negligent in its actions.

In alleging negligence, the Plaintiff has contended that the default on the account was not due to non-performance on the account but was due to an error on the Defendant's own system, which fact was acknowledged by the Defendant, but no attempt was made to correct the same.

Further that the Defendant did not give the Plaintiff the requisite notice of intention to list the Plaintiff on CRA before they did so as required by law.

It is in light of the aforestated, that the Plaintiff is claiming that the Defendant acted negligently in listing the Plaintiff on the CRA in total disregard of the Plaintiff's rights and business reputation as a result of which the Plaintiff has lost out on a lot of funding opportunities which has also resulted in its business reputation being severely injured and lowered.

As earlier alluded to, the Defendant on its part has insisted that the Plaintiff failed to service the overdraft facility as they were not consistent with payments, hence being in default.

According to the Defendant, there was no negligence on its part in the manner the Plaintiff was reported to CRA as it was established that they were in default and their reporting was done in conformity with CRA guidelines.

Further, the Defendant denied that the Plaintiff's default was as a result of a system error.

Despite the parties diverse approach in this matter, I wish to state that for the Plaintiff to succeed in this action it must prove the following:

1. *That the Defendant owed it a duty of care.*
2. *That the Defendant has been guilty of a breach of that duty and*
3. *That damage has been caused to the Plaintiff by the breach.*

The Aforestated principles were well enunciated in the case of **Donoghue v Stevenson**[5] where it was held that for the Court to find liability in a case of negligence, a party complained against should owe to the party complaining a duty of care, which duty should be breached and that he has as a consequence suffered damage as a result of the breach.

In the same case Lord Atkin in considering the duty of care not to injure one's neighbour, had this to say:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour?*

The answer seems to be- persons who are closely and directly affected by my action that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".

In the earlier English case of **Blyth v Birmingham Waterworks Co.[6],** Alderman B, defined negligence at page 748 as:

"The omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do".

The relationship between the Defendant and the Plaintiff was that of Banker and Customer/client and it follows from the said relationship that a duty of care indeed existed. It also follows from that, that the Defendant owed a duty to use reasonable skill and care when performing services for the Plaintiff as a customer. This duty subject to certain exceptions extended to the Defendant keeping the Plaintiff's affairs confidential.

Also pursuant to extra legal regulation and miscellaneous provisions in Statutory Consumer Protection, Banks will in certain circumstances owe private customers a duty to act in good faith and to act fairly and reasonably.

Although I have taken the trouble to address the aforestated principles, it is common cause between the Plaintiff and the Defendant and it is not in dispute that the Defendant owed the Plaintiff a duty of care as aforestated.

What then needs to be determined by the Court is whether that duty was breached by the Defendant, in the manner the Defendant found itself listed on CRA.

A recap of the evidence shows that although the lease facility was given to the Plaintiff in September 2007, the issue of default only arose in October 2008. The Corporate Credit Report on page 27 of the Plaintiff's Bundle of Documents shows the Delinquency date as 31st October 2008 and the accounts as non performing. The genesis of the problem as regards the Default can be traced to that date.

Unbeknown to the Plaintiff at the time, the Defendant's system had a shortfall which led to the account defaulting and in my view culminating into the account being classified delinquent.

Although the Defendant in its Defence and the evidence of DW have denied any system error, the letter on page 5 of the Plaintiff's Bundle of Documents is a clear acknowledgment and admission on the Defendant's part that there was such a system shortfall. The letter in issue is dated 23rd April 2009 and was written by Augustine N. Chigudu, Head: Customer Debt Management, in the employ of the Defendant to the Plaintiff. For ease of reference, and removal of doubt this is what the second paragraph of the letter states:

> *"To this end, please find enclosed provisional statements of both your USD current account and the lease agreement, marked "A" and "B" respectively. As you will note from the current account the debit order running thereon since inception of the lease ceased to be debited to the current account in November 2008 as the last debit order for the amount of $16,563.17 was raised on 28th October 2008.* ***As***

explained during and after our meeting owing to a system shortfall, we would have had the debit order running to the credit of your lease account in the absence of a corresponding debit against your current account. For the record, the debit was instead defaulting to an internal suspense account which anomaly had now been rectified *to correctly throw the lease agreement in arrears of $80,050.34 being 5 instalments unpaid.*

We have incidentally cancelled the debit order with immediate effect and the lease will remain unpaid ***until we consider the current restructuring proposal from yourselves"*** *(the bolding is mine for emphasis only)*

In my view, I do not think that the system shortfall alluded to in the aforestated letter and the delinquency date are a mere coincidence. I am convinced and satisfied and it is my finding of fact that it was indeed the system shortfall which gave rise to the default on the lease account and culminated into the classification of the account as delinquent on 31st October 2008 and not the non performance of

the account at the time. I am indeed sanguined in my finding by the Defendant's admission in the aforestated letter of 23rd April 2009, that there was a system shortfall which caused the debit to be defaulting to an internal suspense account instead of crediting the lease account.

It would seem that at the time of reporting the account as a delinquent account, the Defendant had not conducted adequate investigations as to the cause of the default on the account. If they had taken necessary steps and endeavoured to do so, they would have discovered that the cause was due to their own system failure as they subsequently discovered and not due to non payments on the part of the Plaintiff. They would also have discovered that the account was at the time performing and not non performing.

The Code, which is designed to provide practical guidance to credit data users in Zambia in the handling of data calls for accuracy. Clause 2.6 of the Code states as follows:

> *"2.6 Before a credit provider provides any credit data to a CRA, it shall have taken reasonably practicable steps to check such data for accuracy. If subsequently the*

credit provider discovers any inaccuracy in the data which have been provided to the CRA, it shall update such data held in the database of the CRA as soon as practicable.

2.7 *If a credit provider fails to have taken reasonably practicable steps to check the accuracy of the data before providing such data to CRA, or if he fails to update the data held in the database of the CRA after discovering such inaccuracy, this will give presumption of contravention of DPP2 (i)"*

Data Protection Principle (DPP) in particular DPP2 (i) rehashes Clause 2.6 of the Code.

It is evident that the data as provided by the Defendant as at October 2008 was not accurate as the Defendant did not take reasonably practicable steps to check the data it provided on the Defendant to CRA.

In fact it would seem that what we are dealing here with was an automated decision taking, and that is the more reason no decision which significantly affects a customer which is based solely on the

automatic processing of data for purposes of evaluating matters relating to the Customer's creditworthiness should be taken without giving the customer an opportunity to require the data controller to reconsider the decision.

In not properly investigating the default in terms of accuracy, the Defendant did not only act carelessly but also negligently.

In my view, the matter does not end here. Section 50 (i)(a) of ***The Banking and financial Services Act***[12] which deals with confidentiality provides as follows:

> *" 50 (i) A Financial Service Provider and every director and employee thereon shall maintain the confidentiality of all confidential information obtained in the course of service to the bank or institution and shall not divulge the same except-*
>
> *(a) In accordance with the express consent of the customer or Order of the Court"*

There is no evidence from the documents before the Court and neither did the Defendant bring it to the attention of the Court that

they had sought and the Plaintiff had expressly consented to the reference of its confidential information to the CRA, so as not to be in breach of Section 50 (i)(a) of the Act.

In the English case of **Turner v Royal Bank of Scotland**[7] the Court of Appeal held that the practice of banks giving credit references to other banks could not be justified on the basis of the customer having given his implied consent to the practices and was (on the facts of that case) a breach of contract. Reference was made to the **Turner case** by the learned authors of ***Banking Litigation*** when they were dealing with the topic of Credit Reference Agencies and the Banking Code in England and they went on at page 81, paragraph 2-072 to say the following:

> *"Paragraph 13.6 of the Banking Code and paragraph 13.10 of the Business Banking Code restrict the disclosure of information about personal debts to credit reference agencies. This is limited to cases where the customer has fallen behind with payments, the amount is undisputed, no unsatisfactory proposals for repayment have been made following formal demand and the customer has been given 28 days notice of*

intention to disclose. No other information will be disclosed to credit reference agencies without the customers consent.

Banks should ensure that their contracts with the customers incorporate a right to give confidential information to credit reference agencies, as the Banking Code is not a contractual document unless the bank and customer agree that it should be. *Paragraph 112 of the Banking Code states that bankers reference will not be provided without the written permission of the customer". (the bolding is mine for emphasis only)*

Equally under ***The Banking and Financial Services Act, Credit Data (Privacy) Code***[11], on the handling of credit data by credit providers, Clause 2.1 of the Code provides for mandatory notification to a customer upon application for credit as follows:

"Notification to customer by credit provider

Notification upon application for credit.

2.1 A credit provider who provides credit data to a CRA or, in the event of default, to a DCA shall on or before

collecting data, take all reasonably practicable steps to provide to such person a written statement setting out clearly the following information.

2.1.1 *That the data may be so supplied to a CRA and/or in the event of default to a DCA.*

2.2 *If a credit provider fails to take reasonably practicable steps to give to the person a written statement as described in Clause 2.1, this will give rise to a presumption of contravention of DPP1(3).*

Consideration on the issue of confidentiality should also be given to Clause 4.1 of the Code which states as follows:

"No effect on duty of confidentiality.

4.1 *For the avoidance of doubt, nothing in parts i to iii of the Code affects the application of the law of confidentiality in relation to credit data. In particular, in a situation where under the general law, a credit provider or a CRA owes a duty of confidentiality to a person in respect of the credit data relating to such*

person, none of the provisions in parts i and iii of the code shall have, or purport to have the effect of abrogating, limiting or otherwise modifying such duty under the general law.

4.2 Without prejudice to the generality of 4.1 above, a credit provider shall provide confidential information about the customer in accordance with the provisions of Section 50 of the ACT."

In dealing with the issue of confidentiality under Section 50 of ***The Bankers and Financial Services Act***[12], which deals with the requirement of the customers consent, and also issues of prior notification under the Code, I am recognizant of the fact that these issues were not pleaded by the Plaintiff. However it is the duty of the Court when breaches of the law arise to step in and look at the breaches despite lack of pleadings.

As Scrutton LJ said in the case of **Phillips v Copping**[8] at page 15:

"It is the duty of the Court when asked to give a Judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the

attention of the Court overrides all questions of pleadings including any admission made therein".

As earlier alluded to there is no evidence on the part of the Defendant that they notified the Plaintiff and got consent from them on the mandatory requirement requisites and were therefore in breach of both the Act and the Code.

I find it strange that a reputable financial institution of long standing such as the Defendant would be so imprudent and impudent in their actions towards the Plaintiff. I cannot find any explanation for their behaviour but to say that their actions were not only deliberate but careless and they were negligent.

In my view the Defendant 's failure to observe the law and their failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation amounts to conduct that falls below the legal standard established to protect the customers such as the Plaintiff against unreasonable risk of harm and amounts to culpable carelessness.

And again the matter does not end there. The Plaintiff in the Statement of Claim did aver that they were not given the necessary notice of intention before being listed as required by law.

Clause 2.3 of the ***Code*** states that:

> "***Notification upon default***
>
> *2.3 Where the credit provider has provided credit to a person and the account is subsequently in default, the credit provider shall as a recommended practice give to such person within 30 days from the date of the default a written reminder stating that unless the amount in default is fully repaid before the expiry of 60 days from the date of default, the person shall be liable to have his account data retained by the CRA until the expiry of 7 years from the date of final settlement of the amount in default or 7 years from the date of the persons discharge from bankruptcy".*

The Defendant has drawn the attention of the Court to the letter on page 10 of the Agreed Bundle of Documents dated 10th October 2008 addressed to the Plaintiff. In my view the said letter falls far

too short of the notification envisaged under Clause 2.3 of the Code in terms of time limits and neither does it make any reference to CRA, but refers to seeking other avenues in recovering the facilities.

This is another evident deliberate omission on the part of the Defendant and a breach of the Code as a credit provider.

In the introductory part, the Code states that a breach of the Code by a data user may give rise to a presumption against the data user in any proceedings in Zambia.

Indeed the numerous breaches as highlighted in the matter does give a strong presumption of negligence on the part of the Defendant.

To make matters worse, the Defendant has not taken any steps despite their omissions, breaches and acts of negligence to rectify the Plaintiff's listing on CRA despite there being abundant evidence of the parties engaging in restructuring of the credit facilities around October 2008 and immediately thereafter and also of the fact that the debt was fully secured by legal mortgages.

The fact that there was talk of restructuring and the debt having been fully secured, the Plaintiff could not be said to have been in a position as to be unable to pay the debt .

As Hoffman, J put it in the case of **Re a debtor (No 490/SD/91) ex parte the debtor v Printline (offset) Ltd**[9]**:**

> *"....normally it would be unjust that an individual should be regarded as unable to pay a debt if the debt is disputed on substantial grounds, likewise if the debtor has a Counter Claim, set off or cross demand which equals or exceeds the amount of the debt;* ***again if the creditor is fully secured"*** (the bolding is mine for emphasis only).

Although the Defendant would want to advance arguments over their intention of writing the letter of reference to Standard Charted Bank Plc over the Plaintiff's credit worthiness which letter appears on page 4 of the Plaintiff's Bundle of Documents in which they indicated that the Plaintiff was credit worthy, I am of the view that, despite there being a disclaimer, that was the Defendant's honesty reference as they knew that the Plaintiff was credit worthy despite their reference of the Plaintiff to CRA. In the case of **Hedley Byrne**

& Co. Ltd v Heller & Partners Ltd[10] the Court of Appeal applied the case of Robinson v National Bank of Scotland (1916 SC (HR) 154) where SEMBLE (per Lord Reid, Lord Morris of Borth-Y-Gesu and Lord Hodson) had this to say:

> *"In the absence of special circumstances requiring particular search and consideration on the part of* the bank giving to another bank a reference concerning a customer's credit – worthiness, ***There is no legal duty on the replying bank beyond that of giving an honest answer".*** (the bolding is mine for emphasis only).

Having established the breach, the final step for the Court is to determine whether the breach did cause damage to the Plaintiff.

It is common knowledge that Credit Reference Agencies obtain information from the banks which they hold concerning the creditworthiness of individuals and businesses. In economic terms, the practice of disclosing *"black information (information about customers in default as opposed to "white" information concerning customers not in default)* has globally been justified on the grounds that the sharing of such information minimises the risk of bad

debts and keeps the cost of borrowing down for the average customer.

The agencies work for lending institutions to help them make loan decisions in individual cases. Their reports help lenders decide whether or not to extend credit to a business or approve a loan and determine the interest to be charged. They are very powerful institutions in finance and their information which is usually cossumated without doubt can have a substantial impact on ones financial future. It must also be noted that negative reporting, inaccuracies, deliberate or negligent information can result in difficult in getting loans.

Although Bank of Zambia in their ***Guidance Note No. 1 of 2014 – On utilization of the Credit Reporting system*** which appears on page 1 of the Defendant's Bundle of Documents indicated that credit providers are reminded that the credit reporting system is not a blacklisting system and that negative credit reports are not meant to lock out those listed but to ensure full disclosure to potential lenders by minimizing information asymmetry on borrowers, more often than not, it does serve as a blacklisting mechanism as most

lending institutions are not keen to advance monies to any business or individual listed on the CRA.

In the matter at hand, there is ample evidence that the listing of the Plaintiff which as alluded to was negligently done, did have an adverse impact on the Plaintiff. It is evident from the Bundles before this Court that the Plaintiff who is specialised in global supply, chain management, logistics and project management was dependant in its business on financing from banks and financial institutions. It is also evident that as a result of being listed the Plaintiff could not access facilities from banks and financial institutions.

As shown on pages 30 and 61 of the Plaintiff's Bundle of Documents, the Plaintiff failed to access financial facilities from Eco Bank(The Pan African Bank) and also Eidan S. Engineers Ltd of Eidan Group Expressed strong reservations over the issue of listing and had to put the project on hold. Also as shown on page 262 of the Plaintiff's 2nd Supplementary Bundle of Documents, Smart Dynasty declined a loan refinance in the sum of USD 1,400,000 because of the listing on CRA.

From the aforestated, it is my finding that there is damage which arose as a result of the breach.

In view of the aforestated, the Plaintiff has proven its case on a balance of probability and is entitled to all the reliefs being sought. I award damages to the Plaintiff as prayed for and refer the matter to the learned Deputy Registrar for assessment of damages. I further order that the Plaintiff be de listed from the CRA.

Costs shall be to the Plaintiff. Same are to be taxed in default of agreement.

Dated at Lusaka this 17th day of August 2016.

.....

Justin Chashi

HIGH COURT JUDGE