

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2018/HPC/0036

BETWEEN:

**LYBIAN AFRICAN INVESTMENT COMPANY
ZAMBIA**

PLAINTIFF

AND

FIRST NATIONAL BANK LIMITED

DEFENDANT

CORAM: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka the 24th day of February, 2020.

For the Plaintiff: Mr. M. J. Katolo and Ms. K. Tembo of Milner and Paul Legal Practitioners

For the Defendant: Ms. G. Musyani and Mr. M. Moonga, In-house Counsel for the Defendant

JUDGMENT

Cases referred to:

- 1) *Barclays Bank Plc. Quincecare Limited and Another* (1992) 4 All E.R. 363.
- 2) *Alfred Mkonda v. Barclays Bank Zambia Plc.*, 2009/HP/1287 (unreported).
- 3) *Inutu Etambuyu Suba v. Indo-Zambia Bank Limited*, SJZ Judgment No. 52 of 2017.
- 4) *Indo-Zambia Bank Limited v. Lusaka Chemist Limited*, SCZ Judgment No. 5 of 2003.
- 5) *B.P. Zambia Plc v. Interland Motors Limited*, SCZ Judgment No. 5 of 2001.
- 6) *Wilson Masauso Zulu v. Avondale Housing Project Limited* (1982) Z.R.172.
- 7) *Khalid Mohamed v. The Attorney General* (1982) Z.R. 491.
- 8) *Royal British Bank v. Turquand* (1856) 6 E & B 327.

Legislation referred to:

1. Section 25 of the Companies Act, Chapter 388 of the Laws of Zambia.
2. Order 10, rule 4 (1) of the Court of Appeal Rules, S.I No. 65 of 2016 (Court of Appeal Rules).

Published and other works referred to:

- 1) *Bankers Association of Zambia Code of Banking Practice in Zambia.*
- 2) Mark Hapgood, QC (ed) (1996) *Paquet's Law of Banking*, 11th Edition (Butterworths, London) at p.340.
- 3) Peter Watts, (2010), *Bowstead and Reynolds on Agency*, 19th Edition, paragraphs 8 - 13 (Sweet & Maxwell, London).
- 4) Harvey McGregor, *McGregor on Damages*, 16th Edition (Sweet & Maxwell Ltd. 1997).
- 5) Bryan A. Garner (ed) *Black's Law Dictionary* 10th Edition (Thomson Reuters, 2014).

The Plaintiff commenced legal action against the Defendant by way of Writ of Summons, on 1st February, 2018 for the following remedies:

- i. *Payment of the sum of K2,568,992.12 together with K200,000.00 and USD5,000 together with USD110,000.00 being monies wrongly paid out by the Defendant from the Plaintiff's Bank accounts.*
- ii. *Loss of profit and interest on the sums wrongfully paid out.*
- iii. *Damages for negligently allowing a transfer of funds from the Plaintiff's accounts.*
- iv. *Damages for breach of fiduciary duty and duty of care.*
- v. *Other reliefs the Court may deem fit.*
- vi. *Interest.*
- vii. *Costs.*

The Plaintiff's claims as outlined in the Statement of Claim are that at the material time the Plaintiff was a customer of the Defendant Bank and operated three bank accounts, namely, Commercial Cheque Account Kwacha No. 62596956907; Corporate Cheque Account Dollar No. 62596957666 and Business Cheque Account No. 62608402260. On or about 6th May, 2016, the Plaintiff through a letter, advised the Defendant about anticipated interference by some imposters namely, Taher Khalil and Clement Wonani, and instructed that all clarifications should be made through the Managing Director, Mr. Shukri, should there be interference by the named imposters.

On or about 19th July, 2016, after the accounts were operational, the Defendant advised the Plaintiff that it wanted to close the Plaintiff's accounts due to breach of Group Policy based on firm instructions from the Defendant's Head Office in South Africa. The Plaintiff and its advocates made efforts to ensure that the accounts held with the Defendant were not closed and maintain its relationship with the Defendant. On all the follow up meetings with the Defendant, the Plaintiff enquired on the status of the accounts and the Defendant assured the Plaintiff that the accounts were frozen.

The Statement of Claim further discloses that on or about 22nd July, 2016, the Plaintiff received information that the position of Director and Secretary of the Plaintiff Company were dubiously changed at the Patents and Companies Registration Agency (hereinafter referred to as "PACRA") and immediately the imposters rushed to the Defendant to change the signatories for the Bank accounts. That, the Plaintiff and its advocates double checked the information received with PACRA and upon discovering that it was true, the Plaintiff enquired with the Defendant's headquarters who confirmed that the signing mandate was changed after the imposters submitted sufficient documentation as per Bank procedure.

The Plaintiff enquired on whether the accounts were still frozen as earlier advised and the Defendant confirmed that the accounts were still frozen and advised that the signing mandate be amended quickly. On or about 26th July, 2016, PACRA confirmed that the changes to the Plaintiff Company's records were dubious and fake and were immediately revised. The corrected records were obtained on 27th July, 2016.

On or about 28th July, 2016, the Plaintiff submitted the revised PACRA records to the Defendant and on 29th July, 2016, the Defendant confirmed that the revised PACRA records were genuine and that it would immediately initiate changes on the accounts. The Plaintiff requested for interim bank statements but the Defendant refused to issue bank statements unless a written request was made and even after this was done, the Defendant did not issue the bank statements. Further, that the Defendant also confirmed that the bank accounts were still frozen.

After being pursued by the Plaintiff, the Defendant finally issued the interim bank statements on or about 30th July, 2016, whereupon the Plaintiff's Assistant Finance Manager discovered and advised that K200,000.00 had been withdrawn from the Kwacha account and USD5,000.00 had been withdrawn from the Dollar Account and that these withdrawals were effected on the 21st July, 2016 by Clement Wonani. Further, that the interim bank statements revealed that on 26th July, 2016, there were transfers of K2,568,992.19 and USD110,000.00 to the old account held at Finance Bank Zambia which was supposedly frozen for both debits and credits. That, as a result, the Plaintiff has lost its money and has suffered loss and inconvenience. Further, that the Plaintiff has suffered loss on the interest and profits it would have made had it not parted with its money.

The particulars of loss as itemised by the Plaintiff are:

- a) *The Plaintiff had alerted and prohibited the Defendant from transacting with the named imposters over any account held by the Plaintiff with it.*
- b) *The Defendant reassured the Plaintiff, its agents and advocates that the account had been frozen for purposes of having it closed and that it*

- remained closed throughout the time the imposters had interfered with the accounts.*
- c) The Defendant did not diligently inspect the documents presented by the imposters as the same had anomalies and the names of the imposters were clearly visible together with all their details.*
 - d) The imposter Taher Khalil has a Temporal Employment Permit reflecting that he works for Libyan Embassy and not the Plaintiff Company, but the Defendant overlooked this huge anomaly and proceeded to change the signatories.*
 - e) The Defendant changed signatories on 21st July, 2016 and allowed the withdrawal of large sums of money to one of the imposters, Clement Wonani from both accounts of the Plaintiff when the Plaintiff was reassured that the said accounts were frozen and further, allowed another transfer by the imposters on 26th July, 2016.*
 - f) The Defendant, despite the warnings and caution that there were imposters that were after the Plaintiff's accounts, did not take care to protect the interests of their customer, the Plaintiff.*
 - g) The Defendant was dishonest when it stated that the accounts were frozen and were in breach of their fiduciary duty towards the Plaintiff to give account of the true status of the accounts.*

That in view of the above, the Plaintiff now claims for:

- i. Payment of the sum of K2,568,992.12 together with K200,000.00 and USD5,000 together with USD110,000.00 being monies wrongly paid out by the Defendant from the Plaintiff's Bank accounts.*
- ii. Loss of profit and interest on the sums wrongfully paid out.*
- iii. Damages for negligently allowing a transfer of funds from the Plaintiff's accounts.*
- iv. Damages for breach of fiduciary duty and duty of care.*
- v. Other reliefs the Court may deem fit.*
- vi. Interest.*
- vii. Costs.*

The Defendant entered appearance to the Writ of Summons and filed its Defence on 15th February, 2018, wherein it admitted that the Plaintiff opened three bank accounts with the Defendant on or about 7th March, 2016, after satisfying all the requirements for account opening. That, the Plaintiff opened two Kwacha Accounts being Accounts Nos. 62608402260

and 62596956907 and one United States of America Dollar Account being Account No. 62596957666. The Defendant admitted having advised the Plaintiff that it wanted to close the Plaintiff's accounts due to breach of Group Policy based on firm instructions from the Defendant's Head Office in South Africa, but that the said advice was given on 24th June, 2016 and not 19th July as averred by the Plaintiff. That, the Defendant informed the Plaintiff that it would close its accounts after it was reported by the Defendant's parent company in South Africa that the Plaintiff's parent company had been listed on multiple international sanctions lists. As a matter of group policy, the Defendant was obliged to exit the banking relationship with the Plaintiff.

The Defendant asserted that contrary to the Plaintiff's averments, the Plaintiff's accounts were not frozen during the period in issue as alleged by the Plaintiff, and the Defendant made no assurances regarding the freezing of the Plaintiff's accounts, or at all. That, the Plaintiff was only given notice of the decision reached by the Bank to terminate the banking relationship with the Plaintiff. A perusal of the Plaintiff's accounts entries would confirm that at no point were the Plaintiff's accounts restricted, blocked or frozen as the Plaintiff continued to transact normally on its accounts while the Defendant waited for the Plaintiff to furnish alternative bank details where the Plaintiff's money would be sent.

It was the Defendant's further averment that as it waited for the alternative bank account details to be availed by the Plaintiff, it received a resolution passed by the Plaintiff Company and instructions issued by the Plaintiff Company and its advocates instructing the Defendant to change the

signing mandate maintained on the Plaintiff's accounts. The Defendant proceeded to conduct its own diligent searches at PACRA and discovered that the instructions to change the signing mandate on the Plaintiff's accounts were in line with changes effected and reflected at PACRA regarding the directors and Company Secretary in the Plaintiff Company. The Defendant later informed the Plaintiff's agents that it had received instructions to change signing mandates on the Plaintiff's accounts and that it had confirmed the changes with PACRA. This action was carried out before the Defendant proceeded to effect the changes in the banking system and before complying with any instructions from the Plaintiff to withdraw or transfer monies held with the Defendant.

The Defendant further asserted that it acted on sufficient instructions issued by the Plaintiff to change the signing mandate on the Plaintiff's accounts. That, the Defendant acted diligently by independently confirming the changes sought to be made by the Plaintiff on the mandate held with the Defendant when it conducted an independent search at PACRA. On 21st July, 2016, after being satisfied that the instructions were validly issued, the Defendant then obtained the required 'Know Your Customer' (KYC) documentation from the appointed new signatories before finally effecting the changes to the signing mandate and thereafter allowing the signatories to transact on the Plaintiff's accounts. Further, that the Defendant made no assurances as regards the freezing of the Plaintiff's accounts but communicated its intention of freezing the Plaintiff's accounts. The Plaintiff was, however, allowed to continue operating the accounts normally whilst the Defendant awaited alternative account details to be provided.

The Defendant stated that it reversed the changes on the Plaintiff's signing mandate after being notified that the earlier changes were fraudulent and upon verifying with PACRA that the changes on the Plaintiff's mandate had been reversed at PACRA. Further, the Defendant maintained that the Plaintiff's account activity during the period in issue revealed that the Plaintiff's accounts were not frozen. That, it was not in a position to give the Plaintiff copies of the bank statements when the Plaintiff's agents requested for them as the persons requesting for the statements were not the persons mandated to act for the Plaintiff on the accounts at that material time. That, once the changes on the account mandate were reversed, the Defendant was able to avail copies of the bank statements to the mandated persons from the Plaintiff Company.

In its further defence, the Defendant admitted that some monies were withdrawn from the Plaintiff's accounts but states that the monies withdrawn and transferred from the Plaintiff's accounts on the 21st and 26th of July, 2016, were all withdrawn and transferred by an authorised person with the mandate at that point to transact on the Plaintiff's account. Further, that the monies transferred from the Plaintiff's accounts were all transmitted to the Plaintiff's accounts held at Finance Bank as instructed by the Plaintiff.

The Defendant denied that the Plaintiff suffered loss and avers that if the Plaintiff has suffered any loss or lost any money, which is denied, it is not as a result of any action or omission on the part of the Defendant. That, the Plaintiff can trace and recover its money from the known persons that withdrew the monies and effected the transfers.

The Defendant contended that at all times it acted diligently by conducting independent searches and confirming that the documents presented to it by the Plaintiff for change of signing mandate on the Plaintiff's account were genuine and corresponded with changes and records held at PACRA. That, the Defendant expressed an intention to freeze the Plaintiff's accounts but this was not actioned following the Plaintiff's representations to the Defendant and the Plaintiff continued to transact without any restrictions on its accounts. Further, that the Defendant conducted its independent verification of the changes at PACRA before changing the signing mandate on the Plaintiff's accounts. Additionally, that the Defendant took further steps beyond that required of a banker when it informed the Plaintiff's agents that it had received an instruction to change the signing mandate on the accounts and was proceeding with effecting the changes as it was legally obliged to act on properly issued instructions.

It was the Defendant's further averment that the instruction from the Plaintiff clearly appointed the said Taher Khalil as director in the Plaintiff Company and signatory on the Plaintiff's accounts and his KYC documents were all in place before he was allowed to be a signatory on the Plaintiff's accounts. That, the Plaintiff's accounts were never frozen by the Defendant and once the signing mandate had changed, the new signatories were at liberty to conduct the Plaintiff's business in any manner they desired provided the same was not illegal. That, the withdrawals made from and transfers effected on the Plaintiff's account were all done properly by mandated persons of the Plaintiff Company at the material time.

The Defendant asserted further, that it acted diligently at all times and with due care and skill on the Plaintiff's accounts and independently confirmed the instruction to change signatories on the Plaintiff's accounts. That, it professionally discharged its duty of care owed to the Plaintiff when it confirmed the instruction and informed the Plaintiff's agents that the Defendant had received an instruction to change the signing mandate on the Plaintiff's accounts. The Defendant denied any wrong doing or dishonesty as alleged as it acted on valid instructions at all times. That, hence, the Plaintiff's claims against the Defendant lack merit and are misconceived at law as the changes which triggered the alleged fraud took place at PACRA. That, the Defendant is at law obliged to obey all instructions properly issued by its customers. In this regard, the Defendant obeyed the instruction to alter the signing mandate and the instructions to withdraw and transfer monies from the Plaintiff's accounts after the signing mandate had been properly altered.

The Defendant averred that the monies withdrawn over the counter were withdrawn and transfers effected by mandated persons in the Plaintiff Company. Further, that the monies transferred were transferred by a mandated person to the Plaintiff's accounts held at Finance Bank, as such, the Plaintiff suffered no loss as a result of the Defendant's actions. That, therefore, the Plaintiff has no cause of action against the Defendant and is not entitled to the reliefs claimed or any at all.

In a Reply filed on 23rd March, 2018, the Plaintiff averred that it made efforts to ensure that the accounts held with the Defendant were not closed and to maintain its relationship with the Defendant. That it showed at

great length that it conducted a genuine and transparent business which was in good standing. The Plaintiff admitted the averments in paragraph 6 of the Defence. In the said paragraph the Defendant stated that the Plaintiff's accounts were not frozen during the period in issue as alleged by the Plaintiff, and the Defendant made no assurances regarding the freezing of the Plaintiff's accounts, or at all. That, the Plaintiff was only given notice of the decision reached by the Bank to terminate the banking relationship with the Plaintiff and, a perusal of the Plaintiff's accounts entries would confirm that at no point were the Plaintiff's accounts restricted, blocked or frozen as the Plaintiff continued to transact normally on its accounts while the Defendant waited for the Plaintiff to furnish alternative bank details where the Plaintiff's money would be sent. The Plaintiff averred that it had followed up meetings with the Defendant's agent who informed the Plaintiff that the money was safe and they would keep it safe following the exercise of closing the said accounts and as they waited on the Plaintiff to find alternative accounts to which the monies could be transferred.

The Plaintiff averred further, that the Defendant did not carry out a due diligence search and never obtained the Plaintiff's consent from the contact person, that is, the Managing Director, Mr. Shukri, for it to effect the changes in the banking system. Further, that the Defendant in its due diligence search should have noted many errors in the documents and followed the instructions of its client to only contact Mr. Shukri who would have objected to the said changes. That, the Plaintiff opened its accounts with the Defendant's Manda Hill Branch while the changes on the

signatories were effected at the Acacia Park Branch after the staff at Manda Hill Branch had refused to effect the changes.

The Plaintiff further asserted that it had warned the Defendant of the imposters who had approached it for the change of banking details. Nevertheless, the Defendant had proceeded to effect the said changes despite the warnings and instructions of the Plaintiff; therefore, the Defendant did not act diligently. The Plaintiff admitted that the accounts were not frozen but stated that the Defendant's agent, Mr. Ndaba, made the assurance on behalf of the Defendant that the money was safe and advised that the signing mandate be changed quickly. That, unfortunately, this was after the imposters had made some withdrawals on 21st July, 2018.

The Plaintiff averred that the Defendant's agent, Mr. Ndaba, was hesitant in giving the Plaintiff an interim bank statement after the changes were effected and initially refused to produce the bank statements and only did so after much persistence from the Plaintiff.

The Plaintiff admitted the contents of paragraph 13 of the Defence which allude to the fact that monies were withdrawn and transferred from the Plaintiff's account on 21st July, 2016 and 26th July, 2016 by an authorised person with the mandate at that point to transact on the Plaintiff's accounts and that the monies transferred from the Plaintiff's accounts were all transmitted to the Plaintiff's accounts held at Finance Bank as instructed by the Plaintiff, save to say that the Defendant had been earlier cautioned on the named imposters and had been firmly instructed not to allow the two to ever transact on behalf of the Plaintiff. That, nevertheless,

the Defendant proceeded to change the accounts and allowed the said transactions. Further, that the Defendant had been informed that the Plaintiff had stopped transacting through the Finance Bank accounts. That, the Plaintiff initially transferred 95% of its savings to the Defendant Bank due to the anticipated interference by the named imposters. Further, that contrary to the Defendant's averments in the Defence, the Plaintiff has suffered loss and parted away with money as a result of the actions and omissions of the Defendant, who if it had acted diligently and followed the warnings and instructions of the Plaintiff, the Plaintiff would not have parted with its colossal sums of money.

With regard to the particulars listed by the Defendant, the Plaintiff stated that the Defendant did not act diligently when dealing with the Plaintiff's account because if it did, it would have discovered that the signing mandate was not genuine and that there were errors on the documents that were submitted to it by the imposters. Further, that the Defendant did not act with due care and skill and this duty was never discharged because the Defendant had never confirmed the change of signatories with the persons it was instructed to confirm anything regarding the imposters and the plaintiff. That, had the Defendant followed the instructions not to allow the imposters access the accounts and contacted Mr. Shukri for any queries, it would not have proceeded with the change of signatories.

Further, that the Plaintiff was assured by the Defendant's agents, a Mr. Ndaba and a Mr. Shikaputo, on separate and several occasions, that the money was safe.

It was the Plaintiff's further averment that the Defendant having been warned of the named imposters and instructed never to allow any transactions by the two imposters, was in breach of its duties as it obeyed instructions of the imposters and it was well aware of this. That, the Know Your Client (KYC) procedure was not properly followed, thus blame should not be placed on PACRA for the Defendant's own breaches.

The Plaintiff asserted that the Defendant had an obligation to obey all instructions properly issued by its customers. That, it however, breached this obligation when it overlooked the clear instruction of the Plaintiff for it to never transact on the Plaintiff's accounts with the named imposters. Further, that the persons allowed to transact on the accounts by the Defendant were not mandated persons by the Plaintiff and if the money was never transferred or moved, the Plaintiff would not have parted company with its money. Additionally, that the Defendant was well aware of the circumstances under which the Plaintiff was not feeling secure of keeping its money with Finance Bank, nevertheless, it allowed a transfer of money to the same accounts held at Finance Bank which were not safe and therefore, the Plaintiff also lost that money as the same was transferred to the imposters' advocates. That, consequently, the Plaintiff has a proper cause of action against the Defendant and is entitled to all the reliefs sought.

The matter came up for trial on 10th September and 4th October, 2018. The Plaintiff called two witnesses in support of its case. The first witness, PW1 was Shukri Ahmed Eljaiedi, the Plaintiff's Managing Director. His Witness Statement dated 2nd May, 2018 was tendered and duly admitted

in evidence. Under cross-examination, PW1 admitted that there were other court proceedings against Clement Wonani and Taher Khalil. When referred to page 15 of the Plaintiff's Bundle of Documents containing extracts of minutes of 13th June, 2016 containing some resolutions, PW1 confirmed that the letterhead on that page belonged to the Plaintiff and that Taher Ammar Khalil and Clement Wonani are listed as directors of the Plaintiff. PW1 also confirmed that Taher Ammar Khalil appears on page 31 as director and secretary of the Plaintiff while Clement Wonani appears as director of the Plaintiff Company on page 32 of the Plaintiff's Bundle of Documents. PW1 identified a document on page 11 of the Plaintiff's Bundle of Documents as a matter between the Plaintiff and Clement Wonani which was commenced in the Industrial Relations Court and had nothing to do with the Defendant. PW1 admitted that the Plaintiff tried to obtain an injunction order against Clement Wonani and Taher Khalil to prevent the duo from entering the Plaintiff's premises and the said application was refused. He confirmed that the Defendant was not a party to the matter involving Taher Khalil and Clement Wonani. When asked why the Plaintiff did not sue Taher Khalil and Clement Wonani, PW1 said that he sued the Bank which had his money.

PW1 identified the document on page 26 of the Plaintiff's Bundle of Documents as a signature card showing Taher Ammar Khalil and Clement Wonani, as signatories for both the Kwacha and Dollar Accounts. PW1 identified the document on page 27 as a List of Signing Officers. He agreed that the document was an official document presented to the Bank and it was dated 21st July, 2016. Further, that as at that date the document was officially with the Bank for the Plaintiff Company and that as far as the

document was concerned, the two were the signing officers. PW1 identified the document on page 28 as the Individual KYC Related Party Form relating to Clement Wonani. He agreed that the Bank took effort to ensure that KYC documents for anyone coming to the Bank had been thoroughly checked before putting them on the system. PW1 agreed that according to the document, Mr. Clement Wonani was Director Finance for the Plaintiff. He also agreed that the Bank could act on instructions from either Clement Wonani or Taher Khalil.

PW1 was referred to page 11 of the Defendant's Bundle of Documents and admitted that the document on that page was a List of Signing Officers at the Defendant Bank, which list contained his name and Gabriel Bwalya dated 26th February, 2016. He agreed that as of that date the two of them had the mandate to transact on that account. He agreed that in July, Clement Wonani and Taher Khalil had the mandate to sign.

PW1 confirmed that the issues before Court relate to the transactions that occurred during the time that the mandate was changed from his name and Gabriel Chanda to Clement Wonani and Taher Khalil. When asked who changed the signing mandate from his name and Gabriel Bwalya's name to Clement Wonani and Taher Khalil, PW1 said it was Clement Wonani, Taher Khalil and the Defendant who confirmed and gave them money. However, PW1 state that it was the Plaintiff's lawyers who gave the Bank the names of the signing mandate. PW1 further stated that the procedure for changing the mandate is that the customer instructs the Bank to change the signatories.

In further cross-examination PW1 stated that he was aware that the Defendant is an international Bank and belongs to a group. He was also aware of the international sanctions list and that the Plaintiff at the time appeared on a number of sanctions lists. PW1 admitted that it was on the basis of the document on Sanctions Review that the Defendant gave the Plaintiff notice that it would be exiting the relationship with the Plaintiff because it was obliged in terms of international policies not to transact with the Plaintiff. He also admitted receiving the letter on closure of accounts.

It was PW1's further testimony that the money went out of the accounts at the time the alleged imposters were in control. He admitted that the documents filed at PACRA by the alleged imposters do not look different from the ones filed earlier by the Plaintiff. PW1 also testified that he was aware that the Defendant conducted a search at PACRA. When referred to the letter on page 44 of the Plaintiff's Bundle of Documents, referenced "Bravo FNB Team" dated 28th July, 2016, PW1 said that in the said letter, the Plaintiff was thanking the FNB (Defendant) team for the professional manner in which they had handled the issue of change of signatories and mandate.

In further cross-examination, PW1 agreed that despite being the agency that effected the changes, PACRA was not sued and that PACRA reversed the changes later. He agreed that Clement Wonani and Taher Khalil were signatories before the reversal was made but after the reversal, PW1 was reinstated to his position.

In further cross-examination, PW1 admitted that he was not appearing as a signatory to the Dollar Account between 21st and 27th July, 2016. He agreed that on 21st July, 2016 Mr. Clement Wonani withdrew the sum of USD 5000 from the Dollar Account and that on 26th July, 2016 there was a transfer of the sum of USD110,836.62 from the Dollar Account to the Plaintiff's Finance Bank account by Mr. Clement Wonani. He also agreed that the USD110,836.62 which had gone to the Finance Bank account was returned to the Plaintiff's Dollar Account at the Defendant Bank, but maintained that they were still suing for damages.

PW1 agreed that Mr. Clement Wonani withdrew the sum of K200,000.00 on 21st July, 2016 from the Kwacha Account. PW1 also confirmed that an amount of K2,568,992.19 was moved to the Plaintiff's account at Finance Bank. It was PW1's further testimony that he sued the Defendant for the money that was transferred to Finance Bank because the Defendant did so without the Plaintiff's authority. He admitted that the Defendant complied with the request to change the mandate based on the PACRA records; that the PACRA records and the records submitted at the Bank matched. He also agreed that the records that the Bank received showed that PW1 was removed as director from the company. He admitted that the Plaintiff was able to transact on the accounts at the Defendant Bank as they were not frozen.

In re-examination, PW1 reiterated that the Bank was negligent because it did not follow the procedure; that it did not serve the client and transferred money without notifying him. Further, that the Bank dealt with the wrong people as he was the right person who was physically in the office. When

referred to the Signature Card, List of Signing Officers and Individual KYC Related Party Forms for Clement Wonani and Taher Khalil, PW1 said that the Bank had no right to act on these documents.

It was PW1's further testimony that the documents on pages 7 – 10 of the Defendant's Bundle of Documents show the right directors with himself as Managing Director. That, he sued the Defendant and not PACRA because the problem was with the Bank which was keeping the Plaintiff's money. Further, that the transfer of the money from the Defendant to Finance Bank was not correct because there was no authority from himself who was the correct person.

PW1's evidence in further re-examination was that the Plaintiff had two Kwacha accounts and a Dollar Account with the Defendant Bank and that the Account at the bottom of page 26 of the Plaintiff's Bundle of Documents is a Kwacha Account even though it is indicated as Dollar Account. PW1 attributed this to a mistake on the Bank's part. He further testified that there was no signature change mandate for the Dollar Account. PW1 identified the Statement on page 49 of the Defendant's Bundle of Documents as belonging to the Dollar Account Number 62596957666 from which Mr. Clement Wonani withdrew. It was PW1's testimony that Clement Wonani did not have any power to transfer or withdraw money from the Dollar Account because he had no signing mandate for the Dollar Account.

The Plaintiff's second witness (PW2) was Gabriel Lesa Bwalya, the Assistant Finance Manager/Company Secretary in the Plaintiff Company. His Witness Statement dated 24th April, 2018 was tendered and duly

admitted in evidence. It was PW2's testimony in cross-examination that one of his duties in the Plaintiff Company was to keep the company records updated. PW1 identified a letter from PACRA inviting a named party (Messrs. J&M Advocates) to a meeting on the change of directors and secretary in the Plaintiff Company. It was his testimony that the issues that prompted PACRA to write the said letter were irregularities that had taken place at PACRA, namely, changes that had taken place in the directorship and secretary of the Plaintiff Company whereby the entire team of directors and the Secretary were removed.

PW2 also identified a letter PACRA wrote to advise its decision to reverse the changes that were effected on the Plaintiff Company's records and agreed that going by the records, between 19th July 2016 and 27th July, 2016, Mr. Clement Wonani and Mr. Taher Khalil the two men he was calling imposters, had the mandate act on behalf of the Company as director and secretary. He conceded that the instruction by the two men was valid as they were authorised officers of the company. He denied that the Defendant was empowered to change signatories because it was put on notice on 6th May, 2016 and therefore, it should have contacted the Plaintiff when the two men walked into the Bank. He, however, conceded that the two men had the requisite PACRA documents that were reflecting changes at PACRA when they walked into the Bank.

It was PW2's evidence in further cross-examination, that the Plaintiff only came to know about the changes at PACRA when he was called by a Mr. Geoffrey Ndaba on 22nd July, 2016. Further, that as far as the records at PACRA were concerned, Clement Wonani and Taher Khalil were the

officers with authority to deal on behalf of the Plaintiff and were the two people appearing as signatories at the Defendant Bank. When asked about the sanctions list, PW2 stated that it was never given to the Plaintiff; that they were told by the Head of Compliance at the Defendant Bank that the Bank received instructions from its Head Office in South Africa to sever ties with the Plaintiff because it had breached Bank policy and the Plaintiff's request to Mr. Shikaputo, the Head of Compliance to avail the Plaintiff with a copy of the sanctions list went unanswered.

In further cross-examination, PW2 testified that the Plaintiff's accounts at the Defendant Bank were never frozen and the Plaintiff was able to transact. PW2 said that the funds were transferred to the Plaintiff's account at Finance Bank. He confirmed that the money moved from the Plaintiff's account at the Defendant Bank to the Plaintiff's account at Finance Bank on 26th July, 2016, at which point in time the records had already been changed. He conceded that as far as PACRA and the Defendant Bank were concerned, this money was transferred by people authorised to transfer the money. PW2 confirmed that Clement Wonani who withdrew K200,000.00 had the mandate to do so going by the records at PACRA and the Defendant Bank. PW2 agreed that Mr. Clement Wonani had the authority to withdraw USD5,000 going by the records at PACRA and the Defendant Bank.

PW2 testified in further cross-examination that the USD110,836.62 which was intended to be transferred on 26th July, 2016 to the Plaintiff's account at Finance Bank was returned to the Plaintiff's account at the Defendant Bank. He conceded that once the PACRA records were reversed and the

Defendant put back the initial signing mandate on the Plaintiff's accounts, the Plaintiff had access to the money. When asked why then the Plaintiff sued the Defendant, PW2 said it was because the Defendant was in breach by not contacting the Plaintiff after being put on notice, to confirm with the Plaintiff since at that time the Bank was seeing two camps. When asked if in the face of official PACRA documents and official company documents notifying the Bank of the changes and the Bank confirming the changes at PACRA and receiving instructions from the Plaintiff to change, he still maintained that the Defendant should have contacted him in his capacity as Assistant Manager. PW2 insisted that the Bank should have contacted him as a core signatory together with the Managing Director as the principal signatory. When put to him whether in the face of the PACRA document showing that he had been removed, the Bank should have still contacted him, PW2 stated that indeed that was his position.

In further cross-examination as to why the Plaintiff did not sue Mr. Clement Wonani and Mr. Taher Khalil despite the fact that there were reversals following some illegalities allegedly perpetuated by the two men, PW2 said that the Plaintiff entrusted its finances with the Defendant and not the two men; therefore, it was the Bank that breached its duties. He disagreed with the suggestion that the two alleged imposters should have been part of these proceedings. He also confirmed that the only Dollar amount subject to the claim is USD5,000.

PW2 was referred to documents on pages 33 and 50 of the Plaintiff's Bundle of Documents and confirmed that both documents were on identical LAICO-Zambia (the Plaintiff) letterheads, showing that the letters

were issued by the people with the mandate at the material time. He agreed that at page 33 is a document on the official letterhead of LAICO and signed by Taher Khalil and Clement Wonani and at page 50 is the same letterhead signed by Mr. Shukri Eljaiedi. He further confirmed that the addresses on the two documents are identical, confirming that at the time both letters were being issued, they were issued under the mandate of the people with the mandate at the time. PW2 was then referred to the document on page 10 of the Plaintiff's Bundle of Documents. He conceded that the letter at page 10 saying that the two gentlemen were imposters, was not from PACRA. He agreed that at any one time the Bank acts on official documents and not mere notices. PW2 agreed that during this period right up to the time of the transactions in issue, the Bank through the relationship team were constantly meeting with the Plaintiff to try and resolve the issues and that through these meetings, the mandate changed two months after the two alleged imposters took over as directors and signatories in the Plaintiff Company.

In further cross-examination, PW2 agreed that in terms of legal set up, PACRA and the Defendant are separate institutions that operate independently of each other. PW2 admitted that the sanctions list is not part of the Plaintiff's claim before court. He agreed that the Plaintiff was given the chance to respond to the sanctions issue and asked the Bank to reconsider its decision to close the accounts. He further agreed that the matter commenced by the Plaintiff in the Industrial Relations Court against Mr. Wonani had nothing to do with the Defendant and the Defendant was not part of that matter.

PW2 identified the letter at page 44 of the Plaintiff's Bundle of Documents as a letter signed by Mr. Shukri commending the Bank for the professional manner in which it had handled the issue of change of mandate and signatories. He said that the said letter was written on 28th July, 2016, which was a few days after the transactions were carried out by Clement Wonani and Taher Khalil. He agreed that the Plaintiff was not complaining about both transactions in this letter. PW2 was then referred to pages 7 – 10 of the Plaintiff's Bundle of Documents and agreed that the documents on these pages were executed in March, 2016, but when put to him that the said documents had no bearing on the case in Court because the documents were for a period before July, 2016, that is, before Clement Wonani and Taher Khalil came on board, PW2 said that this is a rider to what happened in July, 2016.

In re-examination, PW2 stated in reference to pages 7 – 10 of the Plaintiff's Bundle of Documents, that before changes were effected at PACRA, representations were made to the effect that there was a board that was appointed and the previous board was removed. That, an individual called Nabil Sobhi Ibrahim El Mubaret refused to be part of the board for Taher Khalil. That, the documents on pages 7 -10 were a rider of events before they reached the PACRA point. PW2 explained with respect to the document at page 44 of the Plaintiff's Bundle of Documents, that prior to issuing of the letter, in their continuous interactions with Mr. Ndaba and Mr. Shikaputo, they confirmed that the money in the Bank was safe. That with that assurance, the Plaintiff in the letter at page 44, was saluting the Bank for safeguarding the Plaintiff's money, but upon regaining control of the company, armed with a PACRA printout, which reinstated Mr. Shukri,

PW2 and others, they went bank to the Bank to ask them to give them back the signing mandate. That, Mr. Ndaba asked for time to verify with PACRA and came back with the affirmation that the changes were in order and promised that he would change the signing mandate.

When asked why the Plaintiff never mentioned in the letter at page 44 that some money was moved out of the account, PW2 said that they did not have a bank statement at the time and the only time they came to know about the irregularities was when they got the bank statement at the end of the month. He identified the document at page 10 of the Plaintiff's Bundle of Documents as a letter dated 6th May, 2016 from the Plaintiff to the Defendant which served as a warning to the Bank that some people would attempt to represent themselves as officers of the Plaintiff Company. Further, that the Plaintiff even put the names of the people in the letter and highlighted the restraining order that the Plaintiff obtained in January, 2014, restraining Clement Wonani from interfering with the affairs of the Plaintiff Company. He contended that the Bank came into contact with Clement Wonani and had a copy of the restraining order which in essence bars Clement Wonani from interfering with the affairs of the Plaintiff and the correspondence from the Plaintiff of 6th May, 2014.

When asked why he kept saying that the Bank should have contacted him or the Managing Director, PW2's response was that when signatories are being changed, the incumbent signatories should introduce the incoming signatories and hand over the operations of the account to the new signatories, but this was not done in this case. With regard to the letter on closure of accounts, PW2 said that the letter was in response to the

letter written by the Bank informing them that it had received instructions from its Head Office that it should sever ties with the Plaintiff because the Plaintiff had breached internal policy. That, when the Plaintiff issued the letter of notice to the Bank on 6th May, 2016, it expected the Bank to contact it when the two people walked into the Bank. PW2 said that the mandates were fraudulently changed because they did not come through him as the incumbent Company Secretary.

When asked to clarify why the Plaintiff had sued the Defendant for USD110,000 in light of the redirection of the amount, PW2 said that the operation of the Dollar Account was left unchanged. That, the change in signing mandate only affected the two Kwacha Accounts but the Bank went ahead and allowed the named imposters to operate the Dollar Account, which meant that proper Know Your Customer (KYC) was not effected by the Bank. When asked to explain why the Plaintiff sued the Defendant for the sums reflected on the Writ of Summons, PW2 said that the reason was that the Defendant owed the Plaintiff a duty of care and the Defendant breached the trust that the Plaintiff had placed in it by dealing with people whom the Plaintiff had put notice on and repeatedly assured the Plaintiff that its money was safe when the money was not safe at all.

This marked the end of re-examination and the close of the Plaintiff's case.

The Defendant had one witness, Kennedy Shikaputo (DW1). His Witness Statement dated 8th May, 2018 was tendered and duly admitted in evidence.

In cross-examination, DW1 testified that there were changes in signatories and that the Defendant Bank has a Know Your Customer (KYC) policy. It was his testimony that he knew the previous signatories as Mr. Bwalya and Mr. Shukri and that he interacted with the two from the time the accounts were opened in March, 2016 at Manda Hill Branch. That, initially they opened three accounts, one United States of America Dollar Account and two Zambian Kwacha accounts. DW1 agreed that physical documents are tendered when an account is being opened and the documents are loaded on the Bank's central storage system. He further testified that the mandate file which bears signatories, can be accessed from any branch. Once the account has been processed, the information sits in the Bank's system, on a central depository so that if a customer wants to transact from any branch, they are able to do so without any inconvenience. It was DW1's further evidence that a customer has a relationship manager who deals with the client in as far as certain physical changes are made. He also stated that through its Know Your Customer (KYC) process the Bank can ask for an identity for the customer, but the Bank also takes its own photographs and those are the ones which the Bank relies on when a customer walks into the Bank.

DW1 testified that if there is a change of signatories, those that come to provide information for change provide a board resolution to confirm that they are changing signatories. They also provide identity documents of the new signatories; proof of residential address and for foreign nationals, a visa or permit as an additional requirement. That in the case before court, all the documents were provided even though they were not produced in court. He further stated that the Bank interacted with the

people who came to change the signatories. That, they provided documents which had signatures to show that there was a change in signatories. When asked if the Bank compared the signatures with the ones for the previous signatories, DW1 said that there was no basis for comparison because these were new signatories and their records were not held by the Bank. That, they filled in a form and signed it and the signatures were consistent with the ones in the mandate documents. DW1 identified the signature on page 16 of the Defendant's Bundle of Documents as belonging to Mr. Taher Khalil. He also identified the document on page 26 of the Plaintiff's Bundle of Documents as a Signature Card which was part of the mandate. He admitted that the signature of Mr. Khalil on the Signature card was different from his signature on page 16 of the Defendant's Bundle of Documents. When asked to show the Court the resolution on which the Bank based the change, DW1 said that he could not find it in the Defendant's Bundle of Documents.

DW1 identified the document on page 15 of the Plaintiff's Bundle of Documents as an Extract of Minutes containing Special Resolutions. When referred to page 16 of the same Bundle, he agreed that the signature under Proxy Holder and Company Secretary's signature were similar to the signature on page 16 of the Defendant's Bundle of Documents. DW1 testified that the resolution on page 15 of the Plaintiff's Bundle of Documents was presented to the Bank and it is with the Bank but was not included in the documents before Court. With regard to the document on page 17 of the Plaintiff's Bundle of Documents, DW1 identified it as a document dated 13th June, 2016 appointing Mr. Taher Khalil as Proxy Holder. He also said that the date on the Extract of Minutes at page 15 of

the Plaintiff's Bundle of Documents is also 13th June, 2016. DW1 agreed that Mr. Taher Khalil signed differently on the Signature Card at page 26 of the Plaintiff's Bundle of Documents and on the letter at page 17 of the Defendant's Bundle of Documents. He also admitted that Mr. Khalil's signature at page 16 where there is exhibited a letter written by Mr. Khalil in his capacity as General Manager was different from the other signatures. He agreed with the suggestion by Counsel that Mr. Khalil was very inconsistent with how he was signing documents. DW1 also agreed that Mr. Khalil wrote the letter for change of signatories before the resolution to appoint him as director.

In further cross-examination, DW1 said that he knew Mr. Khalil and Mr. Wonani well enough according to the Bank's KYC requirements. He agreed that the Bank's KYC requirements also extended to signatures. DW1 identified the letter dated 6th May, 2016, referenced "LAICO Imposters – Taher Khalil & Clement Wonani" and agreed that the said letter was received by the Bank. That, his understanding of the same was that the Bank was being put on alert not to transact with the two individuals.

DW1 identified the letter addressed to him and signed by Mr. Shukri regarding closure of accounts and the letter he wrote to Mr. Shukri dated 19th July, 2016 in response. It was his evidence that the Plaintiff did not provide alternative accounts and the accounts were not frozen. Further, that Mr. Khalil did not provide a signature card for the Dollar Account and that by this date, 21st July, 2016, the Bank had already declined the extension of the operations of the accounts.

DW1 testified that Clement Wonani withdrew USD5,000.00 cash from the Dollar account on the same date when they changed signatories and this is the account where there were no sample signatures. He further, admitted that while this was happening, the Bank had already been alerted by the Plaintiff as far back as May, not to transact with these people. DW1 also identified a transfer of USD110,836.62 to the Plaintiff's account at Finance Bank. He said that the account at Finance Bank was not provided by Mr. Shukri, for the Bank to transfer the money. It was his evidence that at the time the Defendant was transferring the USD110,836.62 to Finance Bank, they had the letters from the Plaintiff providing the alternative accounts but not necessarily signed by Mr. Shukri. DW1 could not show the Court the said letters as they had not been included in the Defendant's Bundle of Documents.

DW1 stated that the cash withdrawal of K200,000.00 by Mr. Clement Wonani was not consistent with his letter requiring Libyan African Investment Company (LAICO) to provide an alternative account in which all the monies would go. He admitted that his instruction was that LAICO must provide accounts in which all the monies would go because the relationship was coming to an end. He also testified that the transaction on 27th July, 2016 was a transfer to another bank of the entire account balance because after the transfer, the account balance was nil but admitted that there were other transactions on the account after that date even though the accounts were supposed to be closed. He explained that state of affairs as due to the fact that when signatories changed, Mr. Shukri requested that the Bank opens these accounts and that is how the transactions took place.

DW1 denied that the Bank contravened the Sanctions Review Report of June and said that the Bank was giving out the last funds on the accounts in order to close those accounts. It was DW1's testimony that the cash withdrawals went to the signatories. He said that it was not the wish of the Bank but of the customer to do cash withdrawals. Further, that Mr. Khalil provided a Zambian residential address and Mr. Khalil's permit showed that he was an employee of LAICO. However, he could not produce a copy of the work permit as it had not been included in the Defendant's Bundle of Documents.

In continued cross-examination, DW1 testified that the Bank carried out a proper KYC for the changes in signatories. He said that the resolutions that were given by Mr. Wonani and Mr. Khalil to the Bank stating that they were the new Managing Director and Secretary were proper documents provided to the Bank. That, the documents used to make the decision came from the LAICO management. It was his evidence that the said documents were not before Court. When referred to the letters exhibited on pages 16 and 17 of the Defendant's Bundle of Documents, regarding change of signatories and cancellation of cheque books, DW1 said that both letters were signed by Mr. Khalil and were received by the Bank. DW1 testified that the letter on imposters was signed by Mr. Shukri. He confirmed that all these letters were received by the Bank during the same period. It was DW1's further evidence that the Bank did not tell Mr. Shukri that it had received some letter earlier from imposters. When put to him that the Bank did not care about what was happening on these accounts, DW1 said that it did care because it notified management of LAICO about the imposters on 21st July, 2016.

It was DW1's further testimony that the Bank did due diligence by even going to PACRA and paying for a printout. However, the Bank did not ask for a printout of Form 5 because, according to DW1, from their KYC understanding, the PACRA printout suffices for the KYC requirement. He said the Defendant did not ask to see who signed Form 5 to effect the changes. When asked what happened to Mr. Khalil and Mr. Wonani after all the fiasco, DW1 said that PACRA removed them as directors and reversed the changes. He admitted that the Defendant was told that the two had fraudulently changed the details at PACRA, hence the reversal. He admitted that the news of the removal of Mr. Khalil and Mr. Wonani from directorship did not come as a surprise to them because they were warned. He admitted that the Bank went against the warning.

In further cross-examination, DW1 admitted that the documents referred to as attachments in the letter of 3rd May, 2016 exhibited at page 16 of the Defendant's Bundle of Documents were received by the Bank but the Bank did not attempt to show the Court these documents. DW1 agreed that based on the letter of 3rd May, 2016, there was already a Board resolution appointing Mr. Khalil as the new General manager. He denied that the Bank was dealing with two camps at this time over the Plaintiff's accounts. DW1 identified the letter exhibited on page 20 of the Defendant's Bundle of Documents as a letter from the law firm J & M Advocates to the Bank communicating to the Bank that they wanted to start operating the accounts of LAICO. DW1 testified that the Bank responded to the said letter by refusing to allow them to operate the accounts because they did not provide the necessary KYC requirements.

DW1 identified the Proxy dated 13th June, 2016 appointing Mr. Khalil as proxy to vote on behalf the Libyan African Investment Company at a meeting of LAICO Zambia to restructure the current Board of Directors for LAICO. He confirmed that this is the same Khalil described as an imposter. He said he wouldn't know if Mr. Khalil voted for himself at the meeting. When asked whom he informed at LAICO that there were changes on the signatories, DW1 said that they informed Mr. Bwalya and Mr. Mukoloba. He confirmed that they only informed Mr. Bwalya on 22nd July, 2016 and the cash withdrawal was on 21st July, 2016. According to DW1, the Bank went out of its way to notify the past signatories about the new development. Further, that as a Bank it did the right thing and that is, to let the mandate operate. He added that the conflict between the parties happened outside the Bank and so the Bank could not come into resolving issues for the two parties. He admitted that the Bank allowed the transfers of the money for the purpose of closing the accounts. DW1 agreed that they knew the names of Khalil and Wonani as imposters from 6th May, 2016.

That marked the end of cross-examination of the witness. In re-examination, DW1 explained that KYC is short for "Know Your Customer", which is a process in which the Bank gets to know its customers through the customers providing various documents such as certificate of incorporation; board resolution; PACRA printout; proof of operating address, etc. For signatories, the Bank requests for NRC/Passports or Driver's Licence and proof of residential address. He explained that a photograph is not a KYC requirement.

In further re-examination, DW1 explained that for purposes of changing a signing mandate, the Bank requests for a board resolution; identity documents; approval of residential address and a copy of a photograph, as an operational requirement to help with identification of the signatories to the account. That Form 5, which shows the company secretary and his signature, is not a requirement when you are changing a mandate. When asked to explain the effect of some documents not being in the Bundle of Documents, DW1 stated that there was no effect because the said documents have been included in the Plaintiff's Bundle of Documents which are before Court and can be relied on.

It was DW1's further evidence that Mr. Shukri and Mr. Bwalya were signatories to the Plaintiff's accounts from 7th March, 2016 to 21st July, 2016 when changes were made; then also from 26th July, 2016 when the reversals were effected; that in-between the signatories were Mr. Clement Wonani and Mr. Taher Khalil. That, an account at FNB can be opened at any branch but there is a central depository of customer signatures, identity numbers and a copy of the identity card itself, so that they can be attended to at any branch of FNB. That, when it comes to amending signatories on a business account, the Relationship Manager is the most important person because he or she positively identifies the signatories. With regard to the signatures of Mr. Khalil on pages 16 and 17 of the Defendant's Bundle of Documents, DW1 said that they are not handwriting experts so they would not really know who has signed, all they do is compare if there are similarities. It was his evidence that they understand that signatures change depending on the circumstances under which that signature is made.

With regard to the proxy document, DW1 said that it was an internal document for LAICO which was never presented to the Bank and is not one of the requirements either at account opening or for amendment of signatories to the account. Further, whether a proxy can vote or not is not of interest to the Bank. DW1 explained that for a foreign national, the Bank requests for additional documentation which is either a Visa or Permit, but this is dependent on whether the signatory resides in this country; that the permit which Mr. Khalil presented to the Bank met the Bank's due diligence to effect the changes between 21st July, 2016 and 26th July, 2016. With respect to the letter dated 6th May, 2016 about imposters, DW1 testified that it had no significance because the two individuals being cited as imposters were not ordinary individuals but former senior employees of LAICO Zambia Limited and the matter which was being referred to in connection with Mr. Wonani was an industrial relations matter which had nothing to do with the Bank.

DW1 testified that ever since the letter of 6th May, 2016, was received and following the sanctions letter which the Bank wrote to LAICO, there were a lot of engagements between LAICO and the Bank in form of meetings and to that effect, no changes to the accounts were made. The original signatories, Mr. Bwalya and Mr. Shukri, continued operating the accounts until the 21st July, 2016 when signatories were mended based on the new information which was provided by LAICO. He reiterated that the two signatories to the accounts from opening were Mr. Bwalya and Mr. Shukri until 21st July, 2016 when the Bank received fresh instructions to amend the signatories, which information was reconfirmed with PACRA, the only body which is allowed to register companies in Zambia.

When asked to clarify on what authority the Bank proceeded to open the accounts, DW1 said that there was a Board resolution passed to open accounts with FNB. He further stated that the Bank relied on LAICO instructions to change signatories which was counter-checked with PACRA where they found that the records which the two individuals had provided matched with the records at PACRA which showed new directors and a new Company Secretary who happened to be Mr. Khalil and Mr. Wonani, from 21st July, 2016. He said that they were also served with Board resolutions and a copy of signature specimen.

In further re-examination, DW1 stated that the authority to change signatories was not based on the letter of 3rd May, 2016, because it did not meet the requirements of the Bank. Cardinal to this was the PACRA printout on changes at director level which was missing. On the issue of sanctions, DW1 said that the sanctions review was not based on LAICO-Zambia but on the group to which LAICO-Zambia belongs by the name of Libyan African Investment Company. With regard to provision of alternative accounts by the Plaintiff, DW1 said that the alternative was not provided by Mr. Shukri because he did not have the mandate but the Bank did receive alternative account numbers from the Plaintiff to transfer funds to another LAICO account held at Finance Bank Zambia. That, the instruction came from the people that had the mandate to operate the accounts at that time.

With regard to the letter from the Plaintiff exhibited on page 25 of the Defendant's Bundle of Documents, DW1 said that by that date (12th July, 2017), the Bank had no relationship with the Plaintiff. That, the Bank had

exited and paid the Plaintiff the funds which were signed for by the authorised signatories. On why he had said the accounts were not frozen, DW1 said that the reason was because from the date of the notice, statements will show that LAICO officials operated the accounts. Further, that LAICO was represented at the Bank initially by Mr. Shukri and Mr. Bwalya, whose mandate ceased on 21st July, 2016. That, the Bank did countercheck with PACRA about the changes and obtained the necessary KYC documentation which met the Bank's requirements for that period, 21st July, 2016 to 26th July, 2016. With regard to the number of accounts which LAICO had with the Bank, DW1 said that it had three accounts. It was his evidence that when he scrutinised the accounts, he noticed that LAICO had included only two, the first one which is a Kwacha Account No. 62596956907 and an account number which the Bank did not quote in any of its correspondence to LAICO, namely, 62608402260. That the Dollar Account which the Bank wrote to LAICO over was 62596957666 and that was the only Dollar Account which LAICO maintained with the Defendant.

In further re-examination, DW1 said that the cash withdrawal of USD5,000.00 by Mr. Wonani was allowed on the same day as the transfer of the total balance to the Plaintiff's Finance Bank account. That, this was done in the interest of the customer and the instruction to make this withdrawal and transfer were given by the people who had the mandate to operate the accounts then, that is, Mr. Wonani and Mr. Khalil.

When asked to clarify as to why the Bank allowed the transactions to go through despite the alert that it received in May about imposters, DW1

said that as at 21st July, 2016, the people with the right mandate to operate the accounts were Mr. Wonani and Mr. Khalil based on the fresh mandate the Bank received from the Plaintiff, counterchecked with PACRA. On being asked to explain why the Bank transferred the money to an account provided by persons other than Mr. Shukri, DW1 said that to start with, the instruction came from LAICO, which was their customer, on LAICO headed paper; secondly, the alternative account numbers were provided by people who had the mandate to operate the accounts during that period.

DW1 testified that based on the Statement exhibited at page 45 of the Plaintiff's Bundle of Documents, K2,568,992.19 was transferred and the account was closed. However, when PACRA reversed the changes in directors, Mr. Shukri and Mr. Bwalya approached the Bank to receive the money which was in the Dollar Account. On the issue of the K200,000.00 cash withdrawn by Mr. Wonani, DW1 said that the money was withdrawn by one of the people who had authority to operate the account then and the transaction was done on the same date as the transfer of the final transaction of K2,568, 992.19 to close the account.

With regard to the issue of not physically checking the original Form 5 at PACRA, DW1 said that for the purpose of changing signatories, Form 5 is not a requirement. When asked to explain why PACRA made the reversal, DW1 said that PACRA realised that the changes which were effected with them were not in order, that in short, PACRA had allowed the wrong people to make changes. It was his evidence that before the reversal, the mandate was held by Mr. Clement Wonani and Mr. Taher Khalil for the period 21st

July, 2016 to 26th July, 2016 and that was the period when the transactions to close the accounts were done. When asked about the effects of the refusal by the Bank to the letter from J & M Advocates requesting to operate the accounts on behalf of their clients, DW1 said that the Bank having refused to adhere to J & M Advocates' request, implied that the funds of LAICO were safeguarded and the original signatories who happened to be Mr. Bwalya and Mr. Shukri, confirmed operating the account until 21st July, 2016, when the fresh mandate was provided to the Bank.

On being asked if the Bank was dealing with two camps, DW1 said that it was not dealing with two camps because the accounts LAICO held with the Bank were being operated by Mr. Shukri and Mr. Bwalya for the time when they had the mandate to operate the accounts. Transactions on these accounts were done with the full blessings of the two signatories until they were dropped as signatories on 21st July, 2016. Therefore, the issue of entertaining two different camps did not arise. With regard to the relevance of the proxy document, DW1 said that it has no relevance to the matter at hand because the document is a LAICO internal document which the Bank had no access to and was not even a KYC requirement.

With regard to who from LAICO the Bank informed about the changes, DW1 said LAICO introduced Mr. Mwansa Mukoloba as their Legal Counsel and Mr. Gabriel Bwalya as their Assistant Finance Manager and these two were the ones the Bank informed about the changes. Further, that whenever signatories are amended, it is not up to the Bank to determine when the new signatories can decide to start transacting. It was DW1's

further evidence that when signatories are changed, the past signatories have no right to the information on the account. Therefore, the Bank only informed Mr. Bwalya and Mr. Mukoloba after it noticed some irregular activities on the account. Elaborating on the issue of freezing of the accounts, DW1 said that Mr. Shukri and Mr. Bwalya had asked the Bank to allow transactions on the account as the Bank awaited alternative bank details. Therefore, the Bank could not freeze the account. That the status of the account was that it still had positive balances.

In further re-examination, DW1 said that the Bank does not meddle in the affairs of its customers. That, in this case the Bank prudently acted based on instructions from people that had the mandate and that information was counterchecked with PACRA. He reiterated that the Bank's client was LAICO-Zambia Limited.

In continued re-examination, DW1 said that USD5,000 was withdrawn and USD110,836.62 was sent to the Plaintiff's alternative bank account at Finance Bank. That, the transfer was done from one LAICO account to another LAICO account. With regard to the K200,000 cash withdrawal, DW1 said that the money was withdrawn by Mr. Wonani who had the mandate to operate the account then and the K2.5 million was transferred to the LAICO account held at Finance Bank, based on instructions from individuals that had the right to operate the account then.

This marked the end of re-examination and the close of the Defendant's case.

Both parties filed written submissions.

I have examined the pleadings herein; the Bundles of Documents; the evidence before this Court and the parties' submissions. I am indebted to Counsel on both sides for the well-articulated arguments.

In its written submissions filed on 23rd October, 2018, the Plaintiff submitted that the relationship between the banker and a customer is contractual in nature. That, the relationship created between the banker and the customer imposes certain rights and duties on both parties giving birth to an agency from which the duty of care arises; that is to say, in addition to obeying the instructions of the customer, the bank ought to also use reasonable care and skill in carrying them out with a view to protecting the customer and his money. The Plaintiff cited the case of *Barclays Bank Plc. Quincecare Limited and Another*¹, where the court reportedly stated 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 customers' in the banker's hands, the relationship is that of principal and agent... In my judgment it is an implied term of the contract between the bank and its customer that the bank will observe reasonable skill and care in and about executing the customer's orders... a banker may in a case such as the present be sued in tort as well as contract. But the duties in tort and contract are coextensive, and in the context of the present case nothing turns on the question whether the case is approached in contract or not."

It is the Plaintiff's contention that the relationship that existed between the Plaintiff and Defendant was one of principal and agent, out of which rights and duties by both parties were to be fulfilled one towards the other. That, the Defendant was in breach of the duty of care and skill when it negligently allowed the change of the signing mandate of the Plaintiff's two Kwacha Accounts at the instructions of two imposters who the Plaintiff

had placed the Bank on enquiry through the letter of 6th May, 2016. Further, that as held by Kondolo SC, J., (as he then was) in the case of *Alfred Mkonda v. Barclays Bank Zambia Plc*², the Defendant was put on enquiry of possible interference by the imposters as far back as 6th May, 2016. That the Defendant was under a duty of care and skill to ensure that there was no form of interference with the Plaintiff's accounts from the imposters and by not doing so, the Defendant was in breach of this duty which resulted in a breach of its contractual obligations and the liability for negligence.

In support of its submission that the test of negligence is whether the transaction coupled with circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused it to make an enquiry, the Plaintiff cited the Supreme Court cases of *Inutu Etambuyu Suba v. Indo Zambia Bank Limited*³ and *Indo-Zambia Bank Limited v. Lusaka Chemist Limited*⁴. It is the Plaintiff's contention that among the circumstances antecedent include the fact that the Defendant had received correspondence from Mr. Taher Khalil and Clement Wonani and their lawyers requesting for the change of signatories and around the same time, PW1, through the letter of 6th May, 2016 had written to the Defendant instructing the Bank not to allow the two men to transact on the accounts as they were likely to interfere with the Plaintiff's accounts. That, the said circumstances should have raised doubts about the two named persons. Further, that the Plaintiff had endeavoured to give the full names of the two men and had pleaded with the Bank not to transact with them. The Plaintiff contends that the circumstances antecedent were so alarming and clearly

out of the ordinary that they should have raised some doubts in the Defendant and the Bank should have made an enquiry. That, the circumstances present which should have alerted the Defendant and raised doubt are the irregular documents such as the false Board Resolutions appointing the imposters as directors in the Plaintiff Company; the similarities in signatures of the Chairperson and the Proxy Holder to Taher Khalil's signatures on the letter he wrote and the signature cards, etc.

With regard to the Defendant's claim that it had valid legal documents before it and therefore, it was under an obligation to make changes, the Plaintiff submitted that the Defendant had an earlier obligation to the Plaintiff to make enquiries with PW1, the Plaintiff's Managing Director, before making any changes, especially that the changes were being effected by individuals it had been specifically warned not to transact with. Further, that DW1 only informed the Plaintiff's Company Secretary and Financial Assistant, PW2 about the dealings of the two imposters after the damage had already been done and the Defendant had started noticing the syphoning of the Plaintiff's monies by the imposters. That, the Defendant should have informed the contact person of the Plaintiff who is the Managing Director and awaited a response on its next move from the Plaintiff in order to make a complete enquiry. The Plaintiff contended that the Defendant having known all the above facts and having been put on enquiry by the Plaintiff, it was unreasonable for it to proceed with the change of signatories by the instruction of the same identified imposters. Further, that the Defendant and its agents were negligent and it is this

negligence which was the proximate cause of the loss of money occasioned by the imposters' change of signatories.

The Plaintiff submitted further, that the Defendant breached the Plaintiff's trust by not taking reasonable care and skill in the conduct of the Plaintiff's accounts. That, the duty of trust is cardinal in the relationship between the Bank and the customer and breach of such duty is a breach of its obligations which may result in the Bank being liable for the consequences. In support of its contention that trust is the basis of a bank's dealings with its customers, the Plaintiff cited the English case of *Barclays Bank Plc v. Quincecare*¹. That, from the moment the Plaintiff put the Defendant on enquiry, trust became the basis of the Defendant's dealings with the Plaintiff who had put trust in the Defendant that its monies were secure from the two imposters while in the Defendant's possession. Unfortunately, the Defendant breached this trust when it effected the changes on the signing mandate on the instruction of the two imposters. It was the Plaintiff's further submission that according to the Bankers Association of Zambia Code of Banking Practice in Zambia, a Bank can only make changes to the mandate on a customer's account at the instruction of the client. The Plaintiff cited Mark Hapgood (ed) Page's Law of Banking, 11th Edition for the proposition that a bank which acts in accordance with its mandate is duly authorised to debit its customer's account. The Plaintiff submitted that the Defendant had no mandate to cause changes to the signing mandate of the Dollar Account and allow the imposters to withdraw money and transfer money when they were not even signatories to the said account. That though having a fiduciary duty towards the Plaintiff, the Defendant did not consider to protect the rights

and interests of the Plaintiff, thereby resulting in the Plaintiff parting away with its monies on the Defendant's watch and it is only just that the Defendant be found liable for the losses incurred by the Plaintiff.

The Plaintiff submitted further, that the Defendant should be found liable for damages for negligence and breach of fiduciary duty and duty of care. In conclusion, the Plaintiff submitted that they have proven their case on a balance of probabilities. That, having breached its duties, the Defendant should be found liable for that and the Plaintiff be granted the reliefs sought.

In its submissions filed on 23rd November, 2018, the Defendant submitted that the Bank received instructions from the Plaintiff to change its signing mandate and only after the mandate was changed did the Bank allow the new signatories to transact on the Plaintiff's accounts. That, the Bank acted reasonably and with authority when it changed the mandates, and as such, was authorised to debit the Plaintiff's accounts on instructions validly issued by the new signatories at the material time. That, the request to change the signing mandate and supporting documents were independently verified by conducting searches at PACRA, which searches revealed that the persons indicated in the mandate as being the authorised persons on the accounts were in fact also appointed as officials of the Plaintiff Company. That, the Bank, therefore, dealt with the Plaintiff's appointed officials and duly authorised persons on the accounts.

The Defendant submitted that it acted in good faith and without negligence when it allowed transactions to be performed by the new authorised agents on the Plaintiff's accounts. That, the Defendant cannot be said to have

acted in a negligent manner as it took steps over and above the ordinary steps required in order to satisfy itself as to the validity of the instructions received to change the signing mandate on the Plaintiff's accounts. Further, that at no time was there any unusual transactions performed on the Plaintiff's account that would have caused doubts in the Defendant's mind. That the Defendant made diligent and separate verifications of the changes effected in the Plaintiff's signing personnel, thereby eliminating doubt as it proceeded to deal with the appointed persons. Only after the verification was done did the Defendant change the signing mandates on the Plaintiff's accounts and allowed the new signatories to transact. Further, that the changes were preceded by obtaining the requisite KYC documentation from the new signatories as required by the Bankers Association of Zambia Code of Banking Practice in Zambia.

The Defendant submitted that the Plaintiff Company as an incorporated entity acts through its appointed agents at any given moment. That, in this case, the Plaintiff's appointed agents are the persons appearing in the Plaintiff's PACRA records and those duly listed in the mandate advised to the Bank. The Defendant argued that a company is bound by the acts of its human agents, because even if it is a separate legal entity, a company has no physical existence to enable it carry out tasks and for this argument, cited the case of *B.P. Zambia Plc v. Interland Motors Limited*⁵, as authority for the submission. That, the Plaintiff was bound by the actions of the persons appointed as its agents and appearing at PACRA and on the advised mandate to the Bank. That, the Defendant dealt with the duly appointed and authorised agents of the Plaintiff at all material times and

as such cannot be held liable for any loss; that the changes that happened at PACRA, fraudulent or not, are issues out of the Defendant's control.

It was the Defendant's contention that the alleged fraud was initiated away from the Defendant Bank and not on the Plaintiff's accounts held with the Defendant Bank and the Defendant's employees and/or agents were not in any way involved in the alleged fraud. That, the Defendant cannot, therefore, be held responsible for the consequences flowing directly or indirectly from the alleged fraud. Further, that the Defendant did not act negligently and did not breach any duty of care owed to the Plaintiff.

The Defendant further submits that Peter Watts, the learned author of Bowstead and Reynolds on Agency, 19th Edition, in paragraph 8 – 13, had occasion to pronounce himself on the law of agency to the effect that:

“where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to any one dealing with him as an agent on the faith of any such representation to the extent as if such other person had the authority that he was represented to have, even though he had no such authority.

An act of an agent, within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.”

The Defendant contended that it was presented with instructions to change the signing mandate on the Plaintiff's account, which instructions were supported by corresponding changes effected at PACRA regarding the Plaintiff's Directors and Company Secretary; that the persons added as signatories therefore, had the requisite authority to act as agents of the Plaintiff and to that extent, withdrew and transferred money from the

Plaintiff's account. That the Plaintiff's agents acted with full authority and the Plaintiff is bound by the acts of its disclosed and known agents.

With regard to the issue of withdrawals of the USD5,000.00 and K200,000.00 and transfer of the sum of K2,568,992.12 and USD110,836.62 to the Plaintiff's accounts held at Finance Bank Zambia Limited, the Defendant submitted that the said transactions were merely actions in furtherance of what the Defendant had earlier directed the Plaintiff to do, that is, transfer all its money to alternative accounts held at a different bank to enable the Defendant to close the Plaintiff's accounts and exit the banking relationship. That, the money was transferred to the Plaintiff's accounts on valid instructions issued by duly authorised agents of the Plaintiff and for its benefit, and therefore, the Plaintiff has suffered no loss arising from the transferred funds and is bound by the actions of its agents.

The Defendant argued that the withdrawals were done by authorised agents of the Plaintiff and the transfers were done between two accounts held by the Plaintiff at two different banks and therefore, the Plaintiff suffered no loss. With regard to the Plaintiff's claim for loss of profits and interest on sums wrongly paid out, the Defendant claims that no sums were wrongly paid out of the Plaintiff's accounts and in any event the Plaintiff advanced no evidence before Court to prove that it suffered any loss, assuming the amounts withdrawn and transferred were wrongly withdrawn and transferred. Reacting to the claim for damages for negligently allowing a transfer from the Plaintiff's accounts, the Defendant argued that no funds were negligently transferred from the Plaintiff's

accounts as all funds were withdrawn and transferred by authorised persons and there was no negligence established on the part of the Defendant in all the evidence led and adduced before Court. That, it is settled law that to succeed in a claim for loss arising because of negligence, the party claiming must establish three ingredients, namely, that they were owed a duty of care, that the duty has been breached, and that as a result of the breach, the claimant has suffered damages. The Defendant alleges that while it had a duty of care to the Plaintiff, which duty was well exercised, the Plaintiff has not established a breach of this duty owed to it by the Defendant, or any resulting damage because of the breach.

With regard to the Plaintiff's claim for damages for breach of fiduciary duty and duty of care, the Defendant argued that no case for breach of fiduciary duty arises in this case as the Bank acted on validly issued instructions from the Plaintiff's authorised agents. That, the Defendant acted with utmost good faith and breached no duty of care owed to the Plaintiff, as a result, the Plaintiff is not entitled to recover any damages or any other relief. Further, that it is on record that the Defendant independently confirmed the Plaintiff's instructions and documents before acting on them, an act that goes to establish utmost good faith on the part of the Bank and eliminates any possibility of breach of fiduciary duty or duty of care.

The Defendant asserted that the Plaintiff has not proved its case on a balance of probabilities and as the Supreme Court held in *Wilson Masauso Zulu v. Avondale Housing Project Limited*⁶:

“A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case. Quite clearly a defendant in such circumstances would not even need a defence.”

Further, in *Khalid Mohamed v. The Attorney General*⁷, the Supreme Court said:

“A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.”

In its closing arguments, the Defendant quoted from Harvey McGregor, McGregor on Damages, 16th Edition, paragraph 2051 at page 1335 as follows:

“The plaintiff has the burden of proving both the fact and the amount of the damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a given allegation forms an essential part of a person’s case the proof of such allegation falls on him. Even if the defendant fails to deny the allegation of damage or suffers default, the plaintiff must still prove his loss.”

The Defendant urged the Court to find that the mandate was properly changed and that all transactions on the Plaintiff’s accounts were conducted by persons with a mandate to so transact. Further, that the cash withdrawals and fund transfers on the Plaintiff’s accounts were all properly done by the Plaintiff’s appointed agents and to dismiss the case in its entirety with costs for lacking merit.

In its Submissions in Reply filed on 13th December, 2018, the Plaintiff submitted that the Defendant did not act in good faith and was grossly negligent in the manner it handled the Plaintiff’s accounts. With regard to the Defendant’s submission that there was nothing unusual about the transactions on the accounts and thus, the Defendant cannot be said to have acted negligently, the Plaintiff submitted that this flied right into the

Defendant's teeth as the Defendant's own witness testified that he had noted the manner in which the imposters withdrew cash on 21st July, 2016 was not of the ordinary as the original signatories did not manage the accounts in such a manner. Further, that it was established in evidence that the Plaintiff did not appoint Taher Khalil and Clement Wonani as its agents.

The Plaintiff submitted further, that the Defendant actively participated in the fraud that occurred around the Plaintiff's accounts because it had been approached by the imposters sometime in May, 2016 but opted not to inform the Plaintiff about it. Further, that by 22nd July, 2016 the Defendant had come to have knowledge that the imposters had fraudulently caused changes at PACRA and at the Bank, but had allowed the transfer of all of the Plaintiff's monies on 26th July, 2016, while it informed the proper agents of the Plaintiff that the money was safe. That, the Defendant should be held responsible for the consequences flowing directly or indirectly from the fraud perpetrated by the imposters and reiterated its argument that the Defendant acted negligently, and did breach its duty of care to the Plaintiff and should be found liable.

The Plaintiff submitted that contrary to the Defendant's assertions, the fact that the imposters were reported as such to the Bank is at the core of this case and therefore, not irrelevant. That the undisputed evidence before Court is that the Plaintiff has not been able to recover its monies, for which the Defendant should be held liable. That, contrary to the Defendant's submissions, the Plaintiff has proved its case on a balance of probabilities, thereby discharging the burden of proof. That, the

Defendant should be found liable for its various breaches and the Plaintiff be granted all the reliefs sought.

The undisputed facts of this case are that on or about 7th March, 2016 the Plaintiff opened three bank accounts with the Defendant, namely, two Kwacha Accounts and one Dollar Account. The Kwacha Accounts were numbered 62608402260 and 62596956907, while the Dollar Account was numbered 62596957666. The two signatories to the accounts when they were opened were Mr. Shukri Eljaiedi and Mr. Gabriel Lesa Bwalya, the former being the Managing Director and the latter the Company Secretary of the Plaintiff Company. The two appeared on the PACRA records as Director and Secretary, respectively, as per printout dated 4th April, 2016.

On 6th May, 2016, the Plaintiff, through a letter signed by Mr. Shukri Eljaiedi in his capacity of Managing Director, wrote to the Defendant informing them about two people by the names of Taher Khalil and Clement Wonani who were allegedly masquerading as employees of the Plaintiff. The letter advised the Defendant not to transact with the two in any business. It further informed the Defendant that Clement Wonani had a restraining order obtained against him by the Plaintiff from the Industrial Relations Court and that the Company had commenced legal proceedings against the two for several offences occasioned by them from February, 2016. Two days earlier, on 3rd May, 2016, a letter was written by Mr. Taher Khalil, on the Plaintiff's letter-headed paper, as General Manager of the Plaintiff, to the Defendant informing it about a change of signatories following discharge of an injunction by the court on 17th February, 2016, and that the new signatories were himself and Mr.

Clement Wonani. Mr. Khalil wrote another letter on 5th May, 2016 to the Defendant cancelling the cheque books then in use and requesting that the Bank issues new cheque books to him.

On 24th June, 2016, the Defendant wrote to the Plaintiff informing them that pursuant to the Bank's internal sanctions policy, it was decided that the Bank's relationship with the Plaintiff be discontinued and gave the Plaintiff up to 31st July, 2016 to provide alternative bank details where the Defendant could transfer the Plaintiff's funds and close the three accounts with it. On 12th July, 2016, the Plaintiff, through its Managing Director, Mr. Shukri Eljaiedi, wrote to the Defendant asking it not to close the accounts as the Plaintiff wanted to continue its business relationship with the Defendant. On 19th July, 2016, the Defendant advised the Plaintiff that it was going to close the accounts held by the Plaintiff for the reason that there were some breaches on Group Policy and the Head Office in South Africa had firm instructions to have the accounts closed. On 22nd July, 2016, the Plaintiff made a search at PACRA and found out that the directorship and secretarial positions of the Plaintiff Company had been changed on 19th July, 2016. The said changes had also been effected at the Defendant Bank which confirmed that the changes were done at the instance of Mr. Taher Khalil and Mr. Clement Wonani with the help of their lawyers on 21st July, 2016.

Meanwhile, on the same date, 21st July, 2016, Mr. Clement Wonani made cash withdrawals of K200,000.00 from the Kwacha Account Number 62596956907 and USD5,000.00 from the Dollar Account.

On 25th July, 2016, Mr. Taher Khalil, signing as Managing Director and Account Signatory and Mr. Clement Wonani as Finance Manager and Account Signatory, wrote to the Defendant, on the Plaintiff's letter-headed paper, instructing the Defendant to proceed with the intended closure of the accounts and giving them account numbers in which to transfer funds from the Kwacha Account and the Dollar Account. On 26th July, 2016, the sums of K2,568,992.19 and USD110,836.62 were transferred from account numbers 62596956907 and 62596957666, respectively, to the Plaintiff's account at Finance Bank Zambia. However, the USD110,836.62 was returned to the Plaintiff's Dollar Account at the Defendant Bank on 3rd August, 2016.

By letter dated 28th July, 2016, the Plaintiff asked the Defendant to reverse the changes made on its signing mandate following the reversal at PACRA. The Defendant reversed the signing mandate accordingly.

The disputed facts of the case are the following. The Plaintiff claims that contrary to the assurances by the Defendant that the accounts were frozen and that the Plaintiff's money was safe, the Defendant did not freeze the said accounts and allowed the two men the Plaintiff refers to as "imposters" to withdraw some money from the said accounts and, following the instructions of the imposters, the Defendant transferred some money to accounts held by the Plaintiff at Finance Bank Zambia, which were supposedly closed to both credits and debits, That as a result, the Plaintiff has lost its money and has suffered loss and inconvenience. The Plaintiff further alleges that the Defendant was negligent in that, despite warnings and caution that there were imposters that were after

the Plaintiff's accounts, did not take care to protect the interests of its customer, the Plaintiff and further, that the Defendant was dishonest when it stated that the accounts were frozen and were in breach of their fiduciary duty to the Plaintiff to give account of the true status of the accounts. That, as a result, the Plaintiff has suffered loss on the interest and profits it would have made had it not parted with its money. On the other hand, the Defendant claims that despite having written to the Plaintiff stating that they would freeze the accounts, the accounts were never frozen and the Defendant made no assurances regarding the freezing of the Plaintiff's accounts. That, the Plaintiff continued to operate normally on its accounts as the Defendant waited for the Plaintiff to furnish alternative bank details. The Defendant denies being negligent and states that it acted diligently at all times by conducting independent searches.

From the pleadings herein and the evidence adduced by the parties, I have identified the following issues for determination:

1. Whether or not the Defendant owed the Plaintiff a duty of care and/or fiduciary duty;
2. If so, whether the Defendant breached those duties and/or was negligent;
3. Whether or not the Defendant is liable for damages and entitled to profits and interest on the sums paid out from the Plaintiff's accounts;

Issue number one for determination as highlighted above, is whether or not the Defendant owed the Plaintiff a duty of care and/or fiduciary duty.

Black's Law Dictionary, 10th Edition defines 'duty of care' as:

"A legal relationship arising from a standard of care, the violation of which subjects the actor to liability."

The same dictionary defines 'fiduciary duty' as:

"A duty of utmost good faith, trust, confidence and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust)...a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to the other).

It is correct, as submitted by Counsel for the Plaintiff, that the relationship between banker and customer is contractual in nature and requires the bank to obey lawful instructions of the customer. Further, as held in *Barclays Bank Plc. Quincecare Limited and Another*¹, it is an implied term of the contract between the bank and its customer that the bank will observe reasonable skill and care in and about executing the customer's orders. As submitted by Counsel for the Plaintiff, the relationship between the Plaintiff and the Defendant was indeed one of principal and agent out of which rights and duties by both parties were to be fulfilled one towards the other. The Defendant does not dispute the existence of such a relationship, or that it owed the Plaintiff a duty of care and fiduciary duty. What is in dispute is whether or not the Defendant breached those duties. Therefore, the answer to the question whether or not the Defendant owed the Plaintiff a duty of care and fiduciary duty, is in the affirmative.

The second issue for determination is whether or not the Defendant breached the duty of care and fiduciary duty and/or was negligent in the way it performed its duties in relation to the Plaintiff. In order to determine this issue, the Defendant's conduct at the material time needs to be assessed. The Plaintiff claims that the Defendant was in breach of its duty of care and skill when it negligently allowed the change of the signing mandate of the Plaintiff's two Kwacha accounts at the instructions of Clement Wonani and Taher Khalil after the Plaintiff had warned the Bank about possible interference from the two men and therefore, put on enquiry. That, from the time the Defendant was put on enquiry, trust became the basis of the Defendant's relationship with the Plaintiff, which trust was breached by the Defendant by effecting the changes on the instructions of the two imposters.

The Defendant denies being negligent or breaching the trust as it received instructions from the Plaintiff's authorised signatories and only allowed the new signatories to transact on the Plaintiff's accounts after the mandates were changed and after verifying the same by conducting searches at PACRA which revealed that the persons indicated in the mandate as being authorised persons on the accounts were in fact also appointed as officials of the Plaintiff Company. The Defendant claims that it was not negligent in the way it dealt with the issue as it took steps over and above ordinary steps required in order to satisfy itself as to the validity of the instructions received to change the signing mandate on the Plaintiff's accounts.

The evidence before this Court reveals that the Defendant received a special resolution dated 13th June, 2016, (exhibited on pages 15 and 16 of the Plaintiff's Bundle of Documents) from the Plaintiff which, on the face of it, was validly passed by the Plaintiff Company, wherein Mr. Taher Khalil and Mr. Clement Wonani were appointed directors of the Plaintiff and Mr. Taher Khalil was also appointed Company Secretary in place of Mr. Gabriel Bwalya Lesa. The Defendant also received instructions from the Plaintiff on the Plaintiff's letterheaded paper, instructing the Defendant to change the signing mandate maintained on the accounts. The evidence also shows that the Defendant did conduct searches at PACRA which indicated that there were changes effected at PACRA that were in line with instructions to change the signing mandates on the Plaintiff's accounts at the Bank. PW1 admitted in cross-examination, that the documents filed at PACRA by the alleged imposters did not look different from the ones filed earlier. He also admitted that the PACRA records and the records submitted at the Bank matched. Further, PW2 admitted under cross-examination that going by PACRA records, the two people he was referring to as imposters had the mandate to act on behalf of the company as director and secretary between 19th July, 2016 and 27th July, 2016. PW2 conceded that the instructions by the two men were valid as they were the authorised officers of the company and that the two men had the requisite PACRA documents that were reflecting changes at PACRA when they walked into the Bank to instruct the Bank to effect the changes. Considered on their own, the circumstances antecedent in this case as outlined above, were not so out of the ordinary that they should have aroused doubts in the mind of the Defendant. However, as will soon

become apparent, the Defendant had notice about Messrs. Khalil and Wonani's activities that should have raised doubts about the validity of the instructions it received from the two regarding changes to the signing mandates.

As correctly submitted by the Defendant, it is trite that the actions of an agent with actual or apparent authority, bind the principal. Based on the documents presented to the Plaintiff, between 19th July, 2016 and 26th July, 2016, Mr. Taher Khalil and Mr. Clement Wonani appeared to have had the authority to act on behalf of the Plaintiff as director and secretary and to effect the changes in the signing mandate of the company. This seems to be fortified by the principle in the English case of *Royal British Bank v. Turquand*⁸, which alluded to the established indoor management rule which gives effect to the notion that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not. This is because there is no need to look into the company's internal workings; rather, due diligence is satisfied upon examination of documentation filed at the official Company Registry. This stems from the assumption that indoor affairs of the company are the company's problem and there is no need for an outsider to look into the company's internal workings. However, there are exceptions to the indoor management rule, and these are:

- i. *knowledge of the irregularity (by the person dealing with the company).*
- ii. *negligence on the part of the outsider. Thus, a person cannot claim the benefit of the rule in Turquand's case in circumstances under which he would have discovered the irregularity if he had made proper inquiries. Further, where circumstances surrounding the transaction are suspicious, and therefore, invite inquiry, the outsider cannot claim the benefit of this rule*

In light of the exceptions above, section 25 of the Companies Act, Chapter 388 of the Laws of Zambia, which applies in this case due to the fact that the action herein was commenced before the said Act was repealed and replaced by the Companies Act, No. 10 of 2017, provides as follows:

“25. A company or guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company that –

- a) any of the articles of the company has not been complied with;*
- b) a shareholder agreement has not been complied with;*
- c) the persons named in the most recent annual return or notice under section two hundred and twenty-six are not the directors of the company;*
- d) the registered office of the company is not an office of the company;*
- e) a person held out by a company as a director, an officer or an agent of the company has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;*
- f) a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or genuine; or*
- g) the financial assistance referred to in section eighty-three or the sale or disposal of property referred to in section two hundred and sixteen was not authorised; except where that person has, or ought to have had by virtue of his position with or relationship to the company, knowledge of the fact asserted.” (emphasis supplied)*

In *casu*, the letter by the Plaintiff of 6th May, 2016, placed the Defendant in the position that it cannot claim the benefit of the indoor management rule. The said letter clearly informed the Defendant about the two people by the names of Taher Khalil and Clement Wonani who were allegedly masquerading as employees of the Plaintiff. The letter advised the Defendant not to transact with the two in any business. Having been alerted about the two individuals, the Bank should have been placed on inquiry and suspicious of any transaction done by the two men, but that was not the case. In my view, and in light of the warning letter, it cannot

be said that due diligence was satisfied upon examination of the documentation filed at PACRA. Surprisingly, even after realising that all was not as it should have been and notifying management of LAICO on 21st July, 2016, about Taher Khalil and Clement Wonani, as stated by DW1 in cross-examination, the Defendant still went ahead and encashed cheques issued by Clement Wonani and also transferred funds from the Plaintiff's accounts held at the Defendant Bank to the Plaintiff's accounts at Finance Bank on the instructions of the said Clement Wonani. For these reasons, I am in agreement with the submission by the Plaintiff that the Defendant was negligent in this regard.

Black's Law Dictionary defines negligence as:

"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk or harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights; the doing of what a reasonable and prudent person could not do under the particular circumstances."

It is established law that in order to succeed in a claim for negligence, the party claiming must establish the following:

- a) That he was owed a duty of care;
- b) That the duty has been breached; and
- c) That as a result of the breach, the claimant has suffered damages.

It has already been established above that the Defendant did owe a duty of care and indeed fiduciary duty, to the Plaintiff. As correctly submitted by the Defendant, the Defendant was obliged at law to obey all instructions properly issued by its customers. However, in this case the Defendant did

not obey the instruction from the Plaintiff not to entertain the anticipated interference by Mr. Khalil and Mr. Wonani. By not making proper enquiries after being approached by the two men, following the warning by the Plaintiff not to deal with them, the Defendant failed to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation and therefore, breached its duty of care towards the Plaintiff.

Having established that the Defendant breached its duty of care and was negligent, the final issue for determination is whether or not the Defendant is liable for damages on the sums paid out from the Plaintiff's accounts and whether the Plaintiff is entitled to profits and interest.

The Plaintiff's claims as endorsed on the Writ of Summons, are *inter alia*, for payment of the sum of K2,568,992.12, K200,000.00 and USD5,000.00 plus USD110,000.00. The evidence shows that the Sums of K2,568,992.12 and USD110,000.00 were transferred into the Plaintiff's Finance Bank accounts while the K200,000.00 and USD5,000.00 were withdrawn by Clement Wonani. It is not in dispute that the USD110,000.00 which was transferred to the Plaintiff's Finance Bank account was returned to the Plaintiff's account at the Defendant Bank, therefore, that claim falls off. As for the, sum of K2,568,992.12 which was transferred to the Plaintiff's Finance Bank account but which the Plaintiff claims was later transferred by Clement Wonani and Taher Khalil to their advocates, I am inclined to agree with the submission by the Defendant that the Plaintiff has not tendered any evidence before court to prove the

loss of the money. In this regard, I will rely on the learned author Harvey McGregor, who stated the following with regard to proof of damages:

"The plaintiff has the burden of proving both the fact and the amount of the damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a given allegation forms an essential part of a person's case the proof of such allegation falls on him. Even if the defendant fails to deny the allegation of damage or suffers default, the plaintiff must still prove his loss."

In my view, it is not enough for the Plaintiff to simply claim that the K2,568,992.12 which the Defendant transferred to its Finance Bank account was removed from the account by Mr. Khalil and Mr. Wonani and transferred to their lawyers, the Plaintiff should have proved its allegation by providing evidence of the loss. For this reason, this claim cannot succeed.


With regard to the K200,000.00 and USD5,000.00 withdrawn by Clement Wonani from the Plaintiff's accounts, I am of the same view as the Plaintiff that the Defendant's negligence was the proximate cause of the loss of that money by the Plaintiff occasioned by the change of signatories. Consequently, the claim for the two amounts is successful.

In view of my findings above, I enter judgment for the Plaintiff in the sums of K200,000.00 and USD5,000.00 plus interest. Interest on the Kwacha amount shall be at the average of short-term bank deposit rate per annum from the date of withdrawal of the money up to date of judgment. Thereafter, at current bank lending rate as determined by the Bank of Zambia until full payment. On the Dollar amount interest shall be the average lending rate per annum of three commercial banks from the date

of withdrawal of the money until full payment. I also award damages for breach of duty of care and fiduciary duty, to be assessed, and costs. The said costs shall be agreed or taxed in default thereof.

I further grant leave to appeal pursuant to Order 10, rule 4 (1) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016, which permits this Court to grant or refuse leave to appeal without formal application at the time when judgment is given, in which event the judgment is to record that leave has been granted or refused accordingly.

Delivered at Lusaka the 24th day of February, 2020.


DR. W. S. MWENDA
JUDGE