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

2017/HPC/0036

BETWEEN:

MELISSA SUPERMARKET LIMITED	**FIRST PLAINTIFF**
AND	
PHILOMENA PETSAS	**SECOND PLAINTIFF**
STANBIC BANK ZAMBIA LIMITED	**DEFENDANT**

Before the Honourable Mr Justice K. Chenda on 3rd April 2020

For the Plaintiffs	:	**Mr B.C. Mutale, S.C. of Ellis & Company with Mr J. Zimba and Ms P. Mwanza both of Makebi Zulu Advocates**
For the Defendant	:	**Mr J. Jalasi, Mr L. Linyama and Mr M. Chileshe all of Eric Silwamba, Jalasi & Linyama Legal Practitioners**

JUDGMENT

Legislation referred to:

(i) The Competition and Consumer Protection Act, No. 24 of 2010

Case law:

(ii) *Indo Zambia Bank Limited v Mushaukwa Muhanga* (2009) ZR 266

(iii) *Cavmont Capital Holdings Plc. v Lewis Nathan Advocates* SCZ Judgment No. 6 of 2016 at J35-36

(iv) *Printing and Numerical Registering Company v Simpson* (1875) L.R. 19 E.Q. 462

(v) *Colgate Palmolive (Z) INC v Able Shemu Chuka & Ors* - Appeal No. 181 of 2005 (unreported)

(vi) *Sruttons Ltd v Midlands Silicones Ltd* (1962) A.C. 446

(vii) *Oxygen Limited & ZPA v Paul Chisakula & Ors* (2000) ZR27

(viii) *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1

(ix) *Anderson Mazoka, Lt. General Christon Tembo & Godfrey Miyanda v Levy Mwanawasa, The Electoral Commission of Zambia & The Attorney General* (2005) ZR 138

(x) *Konkola Copper Mines Plc. v Mitchell Drilling International Limited & Mitchell Drilling (Z) Limited* - Selected Judgment No. 22 of 2015 (Appeal No. 156/2013)

(xi) *Mhango v Ngulube* (1983) ZR 61

(xii) *Finance Bank Zambia Limited & Anr v Simataa Simataa* - Selected Judgment no. 21 of 2017

Authoritative text:

(xiii) *Chitty on Contracts (General Principles) Vol. 1* 29th Edition (2004), London: Sweet & Maxwell

1 INTRODUCTION AND BACKGROUND

1.1 This matter involves:

(i) the First Plaintiff as proprietor and operator of a chain of retail supermarkets in Lusaka under the brand name Melissa Supermarket;

(ii) the Second Plaintiff as proprietor of a leasehold property known as Stand No. 194, Chindo Road, Kabulonga Lusaka on which one of the supermarkets was located (the "**Property**"); and

(iii) the Defendant as banking services provider to the First Plaintiff.

1.2 Following the destruction of the supermarket on the Property by fire, the First Plaintiff took out this action seeking compensation from the Defendant for the lack of insurance cover.

1.3 The First Plaintiff also sought redress for other alleged breaches including faulting the quality of banking services provided by the Defendant and alleged disclosure of information to third parties to the detriment of the First Plaintiff.

1.4 The Second Plaintiff subsequently joined the proceedings rallying with the First Plaintiff in the compensation claim.

1.5 The Defendant contested the Plaintiffs' claims refuting that it was responsible for insurance of the Property and that it otherwise breached its duties to the First Plaintiff.

1.6 The Defendant also took the position that the Second Plaintiff was a stranger to its relations with the First Plaintiff with no cause of action.

1.7 At a streamlined trial of the matter, the Plaintiffs called four witnesses as follows:

(i) Mr Charalambos Petsas (PW1) - General Manager of the First Plaintiff;

(ii) Ms Nicoletta Petsas (PW2) - a Director of the First Plaintiff;

(iii) Mr Andreas Petsas (PW3) - Managing Director of the First Plaintiff; and

(iv) Mrs Philomena Petsas (PW4) - the Second Plaintiff.

1.8 With similar focus, the Defendant called two witnesses at trial namely:

(i) Mrs Sylvia Lumbwe (DW1) - the Defendant's Manager of Client Coverage; and

(ii) Mrs Chilufya Ngoi - Nyirenda - the Defendant's former Manager of Bancassurance

1.9 The Plaintiffs thereafter tendered final submissions on 27 January 2020 to which the Defendant reacted with opposing submissions on 10 February 2020. The set of submissions was completed by a reply filed by the Plaintiffs on 17 February 2020.

1.10 After a close study and careful evaluation of the pleadings, body of evidence and submissions (whose depth and industry reflected the proficiency of the members of the bar involved), my decision is as set out hereunder.

2 FACTS AND ISSUES FOR DETERMINATION

2.1 Owing to the peculiar facts of this matter and scope of controversy disclosed in the pleadings, I propose to dispense with a copious reproduction of the evidence and will instead analyse the relevant portions when dealing with the respective issues for determination.

2.2 The following facts are common cause when one considers the pleadings exchanged by the parties:

(i) the Defendant and First Plaintiff had the relationship of banker-customer;

(ii) the relationship was most recently governed by a facility letter dated 4 October 2016 (the "**Facility Letter**");

(iii) the Property was mortgaged to the Defendant;

(iv) the supermarket on the Property was destroyed by fire on 9 December 2016; and

(v) the Property did not have insurance cover when the supermarket was destroyed by fire.

2.3 The pleadings also reveal the following controversy between the parties:

(i) the Plaintiffs contend that the Defendant was responsible for payment of the premiums for insurance of the Property according to both the Facility Letter and established practice between them;

(ii) the Plaintiffs contend that the Defendant neglected to renew the insurance of the Property which was accordingly not covered at the time of the fire resulting in loss to the Plaintiffs;

(iii) the First Plaintiff contends that the Defendant made false and malicious disclosures of confidential information to third party financial institutions which resulted in injury to repute and rejection of its attempts to migrate its accounts;

(iv) the First Plaintiff contends that the Defendant operated its accounts without due care, skill and diligence;

(v) the Defendant for its part cross contends that:

a) it had no obligation to insure the Property which was instead borne by the Plaintiffs;

b) it had no legal relationship with the Second Plaintiff who has no cause of action against the Defendant;

c) it did not make the disclosures complained of; and

d) it provided its services with due care, skill and diligence.

2.4 Therefore, the issues for determination as I see them are:

(i) who bore the responsibility to ensure that the Property remained insured for the duration of the facilities under Facility Letter;

(ii) whether the Second Plaintiff had any legal relationship with the Defendant or was otherwise owed a duty of care by the Defendant;

(iii) whether the Defendant made a disclosure of false and malicious confidential information about the First Plaintiff to third party financial institutions and caused a rejection of the First Plaintiff's applications to migrate its accounts from the Defendant; and

(iv) whether the Defendant otherwise breached its banking duties to the First Plaintiff.

3 ANALYSIS AND FINDINGS

The contention of insurance of the Property

3.1 The evidence in chief of the First Plaintiff's Managing Director Mr Andreas Petsas (PW3) was to the effect that the Defendant bore the responsibility to insure the Property insured. PW3 categorically stated that same was in accordance with the mandate given to the Defendant by the First Plaintiff to debit the latter's account and remit the premiums. Such mandate was stated to be pursuant to clause 4.5 of the Facility Letter.[1]

3.2 When cross examined by Mr Linyama, PW3 maintained that clause 4.5 of the Facility Letter was anchorage for his allegation. He however conceded that clauses 6.7 and 7.4 of the Facility Letter cast the obligation to insure the Property on the First Plaintiff.

[1] See paragraphs 6 and 7 of the Witness Statement of Andreas Petsas filed 3 October 2018

3.3 The Defendant's head of bank assurance at the time, Mrs Chilufya Ngoi-Nyirenda (DW2) stated in chief that the obligation to insure the Property was borne by the First Plaintiff, according to clause 7.4 of the Facility Letter.[2]

3.4 She however conceded when cross examined by Mr Mutale, S.C., that she had no personal knowledge of the contention of insurance as hers was limited to the documents she found when she joined the Defendant post execution of the Facility Letter.

3.5 Quite clearly, this Court has to interpret clauses 4.5, 6.7 and 7.4 relied on by the parties to advance their competing positions on the contention of insurance.

3.6 At this point its necessary to delve into the realm of principles governing interpretation of written contracts. The learned authors of **Chitty on Contracts**[3] have this to say:

> *"Adoption of the ordinary meaning of words.* ***The starting point in construing a contract is that words are to be given their ordinary and natural meaning.***"[4] (Emphasis added)

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[2] See paragraphs 4, 5, 8 and 9 of the Witness Statement of Chilufya Ngoi - Nyirenda filed 5 November 2019

[3] 29th Edition (2004), Vol. 1 (General Principles), London: Sweet & Maxwell

[4] Ibid,.p732 at para 12-051

3.7 In ***Indo Zambia Bank Limited v Mushaukwa Muhanga***[5], Mambilima DCJ as she then was gave the following apt exposition:

> *"We have considered the judgment of the Court below, the submissions of counsel and the issues raised in this appeal. At the outset, we wish to commend counsel, for the detailed and thorough submissions they have availed us. We agree with counsel that the kernel of this appeal rests on the interpretation of clause 7.1. of the terms and conditions of service.* ***The various authorities cited to us endorse the general principle to be applied when interpreting contracts or other legal instruments. The starting point is the document itself****. As Lord Hoffman observed in the case of Norwich Union v British Railways Board:*
>
> > *"After all that analysis however, I came back to what seems to be the plain question:* ***what, as a matter of ordinary English do the words of the covenant mean****?"*

[5] (2009) ZR 266

It is envisaged that parties to a legal instrument have expressed themselves through the natural meaning of the words used. *This view was again echoed by Lord Hoffman in the case of Investors Compensation Scheme v West Bromwich Building Society, when he said that:*

> *"**The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents***.
>
> *On the other hand, if one would nevertheless conclude form the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".*

We have applied this general principle in this jurisdiction. *We did hold, in the case of Mazoka and Other v Mwanawasa and Others, that:*

> *"It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to other principles of interpretation".*

Although what was in issue in that case was a legislative enactment, the principle also applies to the interpretation of other legally binding instruments.

From the submissions of the parties, ***it is clear that both parties agree with the position of the law on interpretation of legal instruments; which is that the natural and ordinary meaning of the words will only be departed from when if the words were so taken, ambiguity or absurdity will result.***"[6] (Emphasis added)

3.8 With the appraisal of the relevant law done, I now proceed to examine and interpret the Facility Letter and break the tie on the competing meanings ascribed to its relevant terms by the parties.

3.9 Clause 4.5 of the Facility Letter was worded:

> "*4.5 Costs*
>
> ***Any costs, which may arise such as,*** *mortgage costs, valuation costs,* ***insurance premiums****, lawyer's fees or any other costs, overdue ground rent and/or property rates fees or disbursement incidentals to this transaction* ***will be for the borrower's account, held with the Bank.***

[6] Ibid,.277, lines 6-39

Upon signing this Facility Letter, the Borrower gives consent to the Bank to debit the Borrower's Bank account with such costs*. The Bank may give notice to the Borrower of any such costs within a reasonable time. However, any failure by the Bank to do so shall not in any way prejudice the Bank's rights to recover costs so charged to the Borrower."* (Emphasis added)

3.10 Clause 6.7 for its part read:

"*6. Conditions Precedent*

The Bank will make the Facilities available to the Borrower subject to the fulfilment of the following conditions precedent *to the satisfaction of the Bank:*

6.1 ---

6.2 ---

6.3 ---

6.4 ---

6.5 ---

6.6 ---

6.7 All risks ***insurance cover*** *for the full market value* ***over any assets which the Bank holds as security, with an insurance company approved by the Bank, and with the Bank's interest noted as first loss payee****; and*

(Emphasis added)

3.11 Clause 7.4 for its part provided:

> "*7. Special Conditions*
>
> ***While the Facilities remain available*** *or any amount or commitment remains outstanding to the Bank,* ***the Borrower will****:*
>
> *7.1* ---
>
> *7.2* ---
>
> *7.3* ---
>
> *7.4* ***ensure that the assets over which the Bank holds as security are fully insured*** *to the satisfaction of the Bank; and*" (Emphasis added)

3.12 Looking at the natural and ordinary meaning of the words used, it is clear and unambigous that clause 4.5 of the Facility Letter:

(i) in the first paragraph lumped the burden of various costs on the First Plaintiff including the cost of insurance; and

(ii) in the second paragraph provided a mechanism (without obligation) for the Defendant to debit the First Plaintiff's account to meet such costs.

3.13 Evidently therefore whilst clause 4.5 stated who bore the cost (of *inter alia* insurance), it did not state who bore the obligation to ensure that such insurance was actually in place.

3.14 The natural and ordinary meaning of the wording in clause 6.7 of the Facility Letter was clearly that the provision of the facilities by the Defendant was subject to *inter alia* there being in place insurance cover:

(i) for the assets pledged as security to the Defendant;

(ii) with an insurer approved by the Defendant; and

(iii) with the Defendant as first loss payee.

3.15 Clause 6.7 did not however state who bore the obligation to ensure that such insurance was in place.

3.16 Turning to clause 7.4 of the Facility Letter, the natural and ordinary meaning of the words was clearly that for the duration of the facilities or while any obligation remained outstanding to the Defendant, the First Plaintiff bore the obligation to ensure that any assets pledged as security to the Defendant remained fully insured.

3.17 In terms of duration of the facilities, clause 3.1 of the Facility Letter created the start date as that of acceptance and the end date as 31 July 2017.

3.18 Page 10 of the Facility Letter showed the acceptance date as 11 October 2016 whilst the pleadings and evidence show that the fire occurred on 9 December 2016. I therefore find that the fire occurred during the currency of the Facility Letter.

3.19 The Plaintiffs have pleaded and endeavoured to show through evidence that there was an established practice, prior to the Facility Letter, whereby the Defendant would be involved in arranging for insurance.

3.20 It is tempting to accept this position, however the Facility Letter had the following *'entire agreement'* clause in Appendix 1 *'General Terms and Conditions applicable to overdrafts and other banking facilities'* (the "**General Conditions**"):

> "*Whole Agreement, Variation of Terms, No Indulgence*

This agreement *created upon acceptance of the facility letter by the Borrower* ***shall constitute the whole agreement between the Bank and the Borrower*** *relating to the subject matter of the Facility letter.* ***No addition to, variation, or amendment****, or consensual cancellation* ***of any of the terms contained in the facility Letter shall be of any force or effect unless it is reduced to writing and signed by both parties****. No indulgence shown or extension of time given by the Bank shall operate as an estoppel against the Bank or waiver of any of the Bank's rights unless recorded in writing and signed by the Bank.* ***The Bank shall not be bound to any*** *express or* ***implied term, representation, warranty, promise or the like not recorded herein****, whether it induced the conclusion or any agreement and/or whether it was negligent or not."* (Emphasis added)

3.21 In the case of ***Cavmont Capital Holdings Plc. v Lewis Nathan Advocates***[7], the Supreme Court guided that a Court is duty bound to interpret a written contract within its four corners instead of in light of or in conjunction with extrinsic evidence that contradicts or varies the written text.

[7] SCZ Judgment No. 6 of 2016 at J35-36

3.22 Also useful is the English case of ***Printing and Numerical Registering Company v Simpson***[8], (cited with approval by the Supreme Court at page 8 of its judgment in the case of ***Colgate Palmolive (Z) INC v Able Shemu Chuka & Ors***[9]) and in particular the exposition from the said English case by Sir George Jessel who had this to say:

> "...***if there is one thing more than another which public policy requires it is that*** men of full age and competent understanding shall have the utmost liberty in contracting and ***that their contract when entered into freely and voluntarily shall be enforced by courts of justice***." (Emphasis added)

3.23 I also hasten to point out the following representations and warranties in the General Conditions by which the First Plaintiff accepted the binding nature of its obligations under the Facility Letter:

> "*Representation and Warranties*
>
> ***The Borrower represents and warrants to the Bank that:***

[8] [1875] L.R. 19 E.Q. 462
[9] Appeal No. 181 of 2005 (unreported)

(i) ---

(ii) ***this Facility Letter*** *and the Security,* ***when executed, will constitute*** *legal, valid and* ***binding obligations*** *or those of the provider thereof;*

(iii) ***it has the power to*** *enter into and* ***perform in terms of the Facility Letter*** *and the Security and all necessary shareholder and corporate consents have been obtained for the acceptance of the Facilities, the grant of the Security and the execution and delivery of this Facility Letter and the Security;* (Emphasis added)

3.24 In the case before Court, the validity of the Facility Letter has not been contested. Thus the First Plaintiff and Defendant must be taken to be bound by its provisions which ought to be enforced by this Court. Public policy dictates so.

3.25 Further, I cannot imply any terms based on previous practice as by the '*entire agreement clause*' in the General Conditions, the parties expressly excluded the implying of terms.

3.26 Consequently, in the absence of evidence that clause 7.4 was amended, and duly signed for by the parties in accordance with the variation clause reproduced above, I am unable to accept the Plaintiffs' proposition on the issue of insurance.

3.27 I therefore find that by the clear and unambigous wording of clause 7.4 of the Facility Letter and the warranties and representations in the General Conditions, the obligation to insure and keep the Property insured (at the time of the fire) was borne by the First Plaintiff.

The contention of a legal relationship and duty of care between the Defendant and Second Defendant

3.28 The learned authors of ***Chitty on Contracts (General Principles) Vol. 1***[10] posit:

> "...***the principle that 'only a person who is party to the contract can sue on it' was said to be a 'fundamental' one in English law***. *This view was, indeed judicially doubted in a number of cases but these doubts appear to have been set at rest* ***in 1961 when the House of Lords again affirmed the existence of the doctrine of privity of contract in holding that a person could not take the benefit of a***

[10] 29th Edition (2004),London: Sweet & Maxwell

limitation of liability clause contained in a contract to which he was not a party.[11] (Emphasis added)

3.29 The House of Lords case referred to by the learned authors is ***Sruttons Ltd v Midlands Silicones Ltd***[12] and the doctrine of privity of contract was adopted by the Supreme Court in ***Oxygen Limited & ZPA v Paul Chisakula & Ors***.[13]

3.30 Coming to the case before Court, perusal of the Facility Letter shows that it was made between two entities namely the First Plaintiff and Defendant.

3.31 The Second Plaintiff is not party to the Facility Letter and thus, based on the authorities above, cannot invoke its provisions to make any claim against the Defendant.

3.32 Further, in light of the finding that it was the First Plaintiff's contractual obligation (in its dealings with the Defendant) to ensure that the Property remained insured during the currency of the Facility Letter, it cannot be said that the Defendant owed the Second Plaintiff any duty of care.

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[11] Ibid., para 18-019
[12] (1962) A.C. 446
[13] (2000) ZR27 at page 30

The contention of disclosure of confidential information to third party financial institutions and rejection of migration to other banks

3.33 In paragraph 12, 13 and 14 of the re-amended Statement of Claim, the First Plaintiff categorically alleges:

> "*12. **The 1st Plaintiff** further **avers that the Defendant unlawfully** and without the Plaintiff's knowledge and consent **communicated the 1st Plaintiff's confidential information to third party financial institutions**.*
>
> *13. **The 1st Plaintiff avers that consequent to the foregoing which was false and malicious, all its efforts to mitigate its account to other Banks were rejected by the said Banks.***
>
> *14. **The 1st Plaintiff contends that the communications of the said confidential information to third parties were defamatory and injurious** to its corporate status.*" (Emphasis added)

3.34 In ***Galaunia Farms Limited v National Milling Company Limited***[14], the Supreme Court reaffirmed that the burden to prove any allegation is always on the one who alleges.

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[14] (2004) ZR1 at page 9

3.35 Coming to the case before Court, there is no record of any lender refusing to extend credit to the First Plaintiff because of information disclosed by the Defendant.

3.36 Suffice to say that the body of evidence before Court does not support the said grievance and allegations pleaded in paragraphs 12-14 of the re-amended statement of claim.

3.37 I therefore decline to make any finding that the Defendant made an unauthorised disclosure of confidential information (relating to the First Plaintiff) to third party financial institutions. Consequently, I cannot even interrogate the secondary issue of failure to migrate the accounts.

3.38 I instead find that the First Plaintiff's allegations on the point are unsubstantiated and baseless.

3.39 Further, I note that a great deal of effort has been spent by the parties on a debate around the the Defendant's obligations to the First Plaintiff with respect to a credit reference agency.

3.40 In the case before Court, the re-amended statement of claim pleads as follows in paragraph 10:

"*10.* ***The 1st Plaintiff will also aver that the Defendant has statutory obligations under the Act to notify and to seek the 1st Plaintiff's consent prior to listing any information*** *relating to the 1st Plaintiff's banking relationship* ***with a credit reference agency***." (Emphasis added)

3.41 However, the First Plaintiff does not go further to plead any breach of the same (let alone allege that the Defendant even shared any information about the First Plaintiff with a credit reference agency) but instead jumps to lay a claim as follows (without foundation):

"AND the Plaintiffs claim:

(i) ---

(ii) ---

(iii) ---

(iv) ---

(v) ---

(vi) ---

(vii) ***damages for breach of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and Credit Data (Privacy) Code***

(viii) ***damages for the Defendant's failure to notify the 1st Plaintiff of its intention to refer the 1st Plaintiff's credit data to a credit reference agency.***" (Emphasis added)

3.42 In ***Anderson Mazoka, Lt. General Christon Tembo & Godfrey Miyanda v Levy Mwanawasa, The Electoral Commission of Zambia & The Attorney General***[15] the Supreme Court held *inter alia* that, parties are bound by their pleadings and the Court must take them as such:

> "***The function of pleadings is very well known, it is to*** *give fair notice of the case which has to be met* ***and to define the issues on which the court will have to adjudicate*** *in order to determine the matters in dispute between the parties.* ***Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.***"[16] (Emphasis added)

3.43 Therefore, in the absence of any specific foundation pleading by the First Plaintiff on the point, I am unable to entertain and determine whether there were any infractions by the Defendant with respect to its obligations governing disclosure to a credit reference agency.

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[15] (2005) ZR 138
[16] Ibid,.177 at lines 25-31

3.44 Suffice to say that it is not a defined issue for me to safely and soundly adjudicate on in the quest to determine the matters in dispute before me.

3.45 I also hasten to add that in any event the evidential record does not show that the Defendant supplied any information to a credit reference bureau, a fact conceded to by PW1 under cross examination by Mr Linyama.

3.46 It would have been useful if the Plaintiff had called an officer from the relevant credit reference bureau to testify and clear the air on any source of information which information the First Plaintiff was aggrieved by.

3.47 Once again the principle in ***Galaunia Farms Limited v National Milling Company Limited***[17] comes in to negative the Plaintiffs' position for failure to discharge the burden of proof.

The contention of breach of general banking duties

3.48 The Competition and Consumer Protection Act[18] (the "**CCP Act**") imposes a duty of care and skill on service providers in Zambia.

[17] (2004) ZR1 at page 9
[18] Act No. 24 of 2010

3.49 I reproduce the relevant provision for ease of reference:

> *"**49.** (1) ---*
>
> *(2) ---*
>
> *(3) ---*
>
> *(4) ---*
>
> *(5) A person or **an enterprise shall supply a service to a consumer with reasonable care and skill** or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time."*
> (Emphasis added)

3.50 The term 'services' is broadly defined in section 2(1) of the CCP Act as including:

> *"---the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;"*

while the exclusions from application of the CCP Act under section 3 (3) do not extend to banking business.

3.51 The Defendant was thus for all intents and purposes under a statutory duty to provide its banking services to the First Plaintiff with reasonable care and skill.

3.52 In a bid to prove this limb of its case the First Plaintiff has drawn attention to the issue of the freezing of its account on the strength of a letter from the Zambia Revenue Authority ("**ZRA**").

3.53 The evidential record shows that the letter was received by the Defendant on 14 September 2016 but only brought to the attention of the First Plaintiff on 16 September 2016 (as per testimony of Mr Andreas Petsas (PW3) and pages 224 and 228 of the First Plaintiff's bundle of documents).

3.54 Ms Nicoletta Petsas (PW2) for her part testified that in those two days the First Plaintiff's cheques were being dishonoured and it was discredited to its suppliers.

3.55 It was less than prudent for the Defendant to delay to inform a customer based in the same town and accessible also by email of something as grave as the freezing of their accounts.

3.56 However, I am mindful that PW3 did concede under cross examination by Mr Linyama that the freezing of the accounts had nothing to do with the Defendant but instead the First Plaintiff's unresolved issues with ZRA.

3.57 In ***Konkola Copper Mines Plc. v Mitchell Drilling International Limited & Mitchell Drilling (Z) Limited***[19], the Supreme Court guided:

> *"...But the appellant was in breach of contract resulting in the respondent's failure to meet the completion schedule and* ***it is trite that a party cannot benefit by taking advantage of the existence of a state of things he himself produced*** *(New Zealand Shipping Co Ltd)"*[20] (Emphasis added)

3.58 I am therefore loathe to hold the Defendant accountable for the delay in informing the First Plaintiff of the freezing of the accounts as to do so would be to allow the First Plaintiff to benefit from a situation ultimately brought about by its own actions (with ZRA).

3.59 I now turn to the First Plaintiff's production in Court of a letter dated 21 October 2016 (the "**Complaint Letter**") detailing complaints of several irregularities on its accounts with the Defendant.[21]

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[19] Selected Judgment No. 22 of 2015 (Appeal No. 156/2013)
[20] Ibid,.pJ29
[21] See the First Plaintiff's bundle of documents at page 292

3.60 The First Plaintiff also produced a thread of emails from the Defendant in which it admitted some of the irregularities and attempted to explain the lapses on its part as attributable to system challenges.[22]

3.61 It is reasonable to expect that a man-made banking system will experience faults from time to time however it is expected that such would be rectified with due dispatch.

3.62 In the case before Court, the aforesaid evidential record shows that the irregularities spanned more than 3 weeks from 30 September 2016 to 25 October 2016 with the last rectification.

3.63 The persistence of system challenges for so long was unreasonable and thus the resultant irregularities on the First Plaintiff's account amounted to a breach of the Defendant's duty of reasonable care and skill in provision of its services to the First Plaintiff whose business model involved daily transactions.

3.64 In addition, the evidence of Mr Charalambos Petsas (PW1) in his amended witness statement alleged the following of further irregularities in January 2017 and June 2017:

[22] Ibid,. page 296-299

"58. ***The January 2017 statement confirms the following transactions***:

i. *Cheque No. 023153 was* ***debited three times and credited once***
ii. *Cheque No. 23155 was* ***debited twice and created once***
iii. *Cheque No. 023160 was* ***debited five times and credited once***
iv. *Cheque No. 023179 was* ***debited ten times and credited once***

59. ***The Defendant debited the 1st Plaintiffs account wrongfully on 30th June 2017 with*** *reference interest run for* ***the sum of K25,743.70. The 1st Plaintiff at the time had no facilities with the defendant that could warrant such an interest charge***. *The Defendant later reversed the entries on 11th July, 2017. These transactions are at pages 427 and 428 of the Plaintiff's Bundle of Documents."* (Emphasis added)

3.65 The allegations are substantiated by a bank statement and email complaint dated 10 July 2017 produced by the First Plaintiff,[23] worded as follows:

"*To whom it may concern,*

In reference to this interest payment of 25,743.70 deducted off our account Melissa Supermarket *ZMK account number 9130001961172.*

Below I have sent a screen short of deduction.

[23] Ibid,. 427 - 429

As far as we know we don't owe any interest fees. Please respond as soon as possible to explain why it was deducted and we hope to have it returned in our account soon.

We have spoken to our account executive at Stanbic Sylvia and was told to respond to the call centre instead so we hope to hear back as soon as possible. I have also CC'd all other emails in hope for a quick response. Thank you.

Kind regards.

Nicoletta
Director
Melissa Supermarket." (Emphasis added)

3.66 The evidence of the irregularities in January 2017 is uncontroverted. I also observe that by that time, the issues in the Complaint Letter were still fresh such that the Defendant ought to have ensured that the recently aggrieved customer was handled better.

3.67 As for the email complaint, there is no record of the Defendant offering a reasonable explanation for debiting the First Plaintiff with interest of K25,743.70, let alone a response to the email out of courtesy. Nor has the Defendant countered the First Plaintiff's evidence that the debit was reversed after the complaint.

3.68 I therefore find that the allegations in paragraphs 58 and 59 of the (PW1) have been proven as another instance of the Defendant's breach of duty to provide services to the First Plaintiff with reasonable care and skill.

3.69 I also wish to address the issue of the charges of K900 each imposed by the Defendant and flagged in the Complaint Letter. I have reviewed the Facility Letter and not found any express provision for the said charges.

3.70 I however note that the Facility Letter allowed for imposition of extra charges subject to a commendably transparent process. I reproduce the relevant portions:

> "*4.4 Other fees and charges*
>
> *4.4.1* ---
>
> *4.4.2* ***The Bank reserves the right to alter any fees or charges*** *or the method of calculating them* ***at any time. If the Bank elects to do so, written or displayed notice*** *of the alteration and its effective date* ***will be given to the Borrower within a reasonable time prior to that date***." (Emphasis added)

3.71 That said, there is no evidence before Court that the Defendant gave the First Plaintiff written notice of the K900 charges under narration *'unauthorised fee overdraft'*, prior to imposition.

3.72 The Defendant also did not produce a copy of any notice otherwise displayed (for the First Plaintiff and interested parties to see) of such charges prior to imposition.

3.73 I therefore find that the K900 charges under narration *'unauthorised fee overdraft'* were wrongfully imposed by the Defendant on the First Plaintiff and were thus unlawful.

3.74 Before leaving this segment of the judgment I wish to draw guidance from the case of ***Mhango v Ngulube***.[24] The Supreme Court posited (in the said case) that it is for a party claiming special loss to prove that loss and to do so with evidence which makes it possible for an adjudicator to determine the value of that loss with a fair amount of certainity.

3.75 In ***Finance Bank Zambia Limited & Anr v Simataa Simataa***[25] the Supreme Court further guided that where breach of contract is alleged and proven, it is incumbent upon a claimant to bring evidence to prove that the breach resulted in actual loss, failing which a claimant is only entitled to nominal damages.

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[24] (1983)ZR 61 at 66
[25] Selected Judgment No. 21 of 2017 at J40-44

3.76 In the case before Court, the First Plaintiff has not led any evidence to prove its bare allegations that it suffered injury and loss from the Defendant's breach of duty to provide the banking services with reasonable care and skill.

3.77 The First Plaintiff is thus only entitled to nominal damages though not as compensation but simply in recognition of the infraction of its rights by the erring Defendant.

3.78 However, the carelessness exhibited by the Defendant in its provision of services to the First Plaintiff is legitimate cause for an independent audit of the affected accounts.

3.79 I will in the concluding parts of this judgment make pronouncements for fulfilment of the the foregoing.

4 CONCLUSION AND ORDERS

4.1 The Facility Letter governed the relationship between the First Plaintiff and Defendant at the time of the fire on the Property.

4.2 Under the Facility Letter, the First Plaintiff accepted the obligation to insure and keep the Property insured.

4.3 That the Property was not insured at the time of the fire was on account of a lapse by the First Plaintiff (and not the Defendant) in discharging that responsibility.

4.4 The Second Plaintiff was not privy to the Facility Letter and owing to the casting of the responsibility to insure the Property on the First Plaintiff, the former has no claim of right against the Defendant.

4.5 Accordingly, the Plaintiffs are not entitled to any compensation from the Defendant for the damage occasioned to the Property by the fire.

4.6 Claims (i)-(v) in the re-amended statement of claim are consequently dismissed.

4.7 The onus was on the First Plaintiff to lead evidence of a disclosure of confidential information by the Defendant resulting in the alleged refusal by third party financial institutions to takeover its accounts. The failure to prove that allegation renders it baseless. Consequently claim (vi) in the re-amended statement of claim is dismissed.

4.8 The First Plaintiff was duty bound to lay a foundation pleading for its grievance relating to the alleged credit reference handling by the Defendant.

4.9 In the absence of such foundation its is unsafe and unsound for this Court adjudicate on and determine the issue. Claims (vii) and (viii) in the re-amended statement of claim are accordingly dismissed.

4.10 Persual of claims (ix), (x), (xi), (xiii) and (xiv) of the re-amended statement of claim show that they were dependent on the success of claims (vi) to (viii). Claims (ix), (x), (xi), (xiii) and (xiv) accordingly have no limb to stand on and are dismissed.

4.11 The Competition and Consumer Protection Act[26] makes it mandatory for providers of services in Zambia to do so with reasonable care and skill.

4.12 In the case before Court, the evidence shows a pattern of delinquency by the Defendant in its provision of banking services to the First Plaintiff from 30 September 2016 to 30 June 2017.

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[26] Act No. 24 of 2010 in section 49(5)

4.13 However, the evidence does not show that the First Plaintiff suffered any actual injury as a result of the Defendant's breaches. There is thus no basis to order assessment of damages.

4.14 Instead, under the head of (xvi) of the re-amended statement of claim and powers vested in me by section 13 of the High Court Act[27], I deem it fit to award the First Plaintiff nominal damages (as I hereby do) in the sum of K9,999 for the Defendant's breach of duty to provide the banking services with reasonable care and skill.

4.15 The damages must be paid together with interest at the average of the short term deposit rate prevailing from date of writ to judgment and thereafter at the bank lending rate as determined by the Bank of Zambia from date of judgment to payment.

4.16 Given the nature of the irregularities on the First Plaintiff's account for the period 30 September 2016 to 30 June 2017 and the nonchalance exhibited by the Defendant in attending to them, it is doubtful whether the bank statements for the period are actually accurate.

[27] Chapter 27 of the Laws of Zambia

4.17 I accordingly allow relief (xii) under the re-amended statement of claim to the extent that I order an audit to be undertaken of the First Plaintiff's accounts with the Defendant (the "**Audit**") subject to the following directions:

(i) the audit period shall be 30 September 2016 to 30 June 2017;

(ii) the Audit shall be undertaken by an independent auditing firm duly registered with the Zambia Institute of Chartered Accountants ("**ZICA**") which firm shall be agreed upon by the parties within 30 days from date of publication of this judgment, failing which the parties or either of them shall be at liberty to make a written request to the President of ZICA to appoint a firm;

(iii) the First Plaintiff and Defendant shall avail all such documentation as shall be reasonably required and requested by such firm to conclusively conduct the Audit;

(iv) should the Audit reveal that the First Plaintiff suffered any charges by the Defendant which are not supported by the Facility Letter (for the period 11 October 2016 to 30 June 2017) and any proven agreed terms (for the period 30 September 2016 to 10 October 2016) then same shall be credited to its accounts by the Defendant, with interest in the like manner as the nominal damages awarded; and

(v) should the Audit instead reveal that there are some unclaimed charges due from the First Plaintiff to the Defendant as per governing documents as aforesaid, then same shall be debited to the First Plaintiff's accounts.

4.18 As for the issue of costs, I am of the considered view that had the Defendant discharged its duty to provide banking services to the First Plaintiff with due care and skill, this action (and the Audit) would not have been necessary.

4.19 I therefore condemn the Defendant to bear the First Plaintiff's costs of and occasioned by this action, to be taxed in default of agreement. The Defendant shall also bear the cost of the Audit.

Dated at Lusaka this 30th day of April 2020

K. CHENDA
JUDGE OF THE HIGH COURT