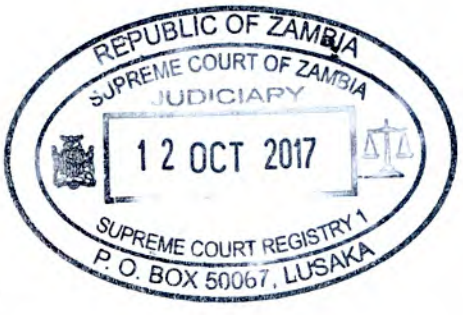
SELECTED JUDGMENT NO. 52 OF 2017

P.1739

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 12/2017**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

IÑUTU ETAMBUYU SUBA **APPELLANT**

AND

INDO-ZAMBIA BANK LTD. **RESPONDENT**

Coram: **Malila, Kajimanga and Musonda, JJS**

on 6th June, 2017 and on 12th October, 2017

For the Appellant: Mr. C. Tafeni, Suba, Tafeni & Associates

For the Respondent: Mr. M Ndhlovu, MRN Legal Practitioners

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Wilson Zulu v. Avondale Housing Project (1982) Z.R. 172**
2. **Stanbic Bank Zambia Limited v. A.S. & C. Enterprises and Others (2008) Z.R. 259**
3. **Barclays Bank of Zambia v. Sky FM Limited and Geofrey Hambulo (2006) SCZ 51**
4. **Indo-Zambia Bank Limited v. Lusaka Chemist Limited (2003) Z.R. 32**

5. **Taxation Commissioners v. English Scottish and Australian Bank [1920] A.C. 683**
6. **Lloyd's Bank Ltd. v. Savory & Co. [1933] A.C. 2018**
7. **Standard Chartered Bank Zambia PLC v. Kasote Singogo SCZ Appeal No. 212/2016**
8. **Emmanuel Mponda v. Mwansa Christopher Mulenga & Two Others Appeal No. 12/2015 Selected Judgment No. 42 of 2017**
9. **Teddy Puta v. Ambindwire Friday SCZ Selected Judgment No. 43 of 2017**
10. **Musa Zimba (suing as the administrator of the estate of the late Gibson Roberts Zimba) v. Lucy Zimba & Two Others SCZ Appeal No. 121 of 2007**

Legislation referred to:

1. **Section 1(a) of the Cheques Act, Cap. 42**
2. **Supreme Court Act, Cap. 25**

Other Works referred to:

1. **Watts Peter (2010) *Bowstead and Reynolds on Agency*, 19th edition (Sweet & Maxwell: London) - para. 8-013**
2. ***Ellinger's Modern Banking Law, 4th Edition***
3. **Hapgood Mark, QC (1996) *Paget's Law of Banking* (Butterworths: London) 11th edition P.340**
4. **Penn, Shea & Arora, (1987), *The Law Relating to Domestic Banking* (Sweet & Maxwell: London) Vol. 1**

This appeal is arising from a judgment of a High Court Judge sitting at Lusaka who dismissed, with costs, the appellant's action in terms of which she had sought to recover a sum of US$129,800.00 plus other moneys and damages against the respondent following the loss of the said sum of US$129,800.00 in

a bank account which the appellant had been maintaining with the respondent. The appellant had alleged that the loss of the said moneys and the resultant stress and inconvenience to which she had been subjected and for which she had sought damages in the court below had been attributable to the respondent's negligence.

The background facts and circumstances surrounding this appeal are scarcely in dispute.

The appellant was a customer of the respondent and maintained both her business and personal bank accounts, including account No. 0100000495014, with the respondent. The said bank accounts were held or maintained at the respondent's Livingstone Branch. For the removal of any doubt, the appellant had been a long-standing customer of the respondent and had even served as the respondent's advocate when she was practising law under the name and style of Kuta Chambers.

Sometime in the last quarter of 2011, the appellant was appointed to the public office of Permanent Secretary in charge of Southern Province. While holding this position, the appellant was

stationed at Livingstone. The appellant was subsequently transferred to Central Province in the same capacity before she finally got transferred to Lusaka.

While all these changes around the appellant's employment circumstances were taking place, the bank accounts earlier referred to remained at the respondent's Livingstone Branch. The appellant continued to operate the bank accounts in question using her agents at Livingstone and her Personal Secretary as Permanent Secretary. According to the evidence on record, whenever the appellant desired to make a cash payment out of any of her bank accounts, she would originate typed and signed instructions which would be faxed from her station (i.e. Kabwe or Lusaka) by her Personal Secretary to the respondent's Livingstone Branch. Upon receipt of the instructions as aforestated, the respondent's agents or servants at the Branch in question would proceed to pay whoever the appellant would have designated as the payee or beneficiary in her letter of instructions to the respondent's Livingstone Branch. Thus, a pattern did emerge, so the trial court found, whereby fund transfer or withdrawal instructions by the

appellant from the bank accounts in question would be relayed to the respondent's Livingstone Branch by her Personal Secretary. In the context of the issues at play in this appeal, a Ms. Monde Konoso had been the appellant's Personal Secretary and had been responsible for relaying the appellant's instructions to the respondent's Livingstone Branch under cover of a facsimile (later, electronic mail (email)).

Sometime in February, 2015, the appellant visited the respondent's Manda Hill Branch for the purpose of establishing whether or not her expected gratuity in some amount exceeding K1,300,000.00 had been credited to her bank account number 0100000495914. Upon checking and establishing the balance which was standing to her account's credit, the appellant formed the view that part of her money had gone missing from that bank account. At that point, the appellant immediately sought to be furnished with a full bank statement relating to her bank account in question. According to the appellant, when she examined the bank statements which had been furnished to her, she noticed six (06) transactions which she described as having been 'alien' and

unknown to her. These 'alien' transactions included two bank transfers of US Dollars to two companies which the appellant claimed to have had no knowledge about together with the associated transfer charges and commissions. The US Dollar transactions involved USD40,000.00 and USD89,800.00.

Upon discovering the transactions alluded to in the preceding paragraph, the appellant proceeded to query the respondent's Manager at its Manda Hill Branch who informed her that the transactions in question had arisen and had been authorised at the respondent's Livingstone Branch. Upon seeking the respondent's Livingstone Branch Manager's clarification over the subject transactions, the appellant was informed that the records which were in the respondent's possession at Livingstone confirmed the fact of the transactions in question having been properly conducted in accordance with the appellant's instructions. The appellant was informed, in particular, that she had sanctioned the US Dollar transfers in question through her then Secretary, Ms. Monde Konoso. The appellant denied having instructed her Secretary to effect the USD transactions in question

and sought to have the respondent's Livingstone Branch Manager explain why the respondent had not verified the instructions relating to the US Dollar transfers with herself. According to the appellant, the respondent's Manager informed her that the respondent could not telephone her over the USD40,000.00 transfer because it was already in possession of the appellant's written and signed instructions. As for the US$89,800.00 transfer, the appellant was told that an attempt was made to contact her to verify the transfer but that her phone had been unreachable, presumably because she (the appellant) was out of the country.

On 13th March, 2015, the appellant's advocates sent a letter of demand to the respondent seeking the recovery of the sum of K852,196.80 together with damages for inconvenience and stress. The K852,196.80 represented the Kwacha equivalent of USD129,800.00 at the time. In a subsequent letter dated 31st March, 2015, the appellant's advocates demanded the payment of K592,951.80 and USD129,800.00.

The respondent's advocates reacted to the two demand letters mentioned above denying liability and asserting that the transfers

in question had been authorised by the appellant. In the light of the aforestated, the appellant proceeded to institute legal proceedings against the respondent seeking:-

"i. **The total amount externalized from the appellant's account in the sum of US$129,800;**

ii. **Commissions amounting to K3,190.60;**

iii. **Transfer charges amounting to K532.20;**

iv. **The cost of the appellant's first set of building plans and the bill of quantities in the sum of K45,000.00;**

v. **Damages arising out of stress;**

vi. **Damages arising out of inconvenience;**

vii. **Damages arising out of the delay in constructing the appellant's house taking into account the escalation of the US Dollar to the Kwacha and the increase in the cost of the building materials;**

viii. **Refunds of any rentals that the court was to determine as due and payable to the appellant as a result of the action;**

ix. **Interest on all amounts that were to be found due and payable from the date of this action up to the date of judgment at the short term Bank of Zambia lending rate and thereafter as determined by the Judgment Act;**

x. **Consequential expenses;**

xi. **Costs of the action;**

xii. **Any other relief that the Honourable Court was to deem appropriate."**

The appellant's action in the court below was subsequently tried. Aside from herself, six witnesses testified on behalf of the appellant.

The gist of the evidence which was deployed in the court below on behalf of the appellant was that the loss of the USD129,800.00 on the appellant's bank account number 0100000495014 was attributable to the negligence or failure to exercise due diligence on the part of the respondent, acting by its agents or servants. The appellant contended that the loss of the moneys in question could have been avoided had the respondent's agents or servants telephoned her to confirm or verify whether or not she had given instructions for the transfer of the money in issue to third parties overseas and that it was not enough or sufficient for the respondent to have acted on the appellant's written and signed instructions which had been furnished to the respondent bank.

The respondent, for its part, denied having acted negligently, or having failed to exercise due diligence when it transferred the moneys in question and maintained that the transfer of the funds in question was effected on the basis of the appellant's written and

signed instructions and in accordance with the respondent's established procedures.

The lower court considered the evidence which had been deployed before it in the context of the pleadings and submissions by Counsel for the parties and made the following crucial findings of fact:

(a) That the appellant had developed a pattern in her dealings with the respondent to the extent that her Secretary was being used by her as the conduit for the transmission of instructions to the respondent;

(b) That the appellant did not entirely or categorically deny having given the funds transfer instructions in question;

(c) That the transfer of the funds in question had followed the pattern referred to in (a) above; and

(d) That, it was the court's considered view that the respondent was not negligent when it effected the transfers or payments of the moneys in question.

Other than reaching the conclusion that the transfer of the USD40,000.00 and USD89,800.00 had followed the same pattern which the appellant had established, the learned trial Judge wondered over and questioned the wisdom of the appellant shying

away from calling the appellant's Personal Secretary to testify. In the view of the trial Judge:

> **"[The] omission by the Plaintiff to call her principal agent in the said transactions (i.e., the Personal Secretary) to explain the two transactions has left me wondering if indeed the Plaintiff did lose the said moneys or if it was the Personal Secretary who was [the] perpetrator of the theft. The Personal Secretary was a key player in all the transactions, including the disputed ones. Her evidence was therefore vital and crucial in the determination of this matter. The omission by the Plaintiff to call her leaves me to form an inference that the testimony she would have given would have been adverse to the Plaintiff's claim.**
>
> **The undisputed evidence in this case demonstrates that the Plaintiff introduced to the Defendant bank a third party in the form of her Personal Secretary to carry out transactions on her behalf. The two transactions that have been questioned, apart from bearing what clearly appears to be the Plaintiff's signature, were given by the personal secretary following an established pattern."**

The learned trial Judge accordingly concluded his judgment by dismissing the appellant's action with costs.

The appellant was thoroughly displeased with the outcome of her exertions in the court below and has now appealed to this court advancing 14 grounds of appeal which have been presented in the memorandum of appeal in the following terms:

P.1750

"1. **The Honourable Court erred in law and fact when it found that the Plaintiff had developed a pattern in her dealings with the Defendant whereby she used her Personal Secretary as a conduit for sending instructions to the Defendant without also finding as a fact that a different pattern was established for payments for foreign transactions and all instructions had to be verified with the Plaintiff.**

2. **The Honourable Court erred in law and fact when it took the view that it was late in the day for the Plaintiff to challenge the documents at pages 17 to 18 and 19 to 27 in the Defendant's Bundle of Documents in respect of transfers involving the sums of US$40,000 and US$89,000 without taking into account the Pleadings.**

3. **The Honourable Court erred in law and fact when it held that the Plaintiff should have challenged or objected to the documents at pages 17-18 and 19-27 in the Defendant's Bundle of Documents at Discovery Stage and that therefore the Plaintiff slept on her rights.**

4. **The Honourable Court erred in law and fact when it held that in considering the documents relating to the transfer of the US$40,000 and US$89,000, and the pattern that the other transactions took it considered that the pattern on all the transactions was similar and therefore the Defendant was not negligent.**

5. **The Honourable Court erred in law and fact when it held that his [its] findings tied in with the *"Know Your Customer"* guidelines without taking into account the evidence on record to the effect that the Plaintiff had not at any given time been known to deal in the products, with the trade**

destinations and in similar amounts thereby defying the pattern of the account transaction.

6. **The Honourable Court erred in law and fact when it held that the omission by the Plaintiff to call her former Personal Secretary left it to form an inference that the testimony [her] Personal Secretary would have given would have been adverse to the Plaintiff's claim.**

7. **The Honourable Court erred in law and fact when it held that the undisputed evidence demonstrated that the Plaintiff introduced to the Defendant a third party in the form of her Personal Secretary to carry out transactions on her behalf when in fact the evidence on record shows that she could only deliver letters to the Defendant.**

8. **The Honourable Court erred in law and fact when it held that there was nothing in the nature of the two disputed transactions that departed from the ordinary course of things to warrant the Defendant being put on alert.**

9. **The Honourable Court erred in law and fact when it took the view that since a "pattern" was established, there was no duty placed on the Defendant to verify the transactions with the Plaintiff before paying them without taking into account that the *'instructions'* to the Defendant were scanned copies of e-mails and quotations which did not come from the Plaintiff.**

10. **The Honourable Court erred in law and fact when it found that the Plaintiff had not substantially challenged the evidence that the Defendant had difficulties in contacting her when in fact there was evidence on Record that no attempt was made to contact the Plaintiff at all.**

P.1752

11. **The Honourable Court below erred in law and fact when it found that the two contested transactions bore what clearly appeared to be the Plaintiff's signature.**

12. **The Honourable Court erred in law and fact when it totally disregarded the evidence of the Plaintiff's witnesses without giving reasons for doing so and believed instead that of the Defendant's witnesses.**

13. **The Honourable Court erred in law and fact when it held that the Defendant were [was] not negligent without taking into account the breaches in procedures and regulation attendant to the two transactions.**

14. **The Honourable Court erred in law and fact when it failed to appreciate that it was in fact the Defendant that were [was] responsible for the introduction of e-mail transmission of instructions in relation to the Plaintiff's account with neither her knowledge nor consent.**

15. **Any additional grounds that the Appellant may herein after file."**

Both the appellant and the respondent filed their respective Heads of Argument to support the positions which they had taken in the appeal. We now turn to examine those grounds and the arguments relating thereto.

The appellant's first ground of appeal attacks the trial court's finding that the appellant had developed a pattern in her dealings

with the respondent whereby she used her Personal Secretary as the conduit for sending instructions to the respondent without also finding as a fact, that the appellant had established a pattern whereby all instructions relating to foreign transactions had to be verified with the appellant.

Counsel for the appellant contended under this ground that evidence was placed before the trial court which suggested that an established pattern of dealings existed between the respondent and the appellant whereby transactions on the appellant's account number 0100000495014 could only be honoured by the respondent after the relevant instructions given by facsimile or delivered to the respondent have been verified by telephone. According to the appellant's Counsel, this would be the case even where the instructions by the appellant bore her original signature and irrespective of how the instructions would have arisen. Counsel further argued that the other witnesses who had testified on the appellant's behalf in the court below also confirmed that the appellant had to personally verify, by telephone, any payment out of her subject bank account.

With regard to foreign currency transactions, the appellant's Counsel contended that a totally different procedure was employed and that that procedure did not even involve Ms. Monde Konoso, the appellant's Personal Secretary. Counsel argued in this regard that foreign currency remittances required the use of a bank Standard Form called the *'Foreign Currency Transaction Form'* which had to be personally signed by the appellant, adding that all foreign currency remittances were evidenced by a 'Foreign Currency Transmission Transcript' which would be furnished to the remitter once the foreign funds have been successfully remitted abroad. Counsel for the appellant concluded his arguments around the first ground of appeal by contending that the first finding of fact by the trial Judge ought to be disturbed by reason of the fact that:

> **"On a proper view of the evidence, the trial Judge could not have arrived at a finding of fact to the effect that the appellant used her Personal Secretary as a conduit for sending foreign currency transaction authorisations to the respondent [and that] no trial court acting correctly could have reasonably made those findings."**

P.1755

According to Counsel for the appellant, unchallenged evidence was deployed before the trial court which suggested that at no point in time did the appellant involve her Personal Secretary to transmit the appellant's foreign currency instructions. In advancing the foregoing arguments, Counsel for the appellant relied upon our decision in **Wilson Zulu v. Avondale Housing Project**[1].

The appellant's Counsel then moved on to the second and third grounds of appeal which he argued together.

The gist of Counsel's arguments around these two grounds was that the trial court erred when it declined to entertain an attempt by the appellant to challenge the instructions relating to the transfers involving the USD40,000.00 and the USD89,800.00. According to Counsel, the appellant had, in her pleadings, challenged the authenticity of the e-mails, quotations and letters which suggested that she had authorized the transactions relating to the transfers of the amounts just mentioned. Counsel also added, on the same issue, that the appellant did not author any instructions to any person in connection with the moneys in

question. Counsel accordingly submitted that the lower court erred when it took the position that the appellant should have objected to the documents at discovery stage and that her failure to do so amounted to sleeping on her rights.

Counsel then proceeded to argue grounds 4, 8, 9 and 13 together by contending that the manner in which the total sum of USD129,800.00 was debited from the appellant's bank account and its eventual externalization overseas pointed to negligence on the part of the respondent. According to Counsel, the debiting of the appellant's bank account as aforesaid was done without the appellant's authority and that, in all respects, the respondent acted negligently by failing to verify or confirm the instructions which resulted in the loss of the moneys in question. Counsel also pointed to a number of factors which, it was contended, had surrounded the externalisation of the funds in question adding that many of these factors ought to have put the respondent on inquiry as to the *bonafides* or genuineness of the transactions involving the transfers of the moneys in question. These factors were said to have been:-

(a) The respondent's alleged failure to verify the instructions to transfer the moneys in the light of the amounts which were involved and the fact that the appellant had never involved her personal secretary in transactions which involved externalization of funds.

(b) The fact that no original documentation in the form of letter, quotations and invoices were involved.

(c) The prevalence of internet frauds.

(d) Irregularities around email accounts, quotations and letters.

Counsel then went on to cite, in relation to the above factors, the following passages from our judgment in **Stanbic Bank Zambia Limited v A.S. & C. Enterprises and Others**[2]**:**

> **"A banker is under a statutory duty to act in good faith and without negligence and exercise such care and skill as would be exercised by a reasonable banker ....**
>
> **The test of negligence is whether the transaction of paying ..., coupled with the 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 them to make an enquiry."**

The appellant's Counsel then proceeded to advance the argument that the respondent's failure to verify or confirm the instructions relating to the fund transfers in question with the appellant exposed the respondent to liability even in the absence of negligence. Our decision in **Barclays Bank of Zambia v. Sky**

FM Limited and Geofrey Hambulo[3] was cited to support the above proposition.

Counsel for the appellant's arguments around the 5th ground of appeal revolved around the Bank of Zambia Guidelines to Commercial Banks known as *"Know Your Customer"* or 'KYC' in short.

Counsel recited a number of factors which, he contended, ought to have aroused the respondent's suspicion as to the genuineness of the transactions which had resulted in the appellant losing the funds in question. These factors were described as:

(a) The huge foreign currency which was involved (It was suggested that the appellant had never withdrawn foreign currency moneys in excess of USD10,000.00);

(b) The nature of the payees or beneficiaries of the moneys involved (It was contended that no evidence existed to support the appellant's dealings with suppliers in Hong Kong or Malaysia);

(c) The type of Goods ordered (It was suggested that the appellant had never dealt in the goods for which the payment in question was required);

(d) Documents availed to the respondent (It was contended that the documents in question were illegitimate).

Under ground 6, the appellant's Counsel contended, in effect, that the appellant's decision against calling her former Personal Secretary to testify on her behalf did not warrant the conclusion which the trial court had reached as regards the nature of the inference which, in the apparent view of the court below, the omission necessarily attracted.

As to ground 7, Counsel's simple and short argument was to the effect that the bank account which had been the subject of the fund transfers in question was a personal one and was only operated by the appellant. Counsel accordingly faulted the trial court for having taken the position that the appellant had involved her Personal Secretary in the operation of the bank account in question.

In his penultimate arguments, Counsel for the appellant argued grounds 10, 11 and 12 together.

Counsel's arguments around these three grounds were of the nature of an attack upon the trial court's evaluation of the evidence which had been deployed before that court on behalf of the appellant. The appellant's Counsel contended that the trial court glossed over or unfairly disregarded vital evidence which had been placed before that court on behalf of the appellant while according undue weight and attention to the evidence which had been marshalled on behalf of the respondent. Counsel went on to assert that the trial court did not attach due weight to the claim or allegation by the respondent's witnesses that the appellant was unavailable or uncontactable when they tried to contact her in connection with the fund transfers in question. According to Counsel, the evidence by the respondent's witnesses relating to their attempts to confirm the transfer instructions was simply unbelievable and ought not to have been believed by the court below. The appellant's counsel also complained that, quite aside from believing the respondent's allegedly porous evidence, the trial court glossed over or disbelieved what he described as *"the overwhelming evidence of all the appellant's witnesses on all material allegations."*

In the view which was taken by the appellant's Counsel, the court below should not have believed what he described as the 'misleading' evidence which suggested that the appellant had changed her mode of transmitting bank transfer instructions from facsimile to email. According to Counsel, the trial court generally erred when it chose to believe the evidence which had been tendered on behalf of the respondent at the expense of the evidence which had been proffered on behalf of the appellant and without assigning reasons for its preference.

The appellant's Counsel also attacked the trial court's judgment on the alleged basis that the court had made questionable findings of fact. In particular, Counsel criticized the trial court's reliance on documents which, in his view, only "*appeared*" to bear the appellant's signature and added that the court had assumed the role of a handwriting expert while remaining the trier of fact. In the view of Counsel for the appellant, the trial court erred and misdirected itself in the manner it handled or evaluated the evidence which was placed before that court.

P.1762

Counsel for the appellant's arguments around the last ground of appeal (No. 14) attacked the trial court's alleged failure to appreciate that it was the respondent which had been responsible for the introduction of email transmission of instructions relative to the plaintiff's bank account and without the knowledge or consent of the appellant.

According to counsel for the appellant, the transmission of the appellant's instructions to the bank was effected via facsimile and that the subsequent substitution of this mode of communication with electronic mail was the respondent's initiative. In this regard, Counsel contended that it was the respondent which had effectively altered the manner of transmitting the appellant's instructions relative to the operation of the appellant's bank account.

Learned Counsel for the appellant concluded his arguments by reiterating that the respondent was negligent in the way it had handled the transactions which had resulted in the loss of the huge sums of money in question by the appellant. Counsel accordingly invited us to reverse the judgment of the court below without more

or, in the alternative, that we set aside the judgment of the court below and order the whole matter to be re-tried and that, upon such retrial, the appellant's former Personal Secretary as well as cybercrime or handwriting experts be called to testify and that the cost of such re-trial be borne by the respondent.

At the hearing of the appeal, Mr. Matiya Ndhlovu, the learned counsel for the respondent sought and was granted leave to file the respondent's Heads of Argument out of time. Counsel for the respondent accordingly proceeded to file the respondent's Heads of Argument in court. Arising from this, we also allowed the appellant's counsel liberty to respond to the respondent's Heads of Argument.

Counsel for the respondent opened the respondent's Heads of Argument in response by contending, in response to the appellant's first ground of appeal, that the learned trial judge properly evaluated the evidence which had been placed before him when he found as a fact that the appellant had developed a pattern in her dealings with the respondent whereby she (the appellant) had been using her Personal Secretary as a conduit for the transmission of

instructions to the respondent relating to the appellant's bank accounts.

According to the respondent's counsel, the findings of fact which the trial judge made could not be disturbed by this superior court because the same had been founded on solid ground and were well supported by:

(a) Unimpeached oral testimony by the respondent's witness;
(b) Correspondence in the form of emails; and
(c) The appellant's own oral evidence in terms of which she failed to distance herself from the different signatures which appeared on the appellant's various instructions to the respondent.

The respondent's counsel further contended that a clear principal and agent relationship did exist between the appellant and Monde Konoso, her Personal Secretary and that the appellant's instructions to the respondent were transmitted via this agent who possessed ostensible authority to act on behalf of the appellant.

According to the respondent's counsel, all the appellant's instructions from September, 2014 to February, 2015 were of the nature of letters which would have been signed by the appellant

giving the respondent authority to debit the appellant's bank account. These letters, according to counsel, were scanned and sent as email attachments from the appellant's Personal Secretary's email account.

The respondent's counsel then went on to explain the legal status of Monde Konoso in relation to the appellant by quoting the learned authors of *Bowstead and Reynolds on Agency* who have put the matter thus (at para. 8-013):

> **"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."**

The same authors were quoted as having stated, at paragraph 8-063 of the same book, that:

> **"... 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 respondent's counsel went on to contend that the appellant in this matter had clothed Monde Konoso, her Personal Secretary, with actual and ostensible authority for the purpose of relaying her email instructions to the respondent. According to the respondent's counsel, the appellant had actual or constructive knowledge of the emails in question and their purpose. Counsel specifically cited and referred to an email which was dated 10th February, 2015 and to which was attached a letter of instruction from the appellant to the respondent whereby the former had instructed the latter to pay a sum of K10,000.00 to a designated beneficiary. The said email of 10th February, 2015 had originated from the appellant's Personal Secretary and had contained the following request to the respondent:

> **"And please send me the transaction copy of the transfer of 89,800.00 US$ to Hong Kong."**

According to the respondent's counsel, the latter part of the appellant's Personal Secretary's email of 10th February, 2015 which contained the statement which we have just quoted above "... *erased all doubts that the instructions for the transfer of the US$40,000.00 and US$89,800.00 had originated from the appellant*

acting by her agent in the same manner that all her other previous instructions to the respondent had been arising."

In relation to grounds 2 and 3 of the appeal, counsel for the respondent contended that the trial judge did not err when he accepted documents in the then defendant (now respondent)'s bundle of documents in respect of the transfer of the US$40,000.00 and US$89,800.00. According to the respondent's counsel, the documents which the appellant had belatedly targeted for his attack were available at discovery and had been produced during the trial of the matter and had been specifically referred to in the respondent's witness statement and yet no objection was raised by counsel for the appellant. Under those circumstances, counsel submitted that grounds 2 and 3 of the appeal were devoid of merit.

With regard to grounds 4, 8, 9 and 13, counsel for the respondent contended that the trial judge was on firm ground when he adjudged that the respondent was not negligent in effecting the payments of the US$40,000.00 and US$89,800.00 from the appellant's bank account. To support this contention, the

respondent's counsel cited our decision in **Indo-Zambia Bank Limited v. Lusaka Chemist Limited**[4] where we held that:

> **"The test of negligence is whether the transaction of paying on any given cheque was so out of the ordinary course that it ought to have caused doubts in the banker's mind and caused them to make an inquiry."**

According to the respondent's counsel, the learned trial judge had properly applied the test which we enunciated in the ***Indo-Zambia Bank[4] case*** when he considered the documents and email communication which had been involved in the US$40,000.00 and US$89,800.00 fund transfers. Counsel further contended that the trial judge had correctly identified a pattern which had emerged regarding the appellant's dealings with the respondent.

The respondent's counsel further argued that there was no question of the respondent having acted negligently. In this regard, counsel argued that the standard of care which is expected of a banker is no more than the ordinary standard adding that a bank does not scrutinise payment instructions like forensic detectives. To support this proposition, the respondent's counsel cited a

statement by Lord Dunedin who said, in the case of **Taxation Commissioners v. English Scottish and Australian Bank**[5], that:

> **"... a bank cannot be held liable merely because they have not subjected an account to microscopic examination."**

According to the learned counsel for the respondent, the payment, by the respondent, of the US$40,000.00 and US$89,800.00 in the circumstances which gave rise to this matter was not anything out of the ordinary course which ought to have aroused doubt in the mind of the respondent's agents or servants so as to put them on inquiry.

With regard to the fourth ground of appeal, counsel for the respondent argued that when the respondent effected payment of the US$40,000.00 and US$89,800.00, it did so on the basis of the appellant's mandate. This mandate entailed honouring instructions which bore the sole signature of the appellant. To support this position, the respondent's counsel quoted the following passage from *Paget's Law of Banking* at page 483:

> **"A bank which acts in accordance with its mandate is duly authorised to debit its customer's account."**

According to learned counsel, when the respondent debited the appellant's bank account in respect of the US$40,000.00 and US$89,800.00, it did so within the mandate which had been availed to it by the appellant. Learned counsel for the respondent argued in this regard that the instructions relating to the payment of the US$40,000.00 and US$89,800.00 were duly given under the signature of the appellant.

Secondly, the instructions in question were given to the respondent by the appellant in the same manner that she had been giving her previous instructions. Under those circumstances, counsel for the respondent contended, the respondent was obliged to follow and act on the appellant's signed instructions as long as her bank account was funded or had the requisite funds.

Counsel for the respondent further contended that if anything had arisen which had the effect of altering or affecting or interfering with the mandate of the appellant which the respondent held such as having the email account which was being used to transmit instructions to the respondent hacked, it was the duty of the

appellant to notify the respondent accordingly. In the absence of such notification, the respondent remained at liberty and even obliged to follow instructions which appeared to have been given by the appellant herself.

In response to grounds 5, 6, 10, 11 and 12, counsel for the respondent contended that the learned trial judge was on firm ground and properly evaluated the evidence which had been placed before him when he found, as a fact, that there was nothing in the manner that the instructions for the payment of US$40,000.00 and US$89,800.00 that departed from the pattern which had been established vis-a-vis the operation of the appellant's bank account.

The respondent's counsel contended, by way of speaking to the cited grounds, that sufficient evidence had been placed before the trial court which left no doubt that the respondent had been instructed by the appellant acting by her agent. Counsel further contended that there was also no doubt that the appellant's instructions to the respondent were relayed as scanned attachments to her agent's email and that the foregoing constituted a pattern that had been established in relation to the giving of

instructions regarding transactions on the appellant's bank account with the respondent.

Counsel for the respondent also supported the learned trial judge's conclusion that the signature or instructions from the appellant were consistent with her previous instructions and that there had been no fraud or forgery. Counsel concluded on this point by positing that the question of fraud or forgery could not arise because it had not even been pleaded.

The respondent's Heads of Argument in response to the appellant's Heads of Argument attracted arguments in reply which were filed on behalf of the appellant on 20th June, 2017.

In reply to the respondent's first argument in response, counsel for the appellant contended that, contrary to the position which the respondent had adopted in its arguments, the transactions which had involved the US$40,000.00 and US$89,800.00 on the appellant's bank account in question were so out of the ordinary from the usual transactions in which the appellant's Personal Secretary was instructed to merely transmit

the appellant's instructions. It was contended on behalf of the appellant in this regard that there was no occasion over the period that the appellant had been transacting with the respondent that the former had dealt with middlemen to order goods or to transact in foreign currency on her account with the respondent. According to the appellant's counsel, the appellant did not have any dealings with the foreign companies which had been the designated payees or beneficiaries of the US$40,000.00 and US$89,800.00 which had been paid out of the appellant's bank account. Counsel also refuted the suggestion that Monde Konoso, the appellant's Personal Secretary at the material time, had been acting as the appellant's agent in connection with the US Dollar transactions in question.

Counsel for the appellant went on to canvass arguments around a principle of the law of agency known as agency of necessity which, according to learned counsel, had been suggested by the respondent's counsel in their arguments as having arisen between the appellant and the respondent following the latter's

failure to communicate with the former over the US Dollar payments in question.

Counsel also discounted the existence of any agency relationship as between the appellant and Monde Konoso and went on to contend that the respondent had acted negligently when it allowed the funds in question to be paid out in the manner which we earlier described. In the view of the appellant's counsel, the respondent should have been put on inquiry when it was faced with a foreign currency remittance instruction involving a huge sum of money.

To support his contention, counsel for the appellant referred us to the following passage which he drew from a text entitled *Ellinger's Modern Banking Law, 4th Edition* which was based on the English Case of **Lloyd's Bank Ltd. v. Savory & Co.**[6] where the court held that:

> **"The bank had failed to discharge its duty to act without negligence ... [when it failed] to protect [itself] and others against fraud."**

According to counsel for the appellant, one of the ways in which banks help to prevent frauds being perpetrated on their

customer's bank accounts is the practice of verifying a customer's written instructions.

In the context of this matter, counsel for the appellant contended that the respondent neglected to verify the payment in question resulting in the appellant losing a colossal amount of money.

Counsel for the appellant also discounted the contention by the respondent's counsel that bank employees do not operate like forensic detectives by contending that although bank officials do not operate like forensic detectives, they do operate under a very high duty of care owing to the nature of their work which involves handling huge sums of money on behalf of bank customers.

The appellant's counsel then proceeded to cite a passage from our judgment in **Stanbic Bank Zambia Ltd. v. A.S. & C. Enterprises & Others**[2], which was couched in the following terms:

> **"Under Section 1(a) of the Cheques Act, Cap. 42, [a] banker is under a statutory duty to act in good faith and without negligence and [to] exercise such care and skill as would be exercised by a reasonable banker ..." (at p. 283)**

According to the appellant's counsel, the respondent's officials had acted negligently in the manner they had handled the payment of the moneys in question out of the appellant's bank account by not verifying the payment with the appellant. It was learned counsel's contention that had the respondent's officials verified the payments in question, the fraud which led to the loss of the appellant's money would have been prevented. Counsel closed his arguments in reply by reiterating the arguments which he had canvassed in the appellant's primary arguments.

We are greatly indebted to counsel for both parties for their detailed and undoubtedly clear arguments.

Before we begin to interrogate the grounds of appeal as set out above in the context of the judgment now being assailed, we wish to reiterate, once again, the concerns which we had expressed in **Standard Chartered Bank Zambia PLC v. Kasote Singogo**[7] and which we subsequently articulated in **Emmanuel Mponda v. Mwansa Christopher Mulenga & Two Others**[8] in relation to Counsel's never waning appetite for that otherwise fictitious

ground which, in the context of the present appeal, is represented by the purported ground numbered '15'.

As we emphasised in **Emmanuel Mponda[8],** a 'ground' such as what 'ground' 15 in the memorandum of appeal relating to this appeal or any similarly worded ground represents is not a valid ground of appeal. In **Emmanuel Mponda[8]** we said, at pages J15-16 that:

> **"... the manner in which FORM CIV/3 which is referred to in both rules 49(8) and 58(2) of the Supreme Court Rules is structured does not envisage, let alone, suggest that an appellant or prospective appellant would, at the time of preparing the Memorandum of Appeal, defer the task of setting out their grounds of appeal in the memorandum of appeal to a future date..."**

Indeed, even a purported ground such as *"any additional grounds that the appellant may hereinafter file"* as exemplified in 'ground' 15 does not represent a valid ground of appeal. Perhaps, we should also reiterate another point which we made in **Emmanuel Mponda[8]**, namely that, the Supreme Court Act, via its Third Schedule, envisages that all the grounds on which an appeal would have been founded must be specified in the memorandum

of appeal at the time of its preparation. Indeed, an appellant who desires to add fresh or additional grounds of appeal beyond those that will have been specified in the memorandum of appeal as filed must seek the leave of the court to do so.

Another troubling feature which characterised this appeal and which feature we have lately remonstrated against is the propensity, on the part of appealing counsel, for needlessly excessive and superfluous 'grounds' of appeal. Perhaps, the point can immediately be made that, as things turn out, the bulk of excessively superfluous grounds end up being argued together with the more legitimate or viable grounds. This, in itself, suggests that, with a little imagination and effort, the grounds which end up being combined and argued together could well have lent themselves to fewer or even a single ground. As we suggested in **Emmanuel Mponda**[8], conjuring up an avalanche of grounds of appeal is never necessarily an indicator of a solid or meritorious appeal. Indeed, in some cases, conjuring up an excessive number of grounds of appeal aside from being needlessly time-consuming, only serves to

obfuscate the real issues which the court is required to determine or pronounce itself upon.

We hope, as we now turn to consider the main business at hand, that counsel for appellants will heed our remonstrations and embrace thrift and frugality as they set about to formulate their grounds of appeal.

Although, as we were momentarily remonstrating, the appellant's counsel deployed 14 'grounds' of appeal before us in this appeal, a careful and patient examination of those grounds revealed that their real substance and common denominator pointed to one broad or overarching issue, namely, whether or not the respondent acted negligently when it authorised the payment of the appellant's moneys in question in the manner we described it early on in this judgment. Accordingly and, in the view that we have taken, the fate of this appeal will, depend entirely on how we shall resolve the overarching issue of whether or not the loss of the appellant's money in the circumstances which we earlier unravelled in this judgment was attributable to the respondent's negligence as the appellant fervently argued.

Before we turn to consider the individual grounds which were canvassed in this appeal, we propose to set out the legal principles which we consider germane to the overarching issue we have identified above.

In **Stanbic Bank Zambia Limited v. A.S. & C. Enterprises**[2] we said:

> **"A banker is under a statutory duty to act in good faith and without negligence and to exercise such care and skill as would be exercised by a reasonable banker...**
>
> **The test of negligence is whether the transaction of paying ... coupled with the 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 them to make an enquiry."**

And in **Barclays Bank of Zambia v. Sky FM Limited & Geofrey Hambulo**[3] we said:

> **"The basis of a bank's liability where it has paid on a forged instrument is not negligence but because money has been paid out without the authority of the customer."**

Peter G. Watts, the learned author/editor of *Bowstead and Reynold's on Agency* has written, at paragraph 8-013 as follows:

P.1781

> **"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 anyone dealing with him as an agent on the faith of 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."**

In the context of banking law and practice, the question whether or not a bank had the authority of its customer to adopt a particular course of action such as to make a payment out of the customer's account is a critical one indeed. This question of authority is, in turn, linked to the notion of a bank's mandate. According to *Paget's Law of Banking:*

> **"The mandate embodies an agreement which authorises the bank to pay if given instructions in accordance with its terms... [A] bank which acts in accordance with the mandate is duly authorised. But it does not follow that a bank which acts contrary to the mandate is bound to be unauthorised." (at p.340)**

Penn, Shea and Arora, the learned authors of *The Law Relating to Domestic Banking* have also stated that both a bank and its customer are under an equal obligation to prevent an unauthorised payment being made out of a customer's account or

an authorised payment being altered in an unauthorised manner. These authors have put the matter thus:

> **"In order to avoid loss by fraud adequate steps will have to be taken to prevent an unauthorised payment being made, or alternatively, an authorised payment being made in an unauthorised manner. The question of whether it is the bank or its customer who is obliged to take steps to prevent fraud, will undoubtedly depend on the terms of the contractual agreement between the parties, but also on which party is in a position to take active steps to prevent or deter fraud. Thus, for example, the bank will be responsible for the fraudulent conduct of its employees..."**

Having set out the core legal principles that we consider relevant to the resolution of the issues raised in this appeal, we now propose to examine the grounds of appeal as argued in this appeal.

The first ground of appeal attacks the lower court's finding which suggested that the appellant (plaintiff below) had established a pattern regarding how she had been operating her bank accounts. According to that finding, the appellant had been transmitting her written and signed instructions to the respondent via her Personal Secretary by the name of Monde Konoso who, in turn, relayed such instructions to the respondent either by

facsimile or as attachments to an email from her email account. According to the appellant, the finding of the trial court was erroneous because the court failed to make another finding in respect of foreign transactions which was different and entailed having all transmitted instructions personally verified by the appellant.

We have examined the two sets of opposing arguments around the first ground of appeal and have not found any concrete evidence which supports what the appellant projects in the first ground of appeal. In particular, we are at pains to accept the suggestion which is implied in the first ground to the effect that the mandate which the respondent held on account of local transactions on her bank account was different from that which was applicable to foreign transactions. Indeed, the fact of the appellant's Personal Secretary having served the role of the appellant's agent and conduit for the transmission of the appellant's instructions to the respondent was never, as it was faintly argued on the appellant's behalf, segregated so as to create a dichotomy between local and foreign transactions as contended

by the appellant. As our earlier discussion of the relevant legal principles demonstrated, the key question which the appeal raised was whether or not the appeliant's Personal Secretary had actual or ostensible authority to bind her principal, namely, the appellant?

It cannot be doubted or questioned that the appellant had, so the lower Court found, over a period of time, ***"represented" or "permitted it to be represented"*** that, Monde Konoso, her Personal Secretary, *"had authority to act"* on her (the appellant's) behalf. Indeed, it was the appellant herself who had introduced Monde Konoso to the respondent for the purpose of undertaking banking transactions on her (the appellant's behalf). The appellant's Personal Secretary was, at all material times and as the Court below unassailably found, the key player in all the appellant's bank transactions, not least the ones in issue. Under those circumstances, the appellant had to be bound by her secretary's acts *"even [if she] had no such authority"* as Peter G. Watts, the learned author of *Bowstead and Reynold's on Agency* suggested.

P.1785

Quite aside from the preceding discourse, and without meaning to discount counsel for the respondent's valid objection to counsel for the appellant's arguments pointing to fraud, we would call to mind the observations by Penn, Shea and Arora, the learned authors of *The Law relating to Domestic Banking*, who have noted that it is the responsibility of both the customer and their banker to avoid loss through fraud by taking steps to prevent or deter fraud even by the customer or banker's employees or agents. In this regard, Penn, Shea and Arora's observation, in the context of a bank and its employees, that "...***the bank will be responsible for the fraudulent conduct of its employees...***" is most instructive indeed.

It stands to reason, therefore, that, having regard to the relationship which had subsisted between the appellant and her Personal Secretary vis-a-vis the former's bank transactions, the appellant remained accountable for her Personal Secretary's dealings in her (the appellant's) name.

Beyond the foregoing, there was nothing of the nature of evidence on the record which suggested that the mandate (as

defined above) which the respondent held in respect of the appellant's bank account in question was violated or not followed by the respondent.

As the learned counsel for the respondent correctly observed, the instructions which led to the payment of the USD 40, 000.00 and USD 89,800.00 appear to have been duly given under the appellant's signature. The instructions were given by the appellant to the respondent in the same manner that she had been giving her previous instructions. To borrow the trial Judge's words, the appellant's instructions relating to the payment of the USD amounts mentioned above had "*followed the same pattern*".

Furthermore, it can scarcely be doubted that the appellant's arguments around this ground did not satisfy or come anywhere close to satisfying any of the tests (as established in our countless decisions including **Wilson Zulu v. Avondale Housing Project Limited**[1]) which would warrant interference with the findings of fact around which this ground revolves. Lastly (on this ground), on 10th February, 2015, the appellant's Personal Secretary transmitted a letter which had been authored by the appellant and

in which the appellant was instructing the respondent to pay a sum of K10,000 to Mirriam Milambo. In the email to which the said letter of 10th February, 2015 was attached, the appellant' Personal Secretary sought to have the respondent furnish her (ostensibly acting at the behest of the appellant) with the transmission copy relating to the remittance of the US$89,800.00 to Hong Kong. According to counsel for the respondent, this transaction or instruction of 10th February, 2015

> *"...erased all doubts that the instructions for the transfer of the US$40,000.00 and US$89,800.00 had originated from the appellant acting by her agent in the same manner that all her other previous instructions to the respondent had been arising".*

In agreeing with counsel for the respondent with respect to the evidence and submission we have just referred to above, we would add that that piece of evidence had served the crucial purpose of discounting or negativing the appellant's sustained disclaimers and the apparently potent contention that the nature of the transactions and the amounts which were involved ought to have put the respondent on inquiry. Everything considered, the first ground cannot succeed. It stands dismissed.

As to grounds 2 and 3 (which were argued together), the appellant faulted the court below for having rejected what that court deemed to have been the appellant's belated challenge of documents relating to instructions to transfer the USD40,000.00 and USD89,800.00 from the appellant's bank account. The appellant had sought to distance herself from the documents in question and their contents.

As earlier intimated, the trial judge rejected the appellant's challenge on the basis that it was coming too late in the day. The learned judge reasoned that the appellant had the opportunity to disown those documents at discovery stage but failed or neglected to do so.

We are inclined to agree with both the reasoning as well as the conclusion of the learned trial judge. The appellant, as the trial judge correctly observed, had the opportunity to object to the production and admission in evidence of the documents which she was now belatedly challenging both at discovery and at trial. For the avoidance of doubt, our examination of the record revealed that when counsel for the appellant was invited to indicate his position

vi-a-vis the then defendant's desire to have the trial court admit the documents which were contained in its bundle of documents, his response was that he did not object. To cut the story short, grounds two and three cannot succeed and stand dismissed.

The gist or essence of grounds 4, 8, 9 and 13 which were also argued together was that the lower court fell in error when it not only discount negligence on the part of the respondent, but proceeded to project, as unassailable, the role that the appellant's Personal Secretary played vis-à-vis the appellant's bank transactions.

For the reasons which we shortly adumbrated in the context of grounds 2 and 3, we really cannot fault the reasoning of the court below on the issues on which he is now being criticised. Like the trial judge, we found it rather odd and disingenuous that not only did the appellant opt not to call her Personal Secretary who was at the heart of the bank transactions which were imputed to the appellant but even objected to the respondent's formal application to have her testify. In all seriousness, grounds 4, 8, 9

and 13 cannot succeed particularly in the light of our reflections around ground 1. Accordingly, we dismiss each one of them.

The appellant's contention under ground 5 does appear on its face and viewed in isolation from the totality of the factual matrix involved to possess sufficient force to sway a court in the manner canvassed by counsel for the appellant. However, viewed in the context of the law which we endeavoured to summarise earlier in this judgment, it is hardly difficult to see through the arguments put forward by the appellant under this ground which, above all else, revolve around findings of fact. As we said in the context of the first ground of appeal, the appellant's exertions fell far short of satisfying the tests which would have warranted disturbing the trial court's findings of fact. This ground accordingly fails.

As to ground 6, we really find it pointless to say more than repeating the observations we have already made in relation to the issue which this ground raises and how the trial court handled it. Indeed, we would reiterate that the appellant's decision not only against calling her former Personal Secretary as a witness but even going so far as to formally object to having her testify in the

proceedings was rather odd and strange given the role which the Personal Secretary had been playing in connection with the bank transactions which lie at the heart of this matter. Indeed, we would have been surprised if the trial judge had not taken the natural and obvious view which he took. The ground must suffer the same fate as did the one preceding it.

Turning to ground 7, we find the appellant's argument around this ground truly disappointing. Is the appellant seriously contending, via this ground, that her Personal Secretary's role in relation to her bank transactions was limited to that of a messenger; that of delivering letters to the respondent? Is this argument consistent with the evidence which was deployed before the trial court, even by the appellant herself?

We have noted from the record and are able to confirm that although, in the evidence which the appellant gave in cross-examination, she played down the role which Monde Konoso, her Personal Secretary, was playing vis-à-vis her bank transactions to the extent of suggesting that Monde Konoso was a mere "messenger" who just transmitted her instructions, Monde's role

went beyond that. As we understood the evidence on record, Monde Konoso was what, in banking nomenclature, is termed as the appellant's "*known agent*" and did, at the material time and, apparently at the behest of the appellant, interact a lot more with the respondent or its agents or servants than did the appellant herself. Indeed, not only did Monde Konoso transmit, via facsimile, the appellant's instructions to the respondent, she even generated emails from her own email account for the purpose of transmitting the appellant's instructions to the respondent.

Indeed, there were also some occasions, according to the evidence which was deployed before the trial court, when Monde Konoso would use the appellant's email account to transmit the appellant's instructions to the respondent. To illustrate the point we are making, when, on being cross-examined, the appellant was asked as to whether or not Monde Konoso had been using her (the appellant's) email account without her authority, the following exchange ensued between the appellant and the respondent's counsel:

P.1793

APPELLANT: **"I cannot remember."**

COUNSEL: **"If we call Monde as a witness she will say exactly what you are saying (namely) that she used it without your authority, is that what you are saying?"**

APPELLANT: **"I didn't say without my authority. I said I cannot remember whether or not I gave her my authority. I would like to mention that my email address I don't block it. So, anyone can use it. Sometimes if I am in a meeting I used to leave it on the table at the Ministry and it is possible she could use it if she had problems with the office email."**

In the light of the above evidence, can one really take the appellant's disclaimer which is evident in ground 7 seriously? Speaking for ourselves, we cannot. Accordingly, we outrightly dismiss ground 7.

With regard to grounds 10, 11 and 12 which were also argued together, it does seem to us that a common thread which runs through each one of these grounds is that they represented findings of fact by the learned trial judge who had the opportunity and benefit of seeing and hearing the witnesses testify. The trial

court reached its conclusions on the basis of what it saw and heard. In our recent judgment in **Teddy Puta v. Ambindwire Friday**[9], we made the observation that where evidence is contentious, it is the duty of the trial court to resolve the matter on the basis of the credibility of the witnesses.

As we garnered from the record, the gist of the evidence which was placed before the trial court - so far as it related to ground 10- was not merely that the respondent *"had difficulties in contacting'* the appellant. Rather, the picture which seems to have emerged from the totality of the evidence around this issue was that, even when the respondent's agents managed to get through to the appellant, the former would be rebuffed by the latter ostensibly because she was busy and did not want to be disturbed.

We are, indeed, alive to the fact that a trial court should undertake a balanced evaluation of the evidence which is deployed before it on behalf of the contesting parties. We would also re-affirm that whenever a trial court is confronted with conflicting evidence on contested facts it should reveal its mind or give reasons

as to why it prefers a particular version of the evidence as against the other.

In the context of this appeal, it was contended on behalf of the appellant that the learned trial judge took a preference for the respondent's evidence without setting out his reasons for such preference.

Although the criticism around the trial judge's evidential preference may well be legitimate if viewed in isolation from the trial judge's global discourse, the view which we have taken is that the conclusions which the learned trial judge reached on all the material elements of the case were spot-on. In any case, we did observe in **Musa Zimba (suing as the administrator of the estate of the late Gibson Roberts Zimba) v. Lucy Zimba & Two Others**[10] that:

> **"Although the learned trial judge did not follow the right procedure, we uphold his decision because had he properly directed himself, he could still have arrived at the same decision."**

More importantly, grounds 10, 11 and 12 are bound to face the same fate as did the preceding grounds because we are satisfied

that the findings of fact around which these grounds revolve do not meet the tests which we formulated in **Wilson Zulu v. Avondale Housing Project Limited**[1], in order to warrant this court's interference with the trial court's findings of fact. Needless to say, we affirm that the trial court's findings were well and amply supported by the evidence which had been deployed before the trial court.

As to the 14th ground of appeal, we find, with due respect to counsel, this ground to be really pedestrian and wholly peripheral. Indeed, we, yet again, find it totally disingenuous that the appellant should be seeking to distance herself from the use of electronic mail for the purpose of transmitting her instructions to the respondent when, as we demonstrated early on in this judgment, the appellant had admitted to having gone to the extent of allowing her Personal Secretary to use her email account to transmit her instructions to the respondent.

The net result of this appeal is that it has failed on all the grounds and, accordingly, stands dismissed. The costs are to follow this event and should be taxed if not agreed.

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DR. M. MALILA, SC
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

.....

M. MUSONDA, SC
SUPREME COURT JUDGE