SELECTED JUDGMENT NO. 10 OF 2018

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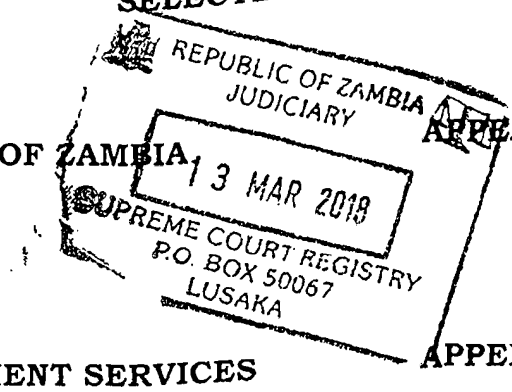

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 37/2017
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

SAVENDA MANAGEMENT SERVICES **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

Coram : **Hamaundu, Musonda and Mutuna, JJS**

On 6th March 2018 and 13th March 2018

For the Appellant : **Mr. M. Mutemwa SC of Messrs Mutemwa Chambers; Mr. A. Musukwa of Messrs Andrew Musukwa and Co.; Mr. K. Nchito of Messrs Kapungwe Nchito Legal Practitioners; and, Mr. M. Sinyangwe of Messrs Wila Mutofwe and Co.**

For the Respondent : **Mr. E.S. Silwamba SC of Messrs Eric Silwamba Jalasi and Linyama; Ms A.D. Theotis of Mesdame Theotis Mataka and Sampa; and Mrs. D. Tembwe and Mr. W. Luwabelwa - In house counsel**

J U D G M E N T

Mutuna, JS. delivered the judgment of the court.

Cases referred to:

1) **Donogue v Stevenson (1932) AC 562**
2) **Blyth v Birmingham Waterworks Co (1856) 11 Exch 781**

3) **Turner v Royal Bank of Scotland (1999) 2 ALL ER (Comm.)**
4) **Phillips v Copping (1935) 1KB 15**
5) **Re a debtor v Printline (offset) Ltd (1992) 2 ALL ER 664**
6) **Tournier v National Provincial and Union Bank of England (1924) 1 KB62**
7) **The Mediana (1900) AC 113**
8) **In Beaument v Geathead, (1846) 2 CB 494**
9) **Stanbic Bank Zambia Limited v A.S.E. Enterprises and others (2008) 1 ZR 259**
10) **Yula Enterprises Limited v Muchabani Atra (A/T Kamara General Dealers) SCZ No. 23 of 2008**
11) **R v Pensions Ombudsman and others, ex parte Legal & General Assurance Society Ltd (2003) 1 ALL ER Comm**
12) **Edith Tshabalala v Attorney General (1999) ZR 139**
13) **The Minister of Information and Broadcasting v Fanwell Chembo and others SCZ Judgment No. 11 of 2007**
14) **Attorney General v Million Juma (1984) ZR 1**
15) **Daphne Alves v The Attorney General of the Virgin Islands BV1HCV 2007/0306**
16) **Attorney General v Chipango (1971) ZR 1**
17) **Buchman v The Attorney General (1993/1994) ZR 131**
18) **Mususu Kalenga Building Ltd and another v Richman's money Lendors ENT (1999) ZR 27**
19) Hedley Byrne & Co. Ltd v Heller & Partners Ltd (1968) 2 ALL ER, 575
20) **Robinson v National Bank of Scotland SCZ Judgment No. 10 of 1992**
21) **Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited**
22) **Mhango v Ngulube and others (1983) ZR 6**
23) **JZ Car Hire Limited v Chala Scirocco and another (2002) ZR**

24) **Financial Bank Zambia Limited and Rajan Mahtani v Simataa Simataa SCZ judgment No. 21 of 2017**

25) **David Chiyengele and others v Scaw Limited SCZ judgment No. 2 of 2017**

26) **Emmanuel Mpundu v Mwansa Christopher Mulenga, Christopher Mungoya and the Attorney General SCZ Judgment No. 42 of 2007**

Legislation referred to:

1) **Banking and Financial Services Act, Cap 387 of the Laws of Zambia**
2) **Credit Reference Services (Licensing) Guidelines, 2006**
3) **Credit Data (Privacy) Code**
4) **Court of Appeal Act, No. 7 of 2016**
5) **Constitution (as amended) Act No. 2 of 2016**
6) **Arbitration Act No. 19 of 2000**
7) **Evidence (Bankers') Books Act, Cap 44**
8) **Court of Appeal Act No. 7 of 2016**

Other works referred to:

1) **Banking Litigation by David Warne and Nicholas Elliott QC General Editors, Sweet and Maxwell, London 2005**
2) **A Practical Approach to Arbitration Law, Andrew and Keren Tweendle**
3) **Paget's Banking Law, 13th Edition, (Reed Elservier (UK) Ltd 2007)**
4) **Toulson R.G. and Phipps C.M. Confidentiality (2nd Ed, London, Sweet and Maxwell 2006)**

5) **Granton Ross Principles of Banking Law, 2nd Edition Oxford University Press 2002**
6) **Chitty on Contracts Vol 1 General Principles Thirtieth Edition London Sweet and Maxwell 2008**
7) **Atkin's Court Forms, second edition Volume 32, 1996 issue, managing editor Inarid Persadsigh, Butterworths, London.**
8) **Writing of Judgments: A Practical Guide For Courts and Tribunals by Dato Syed Ahmed Ibid, 2011 edition, Lexis Nexis and HUM Press**

Introduction

1 The concept of credit referencing was fairly alien to the Zambian banking and financial sector until the year 2006. It entails the providing of customers' credit data to a credit reference agency by a credit provider and the search on such credit data by a credit provider for purposes of evaluating a customer's eligibility for credit.

2 On 30th March 2006 the concept was introduced to the Zambian financial sector by virtue of the ***Credit Reference Services (Licensing) Guidelines*** and the ***Credit Data (Privacy) Code*** (the Code), issued by

the Bank of Zambia. Afterwards, and pursuant to the powers conferred upon it by section 125 of the ***Banking and Financial Services Act,*** Bank of Zambia issued ***The Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive 2008*** (the Directive 2008) and ***Guidance Note No.1 of 2014 - Utilization of the Credit Reporting System*** (the Guidance Note) on 10th December 2008 and 8th January 2014, respectively. These two documents gave directives and guidance on the provision of data to the credit reference agency and the use of such credit data by credit providers.

3 On the other hand, the Code sets out obligations of various credit providers in Zambia in regard to the provision of and resort to credit data with the credit

reference agency and the obligations and rights of credit providers and customers. It is these obligations and rights that are the subject of the contest in this appeal arising from a claim by the Appellant that its rights were infringed by the Respondent when its credit data was provided to a credit reference agency. The contest also considers the effect of the Directive 2008, Guidance Note, ***Code*** and the ***Banking and Financial Services Acts***, in relation to the common law principle of the duty of confidentiality owed by bankers to their customers and the exceptions thereto.

4 We have also considered the dispute in the light of the pleadings and evidence that were deployed before the High Court and the arguments which were canvassed in the Court of Appeal.

5 Last of all, we have considered the provisions relating to a litigant's right of appeal to this Court as the apex Court, in the light of the provisions of the ***Court of Appeal Act*** and the ***Constitution*** of the Republic of Zambia (as amended).

The background to the dispute in this appeal

6 The context in which the dispute arises is that the parties enjoyed a banker and customer relationship as a result of which the Appellant applied for an overdraft in the sum of USD540,000.00 from the Respondent to enable it purchase a printing machine. The security provided by the Appellant to the Respondent was a lease over the printing machine.

7 The monthly repayments on the lease were to be serviced through the Appellant's overdrawn account

with the Respondent, pursuant to which, the Appellant executed a debit order.

8 The Appellant had other credit facilities running with the Respondent.

9 During the life of the lease a problem appeared to have arisen in relation to the Respondent's system, as a result of which the Appellant's instructions in the debit order were being posted to a suspense account instead of the lease account. The Respondent wrote to the Appellant on 23rd April 2009 informing it of this problem and that it had since rectified it by transferring the funds wrongly posted to the suspense account to the lease account. The Respondent also informed the Appellant that despite the transfer of these funds, the Appellant's account was still in arrears in the

sum of USD80,050.34, representing five months' installments.

10 Prior to this, a difference arose as to whether the Appellant was in default of payment on the facilities, which prompted the Respondent to refer the Appellant's credit data to a credit reference agency after it notified the Appellant of the default on 10th October 2008. This did not please the Appellant which, consequently, complained not only to the Respondent, but Bank of Zambia as well.

11 Afterwards, on 3rd December, 2008, in response to a query from Standard Chartered Bank, the Respondent indicated that the Appellant was credit worthy.

12 Despite the differences between the parties, they continued to engage each other in relation to the facilities, and agreed to restructure them in

November 2009. The Appellant also approached other prospective financiers who, in considering its need for funding, checked on its credit data with the credit reference agency in 2010 and onwards.

13 The differences between the Appellant and Respondent in regard to the alleged default by the Appellant escalated after November 2009. The Appellant contended as follows: the default on its account arose from the error in the Respondent's system and, despite the Respondent acknowledging the error it neglected to rectify it but negligently listed it on the credit reference bureau data base; the Respondent continued charging interest on the overdraft facility which resulted in the Appellant defaulting on its undertaking to pay towards the facility for the lease; and that, the Respondent's action of listing it on the credit reference bureau

resulted in loss of funding opportunities because it did not qualify for any business lending.

14 On the other hand, the Respondent contended that the Appellant had breached the lease on account of its default in servicing the monthly installments and declared a dispute which was referred to arbitration. That it informed the Appellant of the default and the consequences thereof, but the Appellant continued to be in default prompting it to refer its credit data to the credit reference bureau, which data was only accessed by the Appellant's intending financiers after the year 2008. In addition, after the arbitration proceedings were concluded, the Respondent was awarded a sum of K7,535,237.96 (or USD1,363,350.49) as moneys due to it as a consequence of the Appellant's default. The Appellant was accordingly ordered by the arbitrator

to settle the said amount, failing which, the Respondent was at liberty to repossess and sell the property pledged as security for the lease.

The Appellant's claim and Respondent's defence before the High Court

15 The Appellant took out an action against the Respondent in the High Court claiming: the sum of K192,500,000.00 as damages for loss of business; an order that it be delisted from the credit reference bureau; damages for loss of business profits; damages for negligence; damages for injury to business reputation; and any other relief the court deemed fit.

16 Essentially, the Appellant anchored its claim on the contention that the Respondent was negligent in listing it on the credit reference bureau; that it

ought not to have done so; and, as a consequence of the said listing, it suffered damage in the form of lost business opportunities.

17 In its defence, the Respondent contended that the default on the Appellant's account was not due to an error in its system but rather the Appellant's failure to consistently service the facility on the lease in accordance with the agreement of the parties. Consequently, it denied that the listing of the Appellant on the credit reference bureau was negligent as the Appellant's default had been established and that it was done in accordance with the provisions of the relevant law.

18 The Respondent contended further that: in any event, the listing of a party on the credit reference bureau, in and of itself, does not preclude it from accessing credit; and, if the default by the Appellant

was attributable to a failure of the Respondent's system, the arbitrator would have found in favor of the Appellant.

Consideration of the matter by the Learned High Court Judge and decision

19 After the Learned High Court Judge heard the evidence and arguments by the two parties, he identified the Appellant's claim as being premised on the tort of negligence stemming from the relief of damages for negligence endorsed on the writ of summons issued against the Respondent. He, therefore, summarized the Appellant's contention as being that the Respondent acted negligently in listing the Appellant on the credit reference agency data base in total disregard of its rights and business reputation which resulted in the Appellant

losing out on funding opportunities. In addition, the Appellant's business reputation was severely injured and lowered.

20 The Learned High Court Judge then considered the Respondent's defence and summarized the Respondent's contentions as being that: the Appellant failed to service the overdraft resulting in default on its part; there was no negligence on its part in the manner it reported the Appellant to the credit reference agency which, in his opinion, was in conformity with the law; and, the Appellant's default was not attributable to an error in the Respondent's system.

21 As a consequence of the foregoing consideration, the Learned High Court Judge found that in order for the Appellant to succeed, it had to prove that: the Respondent owed it a duty of care; it had been guilty

of breach of that duty; and, damage had been caused to the Appellant as a consequence thereof.

22 The Judge referred to the case of ***Donoghue v Stevenson***[1] which he stated enunciated the three principles required to prove negligence aforestated. He also defined who one's neighbour is in accordance with the opinion of Lord Atkins in the case of ***Donogue v Stevenson***[1] and defined negligence in line with the decision in the case of ***Blyth v Birmingham Waterworks Co.***[2]

23 The Judge went on to find that the relationship between the Respondent and Appellant was that of banker and customer/client and as such, a duty of care existed. This, the Judge observed, entailed that the Respondent owed a duty to use reasonable skill and care when providing services to the Appellant

which, subject to certain exceptions, extended to keeping the Appellant's financial affairs confidential.

24 The Learned High Court Judge, concluded by finding that banks, such as the Respondent, in certain circumstances owe private customers a duty to act in good faith, fairly and reasonably, in accordance with extra legal regulations and miscellaneous provisions in, what he termed, Statutory Consumer Protection laws. That it was common cause between the parties that the Respondent owed the Appellant a duty of care.

25 Having set out what he considered to have been the relevant legal principles for the purpose of resolving the dispute, the Judge identified the issue for determination as being, whether or not the Respondent had breached the duty of care it owed to the Appellant as alleged. In answer to the question

posed, the Learned High Court Judge reviewed the evidence and found that the alleged default by the Appellant in servicing the facility arose in October 2008, which coincided with the error in the Respondent's system which occurred in November 2008, as revealed by the letter of 23rd April 2009. This evidence satisfied the Judge that it was the error in the Respondent's system and not the non performing status of the account which caused the default on the Appellant's lease account.

26 The Judge felt fortified in his finding by the fact that the Respondent admitted the error in its system. He, therefore, held that at the time of reporting the Appellant's account to the credit reference agency as delinquent, the Respondent had not conducted adequate investigations to ascertain the real cause of the default on the Appellant's lease

account. That, if the Respondent had done so, it would have discovered the cause of the default as being the error on its system and that the Appellant's account was at the material time not in a non performing status.

27 The Learned High Court Judge sought to ring fence his findings by referring to legal provisions. He referred to clauses 2.6 and 2.7 of the Code which state as follows:

> **"2.6 Before a credit provider provides any credit data to a CRA, it shall have taken reasonably practicable steps to check such data for accuracy. If subsequently the credit provider discovers any inaccuracy in the data which has been provided to the CRA, it shall update such data held in the database of the CRA as soon as possible.**
>
> **2.7 If a credit provider fails to have taken reasonably practicable steps to check the accuracy of the data before providing such data to a CRA, or if it fails to update the data held in the data base of the CRA after discovering such inaccuracy, this will give rise to a presumption of contravention of DPP2 (1)."**

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He explained that DPP2 (1) which is Data Protection Principle, contains similar provisions to clause 2.6 of the Code.

28 The Learned High Court Judge concluded that the data provided to the credit reference agency by the Respondent, as at October 2008, was not accurate because it did not take reasonably practical steps to check the data. The referral decision arose from what the Judge termed, *"automated decision making"*, as a result, the Respondent not only acted carelessly but also negligently. According to the Judge, that was not the end of the matter, because the Respondent's default also extended to its failure to obtain the Appellant's express consent to the reference of its confidential information to the credit reference agency. This, he found, was in line with

section 50 (i) (a) of the ***Banking and Financial Services Act*** which states as follows:

> **"50(i) A financial service provider and every director and employee thereof shall maintain the confidentiality of all confidential information obtained in the course of service to the bank or institution and shall not divulge the same except**
>
> **(a) In accordance with the express consent of the customer or Order of a Court; or**
>
> **(b) Where the interest of the licensee itself requires disclosure;**
>
> **(c) Where the Bank of Zambia, in carrying out its functions under this Act, so requests "**

29 The Learned High Court Judge found that there was no evidence on record nor was any brought to his attention by the Respondent that it had sought and the Appellant expressly consented to the reference of its confidential information to the credit reference agency. He reinforced this position by reference to the English case of ***Turner v Royal Bank of***

Scotland[3] in which the Court of Appeal in England held that the practice of banks giving credit references to other banks could not be justified on the basis of the customer having given his implied consent to the practices and was, on the facts of that case, a breach of contract. In addition, he pointed out that the learned authors of ***Banking Litigation*** referred to the ***Turner*** case when dealing with the topic of credit reference agencies and the Banking Code in England in a passage at page 81 paragraph 2.072 as follows:

> **"Paragraph 13.6 of the Banking Code and paragraph 13.10 of the Business Banking Code restrict the disclosure of information about personal debts to credit reference agencies. This is limited to cases where the customer has fallen behind with payments, the amount is undisputed, no satisfactory proposals for payment have been made following formal demand and the customer has been given 28 days notice of intention to disclose. No other information will be disclosed to credit reference agencies without the customer's consent. Banks should ensure that their contracts with the customers**

incorporate a right to give confidential information to Credit reference agencies as the Banking Code is not a contractual document unless the bank and customer agree that it should be. Paragraph 112 of the Banking Code states that banker's reference will not be provided without the written permission of the customer."

30 The Judge likened the provisions of the Banking Code in England set out in the preceding paragraph to clauses 2.1, 4.1 and 2.3 of the Code. According to the Judge, clause 2.1 states the need for a credit provider to notify a customer that credit data collected from him may be provided to a credit agency, while clause 4.1 emphasizes the fact that the requirement to furnish credit data to a credit reference agency in respect of a defaulting customer by a bank, does not abrogate its duty of confidentiality to the said customer.

31 In regard to clause 2.1 and in particular clause 2.3, the Learned High Court Judge dismissed the

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Respondent's contention that the letter dated 10th October 2008, from the Respondent to the Appellant, was sufficient notice on the grounds that the notification given fell short of the requirement under the clause and made no reference to the credit reference agency.

32 Lastly, the Learned High Court Judge found that clause 2.3 sets out the need for a bank to notify a defaulting customer of the consequences of failure to repay an account that is in default.

33 In making the findings on confidentiality set out in the preceding paragraphs, as well as the need for a customer's consent under section 50 of the ***Banking and Financial Services Act*** and the Code, the Judge acknowledged that the issue of breach of confidentiality was not pleaded by the Appellant in the originating process. He,

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nonetheless, reasoned that he was clothed with jurisdiction to consider it as he was duty bound to consider any breaches of the law regardless of whether they had been pleaded or not. The Judge took solace in the decision in the case of ***Phillips v Copping***[4] in which Scrulton LJ had the following to say at page 15:

> **"It is the duty of the Court when asked to give a Judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the attention of the Court overrides all questions of pleadings including any admission made therein."**

34 The Learned High Court Judge concluded on the issue of liability by finding the Respondent in breach of both the ***Banking and Financial Services Act*** and the Code. He found the Respondent's actions as being, not only deliberate but also, careless and negligent and falling below the legal standard

established to protect customers, such as the Appellant, against unreasonable risk of harm and amounted to culpable carelessness. The Judge went on to condemn the Respondent for failing to rectify its omission given that the two parties were engaged in restructuring the facility around October 2008 and immediately thereafter; and, the debt being fully secured by legal mortgages. He found that the restructuring negotiations and the status of the loans as being fully secured put the Appellant out of the realms of an entity that was unable to pay its debts. Regard was had, in respect of the latter finding, to the decision in the case of ***Re a ex parte the debtor v Printline (offset) Ltd***[5]**.** He also took the view that the letter by the Respondent to Standard Chartered Bank revealed an honest belief

by the Respondent that the Appellant was credit worthy.

35 The Learned High Court Judge then considered the issue of whether or not the Appellant suffered damage as a consequence of the breaches highlighted above.

36 As a preamble to the determination, the Judge went on a crusade of defining the role of credit reference agencies, their objectives and purpose as being: gathering of, what he termed, *"black information"* on individuals and business houses; providing such information to banks and other lending institutions; and, to assist such banks and lending institutions to make decisions on whether or not to lend money. He described credit reference agencies as *"very powerful institutions in finance"* and that the information they give which is usually not sieved

and accepted without question can have a substantial impact on one's financial future. Further, despite the directive by Bank of Zambia under the Guidance Note that credit reporting is not intended to be a black listing system and as such not intended to lock-out would-be borrowers from banks and lending institutions, more often than not, it serves as a blacklisting mechanism because most banks and lending institutions are not keen to advance moneys to any business entity or individual listed on the credit reference agency.

37 In conclusion, the Judge found the evidence on record revealing that the listing of the Appellant on the credit reference bureau was negligently done and had an adverse impact on the Appellant. Further, the evidence revealed that the Appellant who is specialized in global supply chain

management, logistics and project management and dependent on financing from banks and financial institutions was, as a consequence of the listing, denied access to funds by banks and financial institutions as evident from documents in the bundle of documents.

38 The Learned High Court Judge accordingly held that the Appellant had proved its case on a balance of probabilities and awarded it all the reliefs sought. He also awarded the Appellant general damages which he referred to the Learned Deputy Registrar for assessment and costs to be taxed in default of agreement.

Grounds of appeal to the Court of Appeal

39 The judgment by the Learned High Court Judge resulted in an appeal by the Respondent to the Court of Appeal on seven grounds as follows:

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1) **The Learned Trial Judge erred in fact and law when;**

   a) **He made findings of fact that the [Respondent] had acted negligently when it determined that the [Appellant's[loan account was in default and proceeded to classify it as a delinquent account;**

   b) **He made findings of fact that the [Appellant] should not have been listed on the Credit Reference Agency on the basis that the debt was fully secured by legal mortgages;**

   c) **He made a finding of fact when he held that the issue of default only arose in October 2008 notwithstanding evidence on record of the [Appellant's] default prior to that date;**

   d) **It held that the [Appellant] was not indebted to the [Respondent] by misconstruing the import of the letter dated 23rd April 2009 from the [Respondent] to the [Appellant]; and**

   e) **It held that the [Appellant[had suffered loss as a result of being listed on the Credit Reference despite the [Appellant] having failed to prove any loss at trial.**

2) **The Learned Trial Judge erred in law when he fixed the date for hearing and thereafter commenced the trial before the parties had filed Bundles of Documents and thereafter permitted the parties to file Bundles of Documents ex post facto (after the fact) and consequently filed amended and Supplementary witness statements.**

3) **The Learned Trial Judge erred in law and fact when it ordered that the [Appellant] be delisted from the credit Reference**

Agency notwithstanding the [Appellant's] admissions contained in its statement of claim filed in the court below confirming findings of indebtedness and/or default in the arbitration proceedings under cause number 2013/HP/ARB 14.

4) **The Learned Trial Judge misdirected himself in law when he proceeded to determine *suo motu* (on his own motion) the issue of confidentiality under section 50 of the Banking and Financial Services Act, Chapter 387, volume 21 of the Laws of Zambia which deals with the requirement of customer consent and prior notification under the Credit Data (Privacy) Code issued by the Bank of Zambia when these were not pleaded and no evidence adduced.**
5) **The Learned Trial Judge erred in law and fact when it awarded the [Appellant] damages for loss of business, damages for loss of business and profits, damages for injury to business reputation and damages for negligence when there was no evidence adduced by the Appellant at trial to support these claims, and after having acknowledged that Appellant had not addressed the Court below on the requisite ingredients of negligence.**
6) **The Learned Trial Judge erred in law by admitting an Expert Report which was filed in the absence of the requisite notices *videlicet*; Hearsay Notice and Expert Report Notice.**
7) **The Learned Trial Judge erred in law and fact when it did not adjudicate on all issues in controversy.**

The arguments advanced by the parties in the Court of Appeal

40 At the hearing of the appeal in the Court of Appeal both parties filed heads of argument and presented *viva voce* arguments. The Respondent abandoned ground 2 in prosecuting the appeal.

41 In its arguments the Respondent took the view that the Learned High Court Judge made a wrong finding of fact, which was perverse and amendable to setting aside, in relation to the status of the Appellant's account. The perverse finding arose from the Learned High Court Judge's misinterpretation of the effect of the letter of 23rd April 2009 and the effect of a loan secured by a mortgage. According to Respondent, there was sufficient evidence on record, which included the Appellant conceding to the arbitration, to show that the Appellant was in

default from before October 2008, as a result of its failure to settle the facility on the lease as agreed by September 2008. In relation to the payment made by the Appellant of USD100,000.00, the Respondent argued that the Appellant's witness, one Clever Mpoha, did concede that the payment of USD100,000.00 related to the facility availed in 2007 which was restructured and not the lease.

42 The Respondent argued further that it complied with the law prior to referring the Appellant's credit data to the credit reference bureau because it notified the Appellant of the default in October 2008 and it had its written consent for such reference. It, therefore, invited the Court of Appeal to interfere with the findings made by the Learned High Court Judge to the contrary.

43 In regard to the Appellant's allegation of breach of duty of care, the Respondent contended that the burden lay with the Appellant to prove such breach. It also denied breach of such duty on account of the error in its system because the default by the Appellant was not as a consequence of the system error but rather the Appellant's failure to service the facility.

44 On the issue of consent for the disclosure of the Appellant's credit data, the Respondent's position was that it did obtain the consent and that in any event, the duty owed of confidentiality, which was allegedly breached, is not absolute but qualified in accordance with the case of ***Tournier v National Provincial and Union Bank of England***[6] which is

Replicated by the exceptions set out in section 50 of the ***Banking and Financial Services Act***.

45 The Learned High Court Judge, quoted section 50 selectively and did not address his mind to all the exceptions in the section.

46 Further, the directive from Bank of Zambia required the submission of both negative and positive credit data to the credit reference agency.

47 Consequently, consent having been established there was no need for the Learned High Court Judge of his own motion, to raise and determine the issue of illegality.

48 Arguing in the alternative, the Respondent urged the Court to imply a term into the loan agreement that the Appellant had consented to being listed on the credit reference agency.

49 As regards the award of damages, the Respondent took the view that the award was not justified as there was no evidence adduced to support it. Further, that the evidence relied upon by the Learned High Court Judge in awarding the damages was hearsay and, therefore, inadmissible.

50 In relation to quantum of damages and the award of the sum of K192,500,000.00, the Respondent questioned the failure by the Learned High Court Judge to determine whether the claim could stand as a liquidated demand. As such, the award of the sum K192,500,000.00 was, not only a gross failure to adjudicate on the part of the Judge, but would also result in unjust enrichment.

51 In response to the Respondent's arguments' the Appellant argued that although it was indebted to

the Respondent it was not in default. In addition, the Respondent stopped crediting the lease account in November 2008 in accordance with the stop order due to an error in its system which was confirmed by the letter dated 23rd April 2009. The Learned High Court Judge did not misconstrue the letter.

52 The Learned High Court Judge was, therefore, on firm ground when he held that as at 31st October 2008 the Appellant was not in default as evidenced by the payments made of USD16,563.17 on 28th October 2008 and a total of USD100,000.00 on 5th, 6th and 26th November 2008. These payments were to facilitate the restructuring of the loan in January 2009.

53 The Appellant also agreed with the finding by the Learned High Court Judge that the letter of 3rd December 2008 by the Respondent to Standard

Chartered Bank revealed an honest view by the Respondent that the Appellant was credit worthy despite the referral to the credit reference agency of its credit data.

54 The Appellant denied consenting to its credit data being referred to a credit reference agency or signing a facility letter which embodied such consent. It also contended that the Respondent did not follow the relevant law before referring its credit data to the credit reference agency and that the notice of default dated 10th October 2008 was not in accordance with the Code. The Respondent was, in that respect, in breach.

55 Having breached the Code which, according to the Appellant, had mandatory application, the Respondent was negligent and the Learned High Court Judge was, therefore, on firm ground when he

found that the Respondent owed the Appellant a duty of care which was breached and resulted in consequential damages.

56 The Appellant also argued that the Learned High Court Judge was on firm ground when he found that the Appellant ought not to have been listed on the credit reference agency because the debt was secured by a mortgage.

57 As regards the damages suffered as a consequence of the listing, the Appellant reiterated that they were proved by the letters from Eidan Engineering Limited, Messrs Smart Dynasty and the report prepared by the Financial Consultants which it relied upon in the High Court. These letters, it argued, were not hearsay evidence because the Appellant's witness who referred to them had personal knowledge of them because they were

addressed to him. In any event, the Respondent could not raise objection to them at trial having missed the opportunity to do so at discovery stage. The Learned High Court Judge was, as a result, on firm ground in relying upon them in the award of damages.

58 On the issue of the Respondent's duty of confidentiality, the Appellant conceded that it was not absolute but subject to the exceptions in section 50 of the ***Banking and Financial Services Act***. That the exceptions were not applicable in this case because Bank of Zambia did not request the Respondent to disclose the Appellant's credit data at the time, therefore, it should have obtained the express consent of the Appellant before disclosing it.

59 Lastly, the Appellant clarified that the K192,500,000.00 awarded as damages for loss of

business was indorsed as a liquidated claim which it was and that the general damages were awarded in line with principles in various precedents. The Appellant having proved its case, the Court of Appeal should not interfere with the award of damages.

Reasoning by the Court of Appeal and Decision

60 The Court of Appeal considered the arguments presented by the parties and the record of appeal. Although it did not specifically state so, in dealing with the appeal from the decision of the Learned High Court Judge it appeared to have identified four issues, namely: was the Appellant in default in servicing the loan relating to the lease; was the Respondent entitled to refer the Appellant's credit data to the credit reference agency; was the

reference of the credit data to the credit reference agency in accordance with the law; a side issue arising from issue 3 was, what is the effect of the ***Code,*** the Directive 2008 and Guidance Note; and, did the Appellant suffer any damage as a consequence of the reference to the credit reference agency.

61 The court tackled all these issues when dealing with grounds 1, 3 and 4 of the appeal.

62 In relation to the first issue, on default, the Court reviewed the documentary evidence which was in the form of an exchange of letters between the two parties from 10th October 2008 to 13th November 2008. This communication in the Court's view revealed notification by the Respondent to the Appellant that it was in default which the Appellant acknowledged and undertook to remedy. The Court

also observed that there was communication between both the Appellant and Respondent and Bank of Zambia in which the latter noted that the Appellant's default in servicing the facility began immediately after the lease was granted and went on for nine months. Moreover, despite the restructuring of the facility, the Appellant still neglected to service the facility and the initial payment made prior to 8th June 2009 fell far short of the agreed installments.

63 The Court then set out the correspondence from which the Learned High Court Judge arrived at his decision and concluded that it revealed the following: the Appellant had fallen into arrears by 20th August 2008 and despite assurances that it would settle the arrears by end of September 2008, it failed to do so because its debtors did not settle their indebtedness to it; by 11th November, 2008 the

Appellant was aware that it was performing below the expectations of the Respondent or in other words, its performance was dented; there was an admission by the Appellant to Bank of Zambia that it did not service the loans after the lease was granted as there was no real need to do so because, in its opinion, the overdraft account from which the payments were being drawn was not in excess; and, in response to an indication by the Respondent in respect of facilities which were not being serviced, the Appellant did not dispute owing the sums of USD917,829.19 and USD544,403.30, alleging however, that it signed the restructured facility under duress.

64 The Court concluded that the Learned High Court Judge overlooked evidence before him which

indicated that the Appellant was in default of servicing the facilities.

65 The position taken by the court was that by 31st October 2008, the Appellant was delinquent and as such, there was no negligence on the part of the Respondent when it classified it as such. Stemming from this, the Court rejected the finding by the Learned High Court Judge that the cause of the Appellant's default was an error in the Respondent's system and agreed with the argument by the Respondent that the finding was perverse, thereby opening the door to the Court to interfere with it.

66 The Court was of the opinion that the Learned High Court Judge relied heavily on the letter of 23rd April 2009, which it clearly misconstrued, because it stated that after rectification of the anomaly in the system the arrears on the lease still stood at

USD80,000.00. This amount, according to the Court, represented five unpaid installments on the lease. It also rejected arguments to the contrary by counsel for the Appellant which alleged that the Appellant was not in default because the over draft and debit order were cancelled on 23rd April 2009.

67 In regard to the finding by the Learned High Court Judge that since the debt was fully secured by a legal mortgage the Appellant ought not to have been listed on the credit reference agency, the Court held that there was no provision to that effect in the Code. To the contrary, clause 2.5.3.3 of the Code authorized the provision of account data to the credit reference agency relating to a mortgage loan where a current material default exists. The same Code defines material default as being a default in payment for a period in excess of sixty days. Given

the foregoing, the Court found that the holding by the Learned High Court Judge was a misdirection.

68 The Court also agreed with the Respondent's argument that the date of delinquency was different from that of listing, as was evident from the listing report. The former date was 31st October 2008, while the latter was 8th June 2009. Further, the credit report to the credit reference agency was not confined to the lease facility but extended to other loans which the Appellant had with the Respondent.

69 In regard to the Appellant's contention that the burden of proving that it was in arrears rested with the Respondent, the Court held to the contrary. Its opinion was that since it was the Appellant asserting that it was negligently listed as a delinquent debtor despite acknowledgment by the Respondent that the arrears were due to an error in the Respondent's

system, it bore the burden of proving its contention. The Court noted that the Appellant relied on the letter of 23rd April 2009 to prove the contention despite the fact that the letter also stated that the Appellant was in arrears of five installments.

70 In reference to the contention that the matter was referred to arbitration and the Respondent awarded the sum of K7,353,850.49, the Court accepted the Respondent's argument that the Learned High Court Judge should not have ignored the fact that the Appellant conceded to the arbitration. It noted that the law is that an arbitral award is binding on the parties to the reference, and everyone who, by claiming through or under the parties to the reference, are privy to the reference. The Court referred to ***A Practical Approach to Arbitration Law by, Andrew and Keren Tweedle***.

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71 In relation to the second and third issues of whether the Respondent was entitled to refer the Appellant's credit data to the credit reference agency and whether it was done in accordance with the law, the Court initially set out the genesis of the ***Code***; the obligations of the Respondent as credit provider to the Appellant as its customer; and, the rights of the Appellant. It then discussed the effect of the Code, pre and post the Directive 2008.

72 According to the Court, prior to the issuance of the Directive 2008 by Bank of Zambia, a credit provider was obliged to obtain consent from the customer prior to referring its credit data to the credit reference agency. It also took the view that since the Appellant was in default, the Respondent was entitled, subject to consent, to refer its data to the credit reference agency.

73 In dealing with the issue as to whether or not the Appellant gave consent to its referral of its credit data to the credit reference bureau, the Court dismissed the Respondent's contention that the consent was contained in the facility letter dated 18th September 2007. The basis upon which it did so was that: the facility letter related to a general short term banking facility in the sum of USD450,000.00; although signed on behalf of the Respondent and initialed at every page, it was not signed on behalf of the Appellant to signify acceptance of the terms and conditions; the identity of the persons who initialed the document was not addressed by the Learned High Court Judge; and, there was uncertainty as to whether or not the Appellant received the loan in respect of which the facility letter related. It concluded that at the stage

the facility letter was generated, the Appellant had not consented to its credit data being disclosed to the credit reference agency.

74 The Court was also not persuaded by the Respondent's argument that given the size of the Respondent it is inconceivable to assume that it does not have terms and conditions on confidentiality, and as such, the terms should be implied into the lease agreement. In rejecting the argument, the Court pointed out that whether or not a term will be implied in a contract depends on the intentions of the parties. That intention will be discerned from the words of the agreement and the surrounding circumstances.

75 In addition, the Court took the view that the attention of the Learned High Court Judge was not drawn to any terms that could properly be implied

into the banker and customer relationship which existed between the parties. It also found that the Respondent made no effort whatsoever to show that despite the fact that the facility letter in issue which contained the general condition was not signed on behalf of the Appellant, the other facilities upon which credit was availed to the Appellant were on those terms. In the absence of such evidence, the Learned High Court Judge could not imply the general conditions into the facility letter in question.

76 In determining the issue further, the Court considered the Respondent's argument that a term permitting negative disclosure could be implied in the relationship between a banker and customer. It held that this was not a proper case to imply such a term because, although the facility letter expressly stated that the general conditions would be

applicable, the Appellant requested to sign the letter in acceptance of those conditions.

77 Turning to the Respondent's misgivings about the Learned High Court Judge's reference to section 50 of the ***Banking and Financial Services Act*** in determining the issue of breach of confidentiality, the Court held the misgivings misplaced because the statement of claim and evidence led in the High Court revealed that the main issue before the Learned High Court Judge was breach of confidentiality by the Respondent. The contention being that it had disclosed the Appellant's credit data to a third party without its consent and when it was not in default. The view taken by the Court was that, in any event, section 13 of the ***High Court Act*** empowers adjudicators of that Court to award a party all such reliefs to which any party may appear

to be entitled in respect of any and every equitable claim or defence presented by them or which would appear in the cause or matter. To this extent, it found that the Learned High Court Judge was on firm ground when he considered the doctrine of confidentiality and was entitled to examine the extent to which Statute had made inroads or qualified the duty of confidentiality in the banker and customer relationship.

78 In explaining the provisions of section 50 of the ***Banking and Financial Services Act***, the Court took the view that they embody the qualification to the duty of confidentiality articulated in the case of ***Tournier v National Provincial and Union Bank of England***[6]. It stated the facts of the case before setting out the circumstances in which a bank may disclose confidential information according to the

case as follows: where disclosure is under compulsion of the law; where there is a duty to the public to disclose; where the interests of the bank require disclosure; and, where the disclosure is made by the express or implied consent of the customer.

79 The Court extended its discussions on confidentiality by restating the genesis of the ***Code***, the obligations of a credit provider to a customer and the rights of the Appellant as customer by way of reference to clause 2.3 of the ***Code*** which states as follows;

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

final settlement of the amount in default or 7 years from the date of the person's discharge from bankruptcy as notified to the CRA whichever is earlier."

80 The Court explained clause 2.3 as placing an obligation upon a credit provider to inform a customer of the consequences of default within thirty days of the default and the need to remedy it before the expiry of sixty days from the date of default, failing which the credit data would be retained by the credit reference agency until the expiry of seven years from the date of final settlement of the amount in default. Further, the customer had to be informed that he had the right to instruct the credit provider to move a request to the credit reference agency to delete any credit data relating to the terminated account after seven years of termination of the account by full repayment, as

long as the customer would not have made material default within that period of seven years.

81 The Court considered the letter of 10th October 2008 from the Respondent to the Appellant warning the latter that if the arrears were not paid by 30th October 2008, it would classify its facility as non performing, in the light of the explanation given of clause 2.3, and agreed with the Learned High Court Judge that the letter fell far short of the requirements of clause 2.3 and that it did not refer to the credit reference agency. It, however, noted that the practice prescribed under clause 2.3 was merely recommended practice, consequently, the non adherence to the clause was not mandatory. Of equal importance, the consequences of default as contained in clause 2.3 were required to be stipulated in the written statement availed to a

customer at the time of applying for credit. Such customer would be taken as having impliedly consented to his credit data being availed to a credit reference agency in case of default, if he still went ahead and obtained the credit.

82 The view taken by the Court was, as a result, that there would be no breach on the part of a credit provider if it later failed to notify the defaulting customer of the consequences of the default in view of the earlier notification. Hence, the Respondent's breach did not lie in its failure to notify the Appellant within thirty day of default that it had to settle its indebtedness within sixty days, failing which its credit data would be referred to the credit reference agency, but rather its failure at inception to provide a written statement that the Appellant's credit data may be availed to a credit reference

agency in the event of default in repaying a facility availed to it.

83 The Court summed up by holding that the Respondent breached the duty of confidentiality owed to the Appellant because there was no express or implied consent disclosed in the evidence on the record before it.

84 In dealing with the position post the Directive 2008, the Court began by observing that when the Appellant was availed another facility by letter dated 20th November 2009 by the Respondent, to restructure existing debts, it consented to its credit data being listed. The offer of the facility by the Respondent was subject to the *"general term and conditions"* constituting an integral part of and indivisible from the facility letter. The offer was accepted by the Appellant appending its authorized

officer's signature under the words where it expressed its pleasure at accepting the offer on the terms and conditions contained in the facility letter and the attached general conditions.

85 The Court then took judicial notice of the Directive 2008 and noted that it was issued pursuant to the powers vested in the Bank of Zambia by section 125 of the ***Banking and Financial Services Act***.

86 It concluded that when the Directive 2008 came into force the Respondent was required to submit all credit data, negative or positive, to the credit reference agency. That the position was confirmed by Bank of Zambia in its response to the Appellant's complaint on the manner the Respondent was handling its account. Therefore, when the Appellant's facilities were restructured by the Respondent, the Respondent was obliged to report

the restructured facilities to the credit reference agency in accordance with the Directive 2008.

87 As regards the last issue as to whether the Appellant suffered damage, the Court posed the question: what was the effect of disclosing the negative data to the credit reference bureau? It took the view that the position of the law is that a bank which gives a reference without the customer's consent is in breach of its duty to such customer. It went on to state the views expressed by the learned authors of ***Paget's Law of Banking*** 13th edition that, if the reference is accurate, it is difficult to see what foreseeable loss the customer will suffer as a consequence of giving of the reference. For example, the loss of a transaction between the customer and the third party to whom the reference is given, but the bank's, refusal to give a reference (because the

customer does not consent), would probably have caused the same loss. If so, the customer would have suffered loss in any event.

88 In addition, the Court referred to ***Toulson R.G. and Phipps CM, Confidentiality, 2nd edition***, whose view was that the only case where particular damages would probably be easily recoverable is where the data provided by the bank proves inaccurate. In such a case, the customer will also have a concurrent claim based upon the breach of the duty of care and skill.

89 The Court summarized the background to the matter in relation to the foregoing common law principles as follows: the credit data provided to the credit reference agency by the Respondent on the Appellant was accurate; and, the negative credit data was only accessed by banks and other financial

institutions after November 2009, when the Appellant's credit data, both positive and negative, was as a matter of law required to be availcd to the agency. It agreed with ***Ross Granton's Principles of Banking Law*** that, information which is common knowledge is not subject to the duty of confidentiality.

90 Further, the Court took the view that the Directive 2008 having abrogated the common law duty of confidentiality and thereby rendered the credit data of a bank's customer accessible to other financial providers, an action for breach of confidentiality was not sustainable. The Court also found that since the negative data disclosed before the Directive 2008 was accurate, it could not fathom what damage was inflicted on the Appellant by the disclosure.

91 The Court concluded that although the Respondent breached the duty of confidentiality prior to the facilities being restructured and the issuance of the Directive 2008 making it mandatory to report all credit data, no damage can be said to have been suffered. Besides, there was no evidence that the Appellant was denied funding by any would-be financiers in the period before the Directive 2008 and restructuring of the facilities in November 2009.

92 Consequently, the Court found that the Appellant was only entitled to nominal damages, predicated on the principle that where breach of contract is proved, but no actual damages are proved, a claimant is entitled to nominal damages. It referred to ***Chitty on Contracts, General Principles***, Vol. 1, 13th edition.

93 Whilst the Court was dealing with the mandatory effect of the Directive 2008, it also considered the order by the learned High Court Judge directing the delisting of the Appellant from the credit reference agency. It agreed with the contention by the Respondent that the order was a misdirection because of the mandatory requirement that all credit facilities availed after 10th December 2008 be listed. The Appellant having had its facilities restructured after December 2008, same were liable to be listed and cannot be delisted.

94 Turning back to the nominal damages awarded to the Appellant, the Court justified it by defining what constitutes nominal damages by reference to ***Mc Gregor on Damages***, 18th edition quoting Lord Halsbury in ***The Mediana***[7]. It stated that the

phrase is a technical one which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right was infringed. Regard was also had to the decision by Maule J in the case of ***Beaument v Geathead***[8].

95 The Court, accordingly, awarded the Appellant the sum of K5,000.00 as nominal damages. In doing so, it set aside the award by the Learned High Court Judge of K192,500,000.00 and all the other reliefs granted. The award was to attract interest at the short term deposit rate from date of judgment and thereafter, at the current bank lending rate till full settlement. It also reversed the award of costs to the

Appellant in the High Court and ordered that each party bears its own costs and awarded the Respondent the costs of the appeal. Finally, it granted leave to appeal to this Court.

96 The Court did not find it necessary to consider the other grounds of appeal in view of its decision which it stated rendered their consideration academic. It only considered ground 5 by addressing the admissibility of the letters from ECO Bank and Dynasty in view of the hearsay rule. We do not feel compelled to state the opinion of the Court as it is not the subject of this appeal.

The grounds of appeal to this Court

97 Arising from the decision of the Court of Appeal, the Appellant is disgruntled and has brought this appeal advancing four grounds as follow:

1) **The court below erred in law and fact and fell in grave error by failing to properly address and evaluate the application of the Banking and Financial Services Act, Credit Data (Privacy) Code, Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive, 2008 and Guidance Note 1 of 2014 - Utilization of Credit Reporting System.**

2) **The Court below erred in law and in fact when it held that the Appellant subsequently consented to being listed on the Credit Reference Bureau when the finding is not supported by the evidence on record neither was it pleaded nor considered by the trial court.**

3) (a) **The court below misdirected itself and failed to consider documentary evidence and witness testimony as a whole but instead chose to highlight certain pieces of the evidence in isolation and made findings of fact based entirely on the said isolated evidence without referring it to or contrasting it with other evidence on record by holding that the Appellant was in default when there was evidence to support the fact that the Appellant was not in default:**

(b) **The court below erred in law and fact by interfering with the findings of fact made by the learned trial judge in the High Court;**

(c) **The court below fell in grave error by holding that the reference to the Credit Reference Bureau was accurate and despite the evidence to the contrary.**

4) **The court below erred in fact and law when it interfered with the award of damages of the learned trial judge.**

The arguments presented by the parties and decision by the Court

98 The parties filed heads of argument which they relied upon at the hearing and also made verbal submissions to augment the heads of argument. We have considered the arguments along with the two judgments by the learned High Court Judge, and the Court of Appeal and record of appeal.

99 The Appellant's heads of argument at pages 1 to 7 set out the background to the appeal which we have ignored because the purpose of heads of argument is to guide the Court on a party's legal position and not recite the facts of the case to the Court.

100 In relation to ground 1, the Appellant contended that the Court of Appeal erred both in law and fact in the interpretation of the application of the

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Banking and Financial Services Act, Directive 2008 and Guidance Note. Counsel restated the interpretation given by the Court of Appeal of the foregoing documents and set out the provisions of clause 2 of the Code. They argued that the clause makes provision for two aspects. Firstly, clause 2.1 deals with the mandatory requirement of a credit provider at the time of providing credit to a customer to give a written statement to such customer of the consequences of default and failure to remedy the default in sixty days in relation to retention of such credit data by the credit reference agency until the expiry of seven years from the date of final settlement of the amount in default. Counsel argued that there was no written statement as envisaged by clause 2.1 on the record nor was there evidence before the Learned High Court Judge to show that

the Appellant was explicitly or impliedly informed, to use counsel's words, to have its credit data supplied to the credit reference agency.

101 According to counsel, although the Court held that the breach of the Code lay in not availing the said written statement to the Appellant, it nonetheless failed to categorically state or pronounce itself in the judgment that the Respondent was in breach by failing to provide such written statement. The breach, counsel argued, amounts to negligence.

102 The second aspect of clause 2 which counsel submitted on was under clause 2.3. Their position was that the notification upon default was a mandatory requirement and as such, the Court of Appeal misdirected itself when it held that the clause merely prescribed a recommended practice, adherence to which was not mandatory. Counsel

took the view that Clause 2.3 is couched in mandatory terms because there is the use of the word *"shall"* immediately before the words *"as a recommended practice"* which the Court relied upon.

103 Further, the mandatory effect of clauses 2.1 and 2.3 is evident from the wording in Guidance Note No.1 of 2014, 3 and 4 on the need for the credit provider to notify the customer and consequences of default of adherence to the Code. Counsel agreed with the holding by the Court of Appeal that the letter dated 10th October 2008 fell far short of the requirements of clause 2.1 and argued that the consequences of the breach of the Code by the Respondent amounted to negligence. This position, they argued, was affirmed by this court in the case of ***Stanbic Bank Zambia Limited v A.S.C. Enterprises Limited***[9], ***Yula Enterprises Limited and Muchabani Atra***

(T/A Karama General Dealers[10] when we held that: the code of banking is a binding regulatory mechanism on banks as well as members engaged in banking business in Zambia; and, the breach of the code is, therefore, evidence of negligence. That we went further and quoted the learned authors of ***Halsbury's Laws of England*** 4th edition that failure by the banks to follow their own regulations is evidence of negligence. Thus, the breach by the Respondent amounted to negligence of duty for failure to exercise reasonable care and skill in the manner the Appellant was reported to the credit reference agency, in line with the findings by the Learned High Court Judge.

104 Once again counsel referred us to the case of ***A.S. and E. Enterprises Limited***[9] where we set out the statutory duty of a bank to act in good faith, without

negligence and exercise such care and skill as would be exercised by a reasonable banker.

105 Turning their attention to the Directive 2008, counsel took issue with the interpretation given by the Court of Appeal that, upon its coming into effect, it was mandatory for a credit provider to provide credit data to a credit reference agency, thus doing away with the need for prior consent of the customer. They argued that the Guidance note No.1 of 2014 emphasizes the application of both the Code and Directive 2008 and that all three documents are products of, and issued pursuant to section 125 of the ***Banking and Financial Services Act*** and, therefore, have the same force of law. We understood counsel to be saying that the three documents must be read together and all have the same force of law. They, in this regard, set out the

sanction for non compliance with the Code as revealed in the introductory note to the Code and the authority under which the Directive 2008 was issued as captured by its introductory note.

106 Counsel submitted that the Court of Appeal erroneously quoted and misapplied the Directive 2008 piecemeal, and without having regard to the Code and Guidance Note No.1 of 2014 when it held that following the issuance of the Directive 2008 the Respondent was obliged to submit the Appellant's credit data to the credit reference agency without having regard to the notification procedure set out in the Code. That the provisions of the Directive 2008 cannot oust the provisions of the ***Code*** and ***Banking and Financial Services Act*** pursuant to which they were issued.

107 Counsel also attacked the holding by the Court of Appeal that the Respondent was obliged to provide data to the credit reference bureau following the restructuring of the Appellant's facility in November 2009 in view of the Directive of 2008.

108 In the *viva voce* arguments, Mr. M. Mutemwa, SC essentially restated the arguments in the heads of argument, the only departure was the reference to the case of ***R v Pensions Ombudsman and others, ex parte Legal and General Assurance Society Ltd***[11] on the approach to be taken when interpreting a banking Code.

109 In response to the arguments under ground 1, counsel for the Respondent argued that the provisions of clause 2 of the Code were not mandatory but merely recommended practice as the

Court of Appeal held. There was, therefore, no breach of clause 2 committed by the Respondent. Counsel argued that the Code should be interpreted in the same manner as any statute by giving the words their literal meaning. He referred us to our decision in the case of ***Edith Tshabalala v Attorney General***[12] (among other authorities) where we held the fundamental rule of interpreting a statute to be that it should be construed to the intent expressed by Parliament which means that the literal and grammatical meaning will prevail where there is nothing to indicate or suggest that the language should be understood in any other special sense.

110 Counsel quoted at length the opinion by Sakala CJ (as he then was) on the meaning of the word 'recommendation' in the case of ***The Minister of***

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Information and Broadcasting v Fanwell Chembo and Others[13] that it is a "suggestion" to someone on what to do and that one has the option to follow or ignore such suggestion. They argued that the use of the word *"shall"* in clause 2.3 was not conclusive because, and quoting from our decision in ***Attorney General v Million Juma***[14], no universal rule can be laid down for the construction of Statutes as to whether mandatory enactments should be considered as only directory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the Statute to be construed.

111 Concluding arguments under ground 1, counsel agreed with the Appellant's counsel that a breach of the Code amounts to unsafe and unsound practice

which could attract supervisory action by Bank of Zambia in accordance with section 77 of the ***Banking and Financial Services Act***. Therefore, since no such action was taken against the Respondent, there was no breach of the Code by the Respondent.

112 The first limb of ground 1 contends that the Court of Appeal failed to pronounce itself on the breach committed by the Respondent by failing to comply with clause 2.1 of the Code. We must state from the outset that we find this contention strange in view of the fact that the Court specifically stated that the Respondent's breach lay in the fact that it did not provide a written statement to the Appellant at the time of availing credit that it may, among other things, refer its credit data to a credit reference agency.

113 Counsel for the Appellant quite rightly observed that the pronouncement is made in the portion of the judgment where the Court held that *"breach of the Code lay in not availing the said written statement to the Respondent."* We are, as a result, at sea as to what further pronouncement counsel wished the Court to make to satisfy the Appellant's needs. Of equal importance, is the fact that the interpretation given to clause 2.1 of the Code by the Court is flawless. We must, for purposes of clarity and completeness, reproduce the clause.

> **"2.1 A credit provider who provides credit data to a CRA or in the event of default, to a DCA, shall, on or before collecting the credit data, take all reasonably practicable steps to provide to such person a written statement setting out clearly the following information.**
>
> **2.1.1 that the data may be so supplied to a CRA and/or, in the event of default to a DCA**

2.1.2 that the person has the right to be informed, upon request, about which items of data are routinely so disclosed, and his right to be provided with further information to enable the making of a data access and correction request to the relevant CRA or DCA, as the case may be;

2.1.3 that, in the event of any default in repayment, unless the amount in default is fully repaid before the expiry of 60 days from the date such default occurred, otherwise the person shall be liable to have his account data retained by the CRA until the expiry of 7 years from the date of final settlement of the amount in default; and, where applicable;

2.1.4 (where the credit applied for does not involve a mortgage loan) that the person, upon termination of the account by full repayment and on condition that there has not been, within 7 years immediately before account termination, any material default on the account, will have the right to instruct the credit provider to make a request to the CRA to delete from its database any account data relating to the terminated account.

114 Our understanding of this clause is that it compels a credit provider, prior to or at the time of providing credit, to inform the customer of the consequences

of obtaining the credit which primarily are that the customer's data may be provided to a credit reference agency or debt collection agency. In the latter event if there is default on the part of the customer. In addition, the clause compels a credit provider to reveal to the customer the contents of the credit data so provided and advise the customer of the consequences of default in respect to the period of retention of such data by the credit reference agency.

115 The rationale for such written notice is that it serves as express consent from the customer to the credit provider that its confidential information can be given to a third party. The Court of Appeal was correct in its interpretation of the clause and gave a valid demonstration of how such consent is obtained by credit providers when it referred to the text

Banking Litigation that the written statement is in most cases incorporated in the terms and conditions of the borrowing and the customer gives his consent upon accepting the said terms and conditions.

116 The Court, also explained in detail the confidential nature of the relationship of a banker and customer in accordance with section 50 of the ***Banking and Financial Services Act*** and the qualifications to such confidentiality. These qualifications, it found, are mirrored by the *ratio descidendi* in the case of ***Tournier v National Provincial and Union Bank of England***[6]**.** The explanation was prompted by the objection raised by the Respondent that the Learned High Court Judge ought not to have referred to the provisions of section 50 because neither of the parties referred to it. The Court dismissed the argument for the reasons we have explained in the

latter parts of the judgment where the importance of the discussion by the Court of Appeal becomes apparent as we discuss the pleadings and evidence deployed in the High Court and the nature of the appeal before the Court of Appeal.

117 We have no doubt that a banker owes a customer a duty of confidentiality. ***Paget's Law of Banking*** 11th edition, traces the origins of the law on the duty of confidentiality to the ***Tournier*** case where Banks LJ, although not specifically defining it, stated the duty to be a legal one arising out of the contract of banker and customer and not a moral one. That it does not cease the moment a customer closes his account and, *"... information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification ... referred*

to." Lastly, it applies whether the customer's account is in credit or overdrawn.

118 The Court of Appeal concluded its discussion on the confidential nature of the relationship between a banker and customer by noting that the Respondent did not obtain the Appellant's consent prior to referring its credit data to the credit reference agency and accordingly held it in breach.

119 We have difficulty with the pronouncement made by the Court of Appeal in the preceding paragraph because it arises from a finding made by the Learned High Court Judge after he referred to section 50 of the ***Banking and Financial Services Act*** of his own motion after creating a new set of facts and circumstances resulting in the introduction of an extra remedy in favour of the Appellant namely, breach of the duty of

confidentiality. The Court of Appeal justified this departure by the Learned High Court Judge by holding that he is empowered by virtue of section 13 of the ***High Court Act*** to grant all such reliefs to which any party may appear to be entitled in respect of any and every equitable claim or defence properly brought by them, or which shall appear in the cause or matter.

120 This reasoning by the Court of Appeal ignores the fact that, in exercising the powers vested upon it by section 13, the High Court must not, of its own volition, seek out authorities that create new reliefs or remedies for one party at the expense of another. The power which Section 13 of the ***High Court Act*** creates is limited to that of the Court investigating if alternative remedies and reliefs are available from the pleadings and evidence deployed before it as

opposed to suggesting, from a vacuum, fresh remedies or reliefs. The actions by Learned High Court Judge effectively amounted to his stepping into the arena of the dispute to the disadvantage of the Respondent, which we find to be a misdirection on his part deserving of intervention by the Court of Appeal. Ours is an adversarial court system which shackles the judge to the pleadings and evidence presented before him. He is at large and by virtue of section 13 to grant any relief and remedies coming out of such pleadings and evidence, whether they are specifically asked for or not, but he is not permitted to introduce a remedy or relief from facts and circumstances of his own creation and outside the pleadings and evidence.

121 For the avoidance of doubt, the Appellant did not plead breach of duty of confidentiality and neither

did it deploy any evidence to that effect in the High Court. Further, the evidence led in the High Court did not suggest any breach of the duty of confidentiality on the part of the Respondent. But the Learned High Court Judge, of his own motion, brought in the issue of want of consent by the Appellant for the referral of its credit data to the credit reference bureau which the Appellant neither pleaded nor alluded to in its evidence. This is contained in the portion of the Judge's judgment which states as follows:

> **"there is no evidence from the documents before the Court and neither did the Defendant bring it to the attention of the Court that they sought and the Plaintiff had expressly consented to the reference of its confidential information to the CRA, so as not to be in breach of section 50(i)(a) of the Act.**

122 In the pleadings deployed before the Learned High Court Judge, the grievance which the Appellant

presented was that of being listed as a delinquent borrower on the credit reference agency and not that it was listed without its consent. The basis of the grievance was that it denied being delinquent because it attributed its default to the error in the Respondent's system.

123 In arriving at the decision we have made in the preceding paragraph we are alive to the holding in the English case of ***Phillips v Copping*** which was relied upon by the Learned High Court Judge when he introduced the issue of confidentiality and Section 50 of the ***Banking and Financial Services Act***. The case was applied with approval by the Eastern Caribbean Supreme Court, sitting as a High Court, in the case of ***Daphne Alves v The Attorney General of the Virgin Islands***[15] when Hariprashad - Charles J, held as follows:

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> **"The Court is entitled to take judicial notice of all Acts and subsidiary legislation and they are applied <u>when relevant to the facts and circumstances of the case</u> without the necessity of being pleaded.**

(underlining is our for emphasis only)

We endorse the foregoing holding to the extent that it expresses the need for such legislation to be *"relevant to the facts and circumstances of the case."* These facts and circumstances should exist in the case and not be created by a Judge as was the case in this matter.

124 We also take the position that when the Learned High Court Judge formed his intention to invoke section 50 of the ***Banking and Financial Services Act*** and realized it would have an impact on his decision, and felt compelled to rely upon it, he should have invited the parties to address him on it

before proceeding to make his determination of the matter on the basis of this provision.

125 The misdirection by the Court of Appeal was compounded by the fact that it determined an issue upon which the Learned High Court Judge did not make a pronouncement on, despite discussing it. The judgment of the High Court Judge reveals that he awarded the Appellant *"all the reliefs sought [in the pleadings]"*. These reliefs did not include damages for breach of the duty of confidentiality.

For the reasons we have expressed in the preceding paragraphs, we are unable to sustain the holding by the Court of Appeal which upheld the finding by the Learned High Court Judge that the Respondent breached the duty of confidentiality. We, accordingly, set aside the said holding.

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126 Coming to the second limb of ground 1 which contends that the Court of Appeal misinterpreted the provisions of clause 2.3 of the Code, the argument here is that the provisions of clause 2.3 have mandatory application as opposed to the holding by the Court of Appeal that the position is otherwise as we shall explain shortly.

127 Before we determine the contention, it is important that we reproduce the clause 2.3. It states as follows:

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

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128 The fact that clause 2.3 requires a credit provider to give notice within thirty days of default to a defaulting customer is not in dispute. Neither is the fact that such notice should remind the defaulting customer of the need within sixty days of the date of default to settle the amount in default in full or else he would be liable to have his credit data retained by the credit reference agency until the expiry of 7 years from the date of final settlement of the amount in default or from date of being discharged from bankruptcy.

129 The dispute in the interpretation of clause 2.3 lies in the effect given by the Court of Appeal to the phrase *"as a recommended practice"* contained in the clause. The Court held that adherence to the practice set out in clause 2.3 is not mandatory because it is defined as recommended practice. It

went on to say that a recommendation is a suggestion or advice which did not require mandatory compliance.

130 The Court then reminded itself that the matters set out in clause 2.3 will have already been brought to the attention of the concerned person at the time the written statement was being provided at the time of accessing credit, pursuant to clause 2.1.

131 We must admit that we find the holding by the Court of Appeal rather confusing, because in one breathe it finds that the giving of the notice is not mandatory because clause 2.3 is not couched in mandatory terms whilst in another, it attributes it to the fact that the defaulter will have been notified of the consequence of default in the written statement at the time of accessing credit. On the facts of this case, the Respondent did not give a written

statement to the Respondent at the time it availed it credit. The Court of Appeal should, therefore, not have considered the alternative of a written statement when it interpreted clause 2.3.

132 Further, while we agree with the Court and indeed counsel for the Respondent that the phrase *"a recommended practice"*, viewed in isolation, is a suggestion or advice, when one looks at the word *"shall"* that precedes the phrase and, indeed, the intent and purpose of the Code, one is compelled, as counsel for the Appellant has argued, to conclude that the giving of the notice is mandatory. We have not, as the Court of Appeal did, restricted ourselves to looking only at the phrase whose interpretation is sought because we feel compelled to follow the reasoning of Lord Penzance, quoted by Doyle CJ in the case of ***Attorney General v Chipango***[16],

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referred to in the ***Juma*** case as presented by counsel for the Respondent. Lord Penzance is quoted as stating the following:

> **"I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act;"**

133 The subject matter of the Code is credit referencing and consequences of default which are closely linked to clause 2.3 because the retention of the credit data held by the credit reference agency is dependent upon the default of a customer. The analysis leaves us to conclude that it is a mandatory requirement.

134 Crucial to our holding is the fact that the word *"shall"* has been used in the context, as we have held in the past, which connotes a mandatory requirement. The use of the phrase *"a recommended*

practice" is clearly misplaced and the result of poor draftsmanship.

135 Taking the matter of the notification further and to justify our holding, we are of the firm view that even where the matters relating to the consequence of default will have been brought to the attention of the defaulting customer in the written statement at the inception of the borrowing, upon default he still, as a mandatory requirement, must be given notice of default in terms of clause 2.3. We say so because such notification puts the allegation of default beyond doubt. The need for this is evident in the dispute in these proceedings which has been raging from 2009, and the parties are still poles apart as to whether or not the Appellant is in default. Further, the notification is a necessary evil to the defaulting customer in view of the repercussions that arise

from default. Lastly, the notification serves as a reminder of when time starts running in respect of fulfilling the requirement to settle the amount in default in sixty days and the retention period of the credit data by the credit reference agency. Consequently, our holding here is that the Court of Appeal misdirected itself in its interpretation of clause 2.3.

136 The last contention advanced in ground 1 was that the Directive 2008 which mandated all banks to report both negative and positive credit data to the credit reference agency did not do away with the mandatory requirements of the giving of the written statement on accessing of credit and upon default as stipulated in the Code.

137 Before we consider the contention we would like to dispel certain misconceptions harbored by the

Appellant in respect of the effect of the Directive of 2008 as revealed by the arguments advanced by counsel. Firstly, the Directive 2008 does not only mandate credit providers to provide both negative and positive credit data but also mandates them to use the services of a credit reference agency before giving credit to any customer. This is in accordance with the holding by the Court of Appeal and is pursuant to Directive number 4 of the Directive 2008 whose purpose is verification by the credit provider of the financial status of the customer as an intending borrower as revealed by Guidance Note No.1 of 2014 at number 4 which states, in part, as follows:

"4) Utilization of the Credit Reporting System

In accordance with the Banking and Financial Services (Provision of Credit Data and Utilization of Credit Reference Services) Directives, all credit providers are mandated to -

(i) As part of the credit evaluation process, conduct a search for credit information on the borrower from a credit reference agency ..."

138 The rationale for this is, and we take judicial notice of the fact that, at the time of issuance of the Directive 2008, the financial sector in Zambia was coming from an era where most banks were experiencing financial difficulty and others were collapsing on account of poor credit assessment and lack of an avenue for detecting persistent defaulters. Bank of Zambia, therefore, moved in and issued the Directives and Guidance Note making the submission of, and resort to, a credit reference agency mandatory for purposes of protecting the integrity of the banking sector in Zambia.

139 To the extent, therefore, that the Appellant's contention suggests that the Directive 2008 is

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restricted to supply of credit data to a credit reference agency by the credit provider, it is misconceived.

140 The second assertion in the contention which requires clarification is the one that alleges that the Court of Appeal found that the coming into force of the Directive 2008 did away with both the mandatory requirements of the giving of a written statement at the point of giving credit and upon default pursuant to clause 2.3 which we discussed earlier.

141 The finding by the Court was that the effect of the Directive 2008 was that it did away with the need for providing a written statement. This is evident from the following paragraphs from the judgment of the Court:

> **"The import of this directive is that when it came into force, the [Respondent] was required by Bank of Zambia, to submit all credit data to the credit reference agency in respect of credit granted after the directive had been issued."**

And

> **"Therefore, when the [Appellant's] facilities were restructured, the [Respondent] was obliged to provide the information to the credit reference agency"**

142 The Court of Appeal, in its determination of the effect of the Directive 2008, does not refer to the effect of clause 2.3

143 The contentions raised by the Appellant here are for finding by the Learned High Court Judge that there was a breach of the duty of confidentiality on the part of the Respondent which was upheld by the Court of Appeal. In view of our holding that the decision of the Court of Appeal cannot stand on this issue, there is no need for us to determine the

contention. Be that as it may, we do feel compelled to comment on the contention because it has a bearing on our determination of ground 2 of the Appeal. The position we have taken is that the Directive 2008 has the force of law because it is issued pursuant to 125 of the Banking and Financial Services Act which states as follows:

> **"125. The Bank of Zambia shall have power to prescribe and publish such guidelines or other regulatory statements as the Bank of Zambia may consider necessary or desirable for the administration or execution of this Act."**

144 The meaning we have given to the foregoing section is that it gives power to the Bank of Zambia to issue, among other things, directives, such as the Directive 2008 for purposes of the proper administration and operationalisation of the ***Act***. The effect, therefore, of the issuance of the directive number 4 of Directive

2008 was to invoke the provisions of section 50(1)(c) of the ***Banking and Financial Services Act*** and compel banks as credit providers to resort to and provide credit data to a credit agency. It thus did away with the requirement of providing a written statement at the time of accessing credit to a customer by a credit provider.

145 The holding we have made in the preceding paragraph does not ignore the provisions of the Code on confidentiality but rather agrees with them. Clause 4.1 and 4.2 of the Code state as follows:

> "**4.1 For the avoidance of doubt, nothing in Parts 1 to III of the Code affects the application of law of confidentiality in relation to credit data. In particular, in a situation where, under the general law, a credit provider or a CRA owes a duty of confidentiality to a person in respect of the credit data relating to such person, none of the provisions in Parts I to III of the Code shall have, or purport to have, the effect of abrogating, limiting or otherwise modifying such duty under the law general law.**

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

146 Whilst these provisions recognize the importance of maintaining confidentiality, clause 4.2 acknowledges, like section 50 and the ***Tournier*** case that it is not absolute.

147 Consequent to the foregoing, the contention advanced by the Appellant that Directive of 2008 did not do away with the need to preserve confidentiality or subordinated section 50 and ignored the provisions of the Code, is untenable.

148 This concludes our consideration of ground 1 of the appeal, which, essentially fails save to the extent we have stated earlier on the interpretation given by the Court of Appeal to the phrase *"a recommended practice."*

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149 Turning our attention to ground 2 of the appeal in which the Appellant alleges a misdirection on the part of the Court of Appeal in holding that the Appellant subsequently consented to being listed on the credit reference bureau, in the light of there being no evidence to that effect. The main arguments raised by counsel under this ground were that although they do not dispute the holding by the Court that the Appellant signed the facility letter dated 20th November 2009, there was no evidence led to show that, indeed there was a term in the general conditions of the borrowing which permitted the Respondent to submit the Appellant's data to a credit reference agency. Mr. M. Mutemwa SC argued, in his *viva voce* arguments that, although the facility letter of 20th November 2009 appears in the record of appeal, the alleged general

terms and conditions of the borrowing are not attached thereto. He argued further that, the issue surrounding the said general terms and conditions was not pleaded and thus, not considered by the trial court, consequently the Court of Appeal misdirected itself when it considered a matter that was not raised before the trial court against the spirit of our decisions in the cases of ***Buchman v The Attorney General***[17] and ***Mususu Kalenga Building Ltd and Another v Richman's Money Lendors ENT***[18]. Counsel argued further that, in any event, the general terms and conditions to the facility letter dated 20th November, 2009 were not on the record before the Court and indeed the record before us.

150 Concluding arguments on this ground, counsel argued extensively on the effect of the Directive

2008, which we have already dealt with and also the facility letter September of 2007. As regards the latter, counsel were emphasizing the fact that it had not been signed by the Appellant and thus not enforceable, which was the same holding made by the Court of Appeal. We have not found it necessary to reproduce the arguments on these two points because the first one has already been dealt with while the other is misplaced in view of the holding by the Court.

151 In response, counsel for the Respondent argued that the Court of Appeal did not base its holding that there was consent given by the Appellant to have its credit data referred to the credit reference agency on the facility letter of 20th November 2009, but rather , the fact that post the Directive 2008 it had become mandatory for credit providers to provide credit data

to a credit reference agency. They argued further that the Court took the position that even though there was a breach of confidentiality by the Respondent, it failed to demonstrate the damage suffered.

152 Following a query from the Court, Mr. E. Silwamba SC conceded that there is no appendix to the facility letter of 20th November 2009 containing the Respondent's general terms and conditions. He however, was of the view that the Appellant was bound by it because it signed confirming that it was bound by the general terms and conditions.

153 A perusal of the record of appeal reveals that the facility letter dated 20th November 2009 is on record and was indeed signed by the Appellant. In so doing the Appellant accepted the offer of the facility on the *"general terms and conditions"* allegedly attached to

the facility letter as appendix 1. This prompted the Court of Appeal to come to the conclusion that the Appellant consented that the general terms and conditions would apply to the facility it had with the Respondent and consented to its credit data being given to the credit reference agency.

154 The difficulty we have with the finding stated in the preceding paragraph is that, whilst the offer contained in the facility letter, from the Respondent refers to general terms and conditions and, likewise, the acceptance by the Appellant acknowledges them, the said general terms and conditions are not attached to the facility letter in both instances that it appears in the record of appeal. We cannot, therefore, say with certainty what general terms and conditions the parties had in mind, if at all any were there.

155 Further, in arriving at the holding, the Court of Appeal sought to justify its earlier holding that the Appellant, at the time the facilities were restructured, was made aware that its credit data would be referred to a credit reference agency and thus consented, waiving the confidentiality rule. However, the Court in so doing made no reference to the clause to this effect in the general terms and conditions, the reason for the omission being that there were no such general terms and conditions to refer to. The holding by the Court, as argued by counsel for the Appellant, was made in the absence of any evidence and is, as a result, amenable to setting aside.

156 Curiously, the position taken by the Court was made notwithstanding its earlier holding that

although the Appellant had accessed other facilities from the Respondent, the terms of such borrowing were not presented before the trial court. Our understanding of this was that the Court would have sought to refer to the *"general terms and conditions"* of previous borrowings as being standard terms. It regrettably could not have recourse to such information because, as it rightly observed, none was available. Be that as it may, the relevance of the general terms and conditions on the part of the Respondent which was to prove that it had the Appellant's prior consent to release confidential information is rendered redundant by the coming into effect of the Directive 2008 whose consequences we have explained earlier.

157 The success of ground 2 is merely academic because of the effect we have ascribed to the Directive 2008.

158 This brings us to the penultimate ground of the appeal, being ground 3, in which the Appellant attacks the holding by the Court of Appeal that the Appellant was in default. The Appellant's position is that the Court erred when it reversed the finding made by the Learned High Court Judge that it was not in default. The contention here is that the Court failed to consider documentary evidence and witness statements and merely considered isolated pieces of evidence upon which it made its findings.

159 The last contention is that the Court fell in grave error by holding that the Respondent's provision of the Appellant's credit data to the credit reference bureau was accurate despite evidence to the contrary.

160 The gist of the argument by counsel for the Appellant was that the Learned High Court Judge was on firm ground when he held that the issue of default on the part of the Appellant only arose in October 2008 and not September 2007. In addition, the cause of the delinquency in the Appellant's account was due to an error in Respondent's system and, as such, the date of 31st October 2008 indicated as the delinquent date by the Respondent is not a mere coincidence.

161 Counsel argued further that the Learned High Court Judge was on firm ground when he considered the letter of 23rd April 2009 as an admission of the cause of the default and that the Respondent had not conducted an accurate investigation as to the cause of the default, prior to reporting the Appellant

to the credit reference agency. For this reason, counsel argued, the Court made an unbalanced review, evaluation, scrutiny and analysis of selected pieces of evidence and ought not to have reversed the findings by the Learned High Court Judge. To augment their arguments, counsel referred to the evidence of the Appellant's witness during trial on the matter.

162 Counsel advanced their arguments by contending that the Appellant's account continued to remain in default due to the Respondent's decision to cancel the debit order as per the letter of 23rd April 2009. They also argued that the fact that the Respondent recommended the Appellant to standard Chartered Bank *"as credit worthy enjoying facilities in seven digit figures ..."* also confirmed that it was not a defaulter. That, the Learned High Court Judge was,

therefore, on firm ground when he relied on the case of ***Hedley Byrne and Co. Limited v Heller and Partners Limited***[19] quoting from the case of ***Robinson v National Bank of Scotand***[20] that there is no legal duty on the replying bank beyond that of giving an honest answer. According to counsel, it can only follow that the response given to Standard Chartered Bank was an honest response by the Respondent of the Appellant's credit status as it had no duty to shield the Appellant.

163 Concluding arguments on the issue, counsel contended that the only bank statements on record showing the status of the Appellant's account are those for the period 2010 to 2014. The Respondent had not produced bank statements for the period in contention and merely relied on the letter of 23rd April 2009 to prove the default. The absence of the

bank statements had prompted the Appellant to complain to Bank of Zambia about the banking practice of the Respondent. This, notwithstanding, the Court went on to rely on the letter from Bank of Zambia alleging that the lease went into default at inception, the arbitral award and correspondence passing between the parties to justify a finding that the report to the credit reference agency was accurate without regard to the evidence which revealed otherwise.

164 In the *viva voce* arguments, Mr. A. Musukwa went to great length at demonstrating the discrepancies between the information provided to the credit reference agency by the Respondent and the bank statements reflecting the status of the Appellant's account. He argued that as at 31st October 2008, the Appellant was not delinquent because the bank

statements revealed that the installment for that month was paid.

165 Mr. K. Nchito echoed the arguments by Mr. A. Musukwa and reiterated that the letter of recommendation by the Respondent to the Standard Chartered Bank reinforced the argument that the Appellant was not in default. As regards the admission by the Appellant that it was in default, he attributed it to its being misled by the Respondent.

166 In response, counsel for the Respondent argued that the Court of Appeal was on firm ground when it held that the Learned High Court Judge made a perverse finding of fact in relation to the Appellant being in default. They referred to the arguments made by the Respondent in the Court of Appeal which referred to correspondence by the Appellant and evidence by its witness, Clever Mpoha, on the state of its facilities

with the Respondent. They argued that there was no evidence presented to show that any payment was made towards the sum of USD540,000.00 advanced to the Appellant in 2007 in respect of the lease.

167 In addition, counsel argued that the system failure had nothing to do with the Appellant falling in arrears. They went on to argue that the finding by the Court of Appeal was reinforced by the fact that in its pleadings before the High Court, the Appellant conceded to the arbitration and confirmed that an award was made against it. They then set out a plethora of authorities which explain the instances when an appellate court will reverse findings of fact by a trial court.

168 In relation to the interpretation given to the letter of 23rd April 2009 by the Learned High Court Judge, counsel submitted that the Judge applied his mind

only to one aspect of the letter on the system error and ignored the portion which indicated the Appellant being in arrears. The Court of Appeal was, therefore, on firm ground when it reversed the findings of fact by the Learned High Court Judge.

169 Counsel concluded by interpreting the effect of the Directive 2008 and argued that it was mandatory for credit providers to supply credit data to credit reference agencies and the Respondent was not wrong in providing the credit data.

170 In the *viva voce* arguments, Mr. E. Silwamba SC restated the arguments in the heads of argument and emphasized that the Appellant's counsel were interpreting the letter of 23rd April 2003 selectively. Mrs. D. Tembwe argued that the bank statements on the record of appeal revealed that the Appellant's

account was in default for eleven months as at October 2008.

171 The holding by the Court of Appeal that the Appellant had defaulted was preceded by an analysis of various documents which led it to conclude as follows:

> **"[The evidence] amply demonstrates that the respondent Savenda Management Services, had by 20th August 2008 fallen into arrears on the facilities availed to it by the bank. Savenda Management Services assured the bank that it would settle all facilities by the end of September 2008. The failure to settle its indebtedness was attributed to the failure by Savenda Management Services debtors to make good their indebtedness to the company. As at 11th November 2008, the respondent was aware that its performance regarding the facilities, it had with the bank was "dented," to use its own word. Although the respondent requested for extension of time in which to liquidate the loan in the sum of USD170,000.00 it was rendered clear that the respondent's performance on the facilities it had with the appellant bank was below expectation.**
>
> **The respondent admitted to Bank of Zambia that it did not service the loan after the lease had been granted as there was no real need to do so, since the overdraft account, from which the payments were being drawn was not in excess."**

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172 We cannot fault the Court of Appeal for arriving at this conclusion in view of the documents it considered. Indeed, by letter dated 10th October 2008, the Respondent reminded the Appellant that it had, among other things, undertaken in a meeting of 20th August 2008, to settle all arrears on the facilities by end of September 2008. By letter of even date the Appellant responded by acknowledging the delay in settling the arrears and giving the reasons for the delay. Subsequently, by letters dated 7th, 11th and 13th November 2008, the Appellant: notified the Respondent of its intention to continue to pursue its debtors in order to bring the facilities in line; undertook to strive to improve its dented performance with the Respondent; and, made proposals for repayments of the short term loan of USD170,000.00 after acknowledging that it had had

a few challenges in meeting its payments. These examples are but a few that are available on the record which lead us to conclude that there was no misdirection on the part of the Court of Appeal when it held that the Appellant was in default. Further, the evidence demonstrates that the Appellant's financial difficulty began well before October 2008 and, as such, it was delinquent by 31st October 2008.

173 We cannot accept the argument advanced by counsel for the Appellant that the letters of admission were written by the Appellant because it was misled by the Respondent because if this were so, it was obliged to retract the letters subsequent to realizing that it was actually not in default. We also do not accept the argument that the Appellant's witness clarified the context in which the

admissions were made. The explanations given by the witness, as revealed by the notes of the proceedings in the High Court, do not in any way negate the fact that the admissions were unequivocal.

174 The Court of Appeal also alluded to the award of the arbitrator as confirming the default on account of the Appellant being bound by it. We agree with this in the light of section 20 of the ***Arbitration Act*** on the effect of an arbitral award which is that it *"is final and binding both on the parties and any persons claiming through or under them."* The Appellant cannot, as a result, disassociate itself from the award.

175 In regard to the letter of 23rd April 2009, we can only agree with the Court of Appeal that *"the judge misconstrued the import of the letter."* The letter, as

the Court correctly observed, and as argued by counsel for the Respondent, was, among other things, informing the Appellant that the error in the system had been rectified and that, notwithstanding the rectification, the account was still in arrears of USD80,050.34. This was a crucial piece of evidence which the Learned High Court Judge chose to ignore. Moreover, it must be noted that there was already a prelude to the letter of 23rd April 2009 in the form of the meeting between the parties in August 2008, and the subsequent correspondence we have referred to of October and November 2008, which sufficiently proves default as acknowledged by the Appellant which the Learned High Court Judge chose to ignore.

176 Further, the fact that no bank statements were availed for the period in issue to prove the default,

except after 2010 as argued by counsel for the Appellant, does not change matters. The letter of 23rd April 2009, is sufficient proof of default as it is a page in the bankers books of the Respondent. The books of a bank are defined by section 2 of the ***Evidence (Bankers Books) Act*** as including "... *ledgers, day books, cash books, account books and all other records used in the ordinary business of the bank whether such records are in form or in microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."*

(Underlining is ours for emphasis only)

177 A letter from a bank, such as the letter dated 23rd April 2009, is a record used in the ordinary business of a bank, in this case the Respondent bank. Thus, the letter being part of a banker's book can be

received, as was the case in this matter, as *prima facie* evidence of matters and transactions therein recorded especially that its production was not objected to at discovery. This is pursuant to section 3 of the ***Evidence (Bankers' Books) Act***. We, therefore, cannot fault the Court for accepting the letter as evidence of default notwithstanding that no bank statements were on record for the period in issue.

178 We must hasten to add that at no time did the Appellant question the allegation of it being in arrears contained in the letter of 23rd April 2009 or request for a verification of the alleged arrears by way of a bank statement. The contention by counsel for the Appellant, in this regard, is clearly an afterthought.

179 In regard to the contention that by giving a reference letter to Standard Chartered Bank, the Respondent was confirming that the Appellant was not in default, we find the contention lacking in merit. The letter to Standard Chartered Bank must be read in its proper context which is that it confirmed the credit status of the Appellant with the Respondent as being in seven digits denominated in United States dollars. It ends with a disclaimer that *"it is given without responsibility or guarantee on the part of the Bank,"* which we have understood to mean that the Respondent was not guaranteeing its credit worthiness. Further, the purpose of credit referencing must be understood in its proper context which is that, and in accordance with the Guidance Note, it should not be used as a tool for *"blacklisting"*

customers. The Guidance Note states, in this respect, under **(2) Interpretation of Negative Credit *Reports*** as follows: *"The decision to extend a credit facility to a borrower, whether or not that person has a negative credit report, is the preserve of the credit provider, using credit information held by a CRA, additional information provided by the borrower and its internal proceeds."*

180 Thus, the fact that the Appellant was in default did not mean that the Respondent should give a negative recommendation to Standard Chartered Bank, thereby locking it out of credit. Its responsibility ended, as it did, at stating the credit status of the Appellant with it and leaving Standard Chartered Bank to make an informed decision on the matter.

181 We must end by stating that at no time had the Appellant denied being in default as revealed by its pleadings which confirm this and attribute it to the Respondent's system error. It, however, failed to explain how the system error caused the default.

182 To this end the unbalanced assessment of the evidence was by the Learned High Court and not the Court of Appeal. Ground 3 of the appeal must accordingly fail.

183 Coming to the last ground, namely ground 4 of the appeal which challenges the interference by the Court of Appeal with the award of damages by the Learned High Court Judge, the thrust of the contention in this ground questioned the basis upon which the Court held that its action for breach of confidentiality (post the Directive 2008) was

unsustainable and its claim for damages misconceived.

184 The argument by counsel for the Appellant under this ground were by and large a repetition of the arguments advanced under ground 2 of the appeal, except that they expanded the arguments in relation to the effect of the Directive 2008. The view taken by counsel here, was that the provision of the Directive 2008 cannot override the provisions of section 50 of the ***Banking and Financial Services Act***.

185 By the above argument, counsels were essentially saying that a provision of an Act of Parliament such as section 50 cannot be subordinated to a Directive issued by Bank of Zambia. This position, they argued, was reinforced by the fact that the common law duty of confidentiality is codified in section 50 of the ***Banking and Financial Services Act***. Taking

the argument further, counsel submitted that the need to retain confidentiality is emphasized in the Code under clause 4 of the Code. In the light of the arguments by counsel, we have reproduced the clause in full in the earlier part of this judgment in dealing with ground 1 of the Appeal.

186 Concluding arguments on this issue, counsel submitted that the holding by the court that the coming into force of the Directive 2008 made the claim for breach of confidentiality unsustainable, because it abrogated the common law duty of confidentiality, was a misdirection.

187 On the issue of the claim for damages being misconceived, counsel's arguments suggested that the Court denied the Appellant the damages claimed because it was of the view that the Directive 2008 and the subsequent restructuring of the loan cured

the breach by the Respondent of not giving the Appellant a written statement prior to extending credit to it. They also argued that it was a misdirection on the part of the Court to limit damages suffered by the Appellant as a consequence of the wrong reference to the credit reference agency to the period prior to the Directive 2008. According to counsel, the damages suffered by the Appellant continued beyond the Directive 2008 and 20th November 2009 after the loan was restructured. The basis of this latter argument was due to the position held by counsel that the Directive 2008 did not negate the mandatory requirement of notification to a customer upon default and need for the customer to consent to have the credit data referred to a credit reference agency.

188 Arising from this, counsel argued that the Learned High Court Judge was on firm ground when he held that the Appellant was entitled to damages as a consequence of the adverse report on the credit reference agency which resulted in its failure to access funds before 20th November 2009 and afterwards. They also endorsed the award by the Learned High Court Judge, of all the reliefs sought by the Appellant including the sum of ZMW192,500,000.00, being damages for loss of business.

189 On quantum of damages, counsel argued that it was a misdirection on the part of the Court to only award nominal damages because there was sufficient evidence placed before the Learned High Court Judge to justify his award of damages in the sum of ZMW192,500,000.00. This evidence was in

the form of documentary evidence and *viva voce* evidence which was not objected to. Counsel went on to set out the law regarding admission of documentary evidence. They concluded by: condemning the award of nominal damages as contravening Article 18(2)(i) of the ***Constitution*** which directs courts to award adequate compensation; cases setting out principles to be applied in awarding damages; and, referring to authorities on the appropriate instances for the court to interfere with an award of damages.

In the *viva voce* argument both Mr. Mutemwa SC and Mr. A. Musukwa argued that the Learned High Court Judge was on firm ground in assessing the damages at K192,500,000.00. They argued that the sum was properly endorsed as a liquidated demand

because it was ascertainable from the consultancy report by Messrs One Merchant. Counsel also argued that the Learned High Court Judge was on firm ground in accepting the documentary evidence in support of the award of K192,500,000.00 without sieving it because it was not objected to by counsel for the Respondent. Mr. M. Mutemwa SC relied on our decision in the case of ***Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited***[21]. Essentially, they approved of the manner in which the Learned High Court Judge went about the exercise of awarding the reliefs claimed and condemned the Court of Appeal for not upholding him.

190 In response, counsel for the Respondent argued that in awarding the sum of K192,500,000.00 the

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Learned High Court failed to properly adjudicate upon all matters in dispute because he did not determine whether the sum could stand as a liquidated demand. They argued that in accordance with Order 6 rule 2 sub-rule 5 of the ***Supreme Court Practice (White Book)*** *"a liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract."* In addition, *"its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic."*

191 According to counsel, the judgment of the Learned High Court Judge did not interrogate or adjudicate on how it awarded the sum of K192,500,000.00. They set out a passage from our decisions of ***Mhango v Ngulube and another***[22] and ***JZ Car Hire Limited v Chala Scirocco and another***[23]

where we stated the need for a claimant to prove a special loss by tendering evidence before court which makes it possible for a court to place a monetary figure to the loss. They concluded by submitting that the award of K192,500,000.00 without supporting evidence amounted to unjust enrichment.

192 In the *viva voce* argument, Mr. E. Silwamba SC whilst acknowledging that counsel for the Respondent in the High Court may have been sloppy by failing to object to the documentary evidence relied upon by the Learned High Court Judge in awarding the damages, argued that the High Court Judge was still obliged to critically analyze the evidence to see if indeed it proved the claim.

Mr. Luambelwa echoed the arguments advanced by Mr. E. Silwamba SC and urged us to consider our

decision in the ***Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa***[24] case.

193 Turning to the award of nominal damages by the Court of Appeal, counsel set out the object of an award of damages as being the need to compensate a plaintiff for damage, loss, or injury suffered, in accordance with ***Mc Gregor on Damages***. They then argued, with reference to our decision in the case of ***David Chiyengele and others v Scaw Limited***[25], that where it is found that a party's contractual right has been breached but he fails to prove that he suffered actual damage, he is only entitled to nominal damages. Counsel referred to the documentary evidence relied upon by the Appellant in the High Court to prove damages and argued that it did not sufficiently prove its loss.

194 Counsel concluded by discussing two of our decisions whose principle is that there must be sufficient reasons for an appellate court to interfere with damages awarded by a trial court.

195 Our decision under ground 1 setting aside the holding by the Court of Appeal that the Respondent breached it duty of confidentiality renders the determination of this ground *otiose*. However, in view of the misdirection made by the Learned High Court Judge in awarding the reliefs claimed we feel compelled to determine it especially that the Court of Appeal did not address its mind to it. Our determination will also be restricted to this because the award of nominal damages by the Court of Appeal is effectively set aside by our determination under ground 1 of the appeal. Further, the

arguments advanced by counsel for the parties, by and large, focus on the decision by the Learned High Court Judge.

196 The starting point in our determination of this ground of appeal is a perusal of the pleadings settled by the Appellant in the High Court. Paragraph 9 of the statement of claim reveals that the claim by the Appellant was predicated on alleged tortious act by the Respondent of negligence and the relief sought was, among others, a sum of K192,000,000.00. The relief sought under head (iv) in the writ of summons of damages for injury to business reputation is also tortious in nature.

197 We have, in the recent past, frowned upon litigants instituting court actions in circumstances alleging tortious wrongs for liquidated or specified damages. In a judgment delivered not so long ago in the case

of ***Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and the Attorney General***[26], Musonda JS restated our misgivings aforestated and went on to distinguish liquidated damages by reference to the English legal Lexicon in the following terms at pages J41 to J42:

> **"In simple terms, the word 'Liquidated' in the context of the expression 'liquidated damages' means 'specific' (The Longman dictionary of Law, 7th Edition). Black's Law Dictionary of Law defines the expression 'liquidated damages as:**
>
> > **"an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by the party if the other party breaches."**
>
> **For its part, the Oxford dictionary of Law defines the expression 'liquidated damages' as:**
>
> > **"... a sum fixed in advance by the parties to a contract as the amount to be paid in the event of a breach. They are recoverable provided that the sum fixed was a fair pre-estimate of the likely consequences of a breach ..."**
>
> **The opposite or converse of liquidated damages are what are known as unliquidated or, to borrow an expression from the Longman Dictionary of Law, 'unspecified' damages. According to Black's Law Dictionary 'unliquidated damages' are:**

"... damages the amount of which is fixed by the court."

It is a matter of elementary knowledge indeed that the type of damages which are awarded on account of any proven tortious wrong or wrongs are of the second type, that is, unliquidated damages. Needless to say, unliquidated damages are unspecified and, are, therefore, subject to assessment or 'establishment' or 'fixing' by the court."

In the light of the foregoing, it is evident that the Appellant ought not to have claimed liquidated damages because the basis of its claim arose from an alleged tortious claim.

198 Our position is re-emphasized by the fact that in arriving at his decision which upheld the Appellant's claim, the Learned High Court Judge relied on the famous case of ***Donogue v Stevenson***[1], a leading authority on the tort of negligence. He also went to great length at stating the *"neighbour test"* which is relevant for determination of the breach of duty in the tort of negligence.

199 The Appellant, as a result, ought not to have quantified his claim in monetary terms because it was not a liquidated demand as we have demonstrated in the preceding paragraphs as argued by the Respondent's counsel with reference to Order 6 of the ***White Book*** on what constitutes a liquidated demand. The Appellant made such a glaring error in pleadings, the High Court Judge was obliged to strike down the pleadings.

200 We wish to take the matter even further by stating that even assuming the Appellant could claim the K192,500,000.00 as liquidated damages the pleadings as presented before the Learned High Court Judge fell far short of the rules on pleadings and we are at sea as to how the Learned High Court Judge entertained them and awarded the damages.

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Atkin's Court Forms 2nd edn volume 32, 1996 issue states at page 29 as follow:

> **"Where, however, a plaintiff claims that he has suffered special damage, such damage must be alleged with particulars in his statement of claim."**

201 What this means is, a claim for special damages must be specifically pleaded and particularized. A perusal of the originating process filed in this matter, being the writ of summon and statement of claim, reveal that they are both bereft of such particulars. In relation to the claim for the ZMW192,500,000.00 both processes merely state *"K192,500,000.00 damages for loss of business."*

202 The need for particularization of such claims is in order to alert a defendant of the case against him and aid the court to properly assess and determine the loss by giving it a monetary value. We have in the past held, and as argued by counsel for the

Respondent, that it is for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. The case of ***Mhango v Ngulube and others***[18] is a case in point.

203 Not only did the pleadings presented by the Appellant before the Learned High Court Judge fail to sufficiently particularize the damages of ZMW192,500,000.00, the evidence presented also fell short of the principle we set out in the ***Ngulube*** case. The evidence was mainly in the form of documentary evidence, in particular the report by Messrs One Merchant.

204 Learned state counsel Mr. M. Mutemwa in reference to the evidence presented argued that the High Court Judge was obliged to accept it because it was

not objected to. He took the view that we were also bound by our decision in the ***Redlines Haulage*** case and, thus, urged us to overturn the decision of the Court of Appeal which refused to accept the High Court Judge's finding.

205 It is important that we put our holding in the ***Redlines Haulage*** case in its proper context. The crucial holding we made in that case was that where any issue not pleaded is let in by evidence and not objected to by the other side, *"the Court is not precluded from considering it"*. Mr. M. Mutemwa SC suggested that by virtue of the foregoing the Learned High Court Judge was obliged to accept the documentary evidence on damages as proved because it was not contested. We do not agree with this because the crucial words are those we have underlined and in italics which mean that the Court

may consider such uncontested evidence but not necessary accept it.

206 The Appellant's ill fate is compounded by the fact that the documentary evidence which was led and accepted by the Learned High Court Judge as proof of damages suffered does not in any way aid its case. As a starting point, the letter from ECO Bank which the Appellant's witness stated reveals that the Appellant was denied funding does not attest to this. A reading of the letter reveals that it acknowledges the fact that the Appellant was listed on the credit reference agency and requested the Appellant to state its current state of indebtedness to enable it proceed to process the application.

207 The other crucial document was the consultant's report by Messrs One Merchant. According to counsel for the Appellant, this document sets out

the loss in dollar terms suffered by the Appellant from which the K192,500,000.00 was derived. A perusal of the document, as argued by Mr. E. Silwamba SC, reveals that it opens with a disclaimer that *"no warranty or guarantee, whether express or implied, it made by One Merchant Bank with respect to the completeness or accuracy of any aspects of [the] report and no other party ... is authorized to or should place any reliance whatsoever on the whole or any part or parts of [the] report ..."* A similar caveat is placed on the report as argued by Ms. A.D. Theotis when she drew our attention to the portion of it which stated that there had been no verification of the information provided to the consultant by the Appellant.

208 The disclaimers set out in the preceding paragraph reveal that the contents of the report were to be

treated with caution. Despite this, the Learned High Court Judge went ahead and relied on it and other documents without question and upheld the claims it purported to support.

209 What is clear from the judgment of the Learned High Court Judge is that he did not analyze the documents he relied upon to justify the award of K192,500,000.00 and the other damages but merely accepted them as a given. This is against the principles of judgment writing as revealed by Dato Syed Ahmad Idid in ***Writing of Judgments: A Practical Guide For Courts and Tribunals***, 2011 edition at page 49 which states as follows:

> **"The decision must show the parties that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic ... The ... opinions of the parties in a case should not be copied verbatim and adapted to the judgment of the court. It is not just acceptable for a judge to mention in his judgment**

that he agrees with the submission of a party and he has nothing to add. A judge should tower above the parties and their counsel by applying some level of judicial reasoning logic in evaluating a case ..."

The author goes on to say that where a Judge copies verbatim counsel's submission and adapts it to his judgment, the judgment is a *"ghost written"* by counsel.

210 The assessment by Learned High Court Judge of the damages which we have set out above, is nothing but an acceptance of the submission (in the form of pleadings and documentary evidence) by the Appellant. He does not sieve the evidence or attempt to analyze, access or apply judicial reasoning logic to it, *vis a vis* the K192,500,000.00 claimed.

211 We have also considered the argument by the Appellant's counsel of the need for damages to be adequate as per article 18 of the ***Constitution (as***

amended). This argument is not relevant in the light of the holding by the Court of Appeal, which we agree with, that for damages to be awarded they must be proved. The article only comes into play when assessing damages which have been proved.

212 As a consequence of what we have said ground 4 must also fail.

Leave to appeal to this Court

213 We note that this is the first appeal we have dealt with emanating from a decision of the Court of Appeal. It comes before us by virtue of leave to appeal granted by the Court of Appeal at the end of its judgment couched in the following terms, *"leave to appeal is granted."* In so doing the Court of Appeal did not explain the reason why it felt that the dispute between the parties should be escalated to

the apex court and neither was it moved by either of the parties prior to making the order.

214 This omission by the Court of Appeal is important to us because, whilst there is a constitutional right of appeal to our Court by virtue of section 131(2) of the ***Constitution (as amended)*** such appeal is only with leave of the Court of Appeal on limited grounds which are set out in section 13(3) of the ***Court of Appeal Act***. By virtue of this provision, the Court of Appeal, unlike the High Court, is not obliged to pronounce itself at the end of a judgment as to whether leave to appeal has been granted or not and give reasons for such grant or refusal.

215 The Court of Appeal must wait for a party to move it after it has delivered its judgment, seeking leave to appeal, and if it is satisfied that one of the grounds

for granting leave has been satisfied, it must grant the leave. If not, it must refuse the leave.

216 The permissible grounds for the grant of leave to appeal in civil matters are set out in sections 13(3)(a), (c) and (d). These are where: the appeal raises a point of law of public importance; the appeal would have a reasonable prospect of success; or, there is some compelling reason for the appeal to be heard.

217 The rationale for the foregoing is an acknowledgement of the fact that the resources of the courts are overstretched and if it were otherwise, the doors to justice would be open to busy bodies whose only aim is to delay the inevitable execution of a judgment. We are of the firm view that this Court should only be open to a litigant who has

moved the Court of Appeal and met the threshold set out in section 13(3).

218 Coming back to the leave to appeal granted by the Court of Appeal, this appeal obviously raises a legal issue of general public importance in that the public are keen to know the fate of their credit data once they obtain loans. In addition, this is the first time that a matter of this nature which involves the provision of credit date to a credit reference agency is arising in our Courts. It is an important matter which affects every borrower and potential borrower. To this extent, the Court of Appeal's fault lay only in granting leave without the Appellant moving it and meeting the threshold. The downside however, is that this was an appeal by a defaulting borrower and, as such, the question that looms large is,

should such litigants be allowed into our Court? Our answer is no.

Conclusion

219 All four grounds of appeal having failed, we dismiss the appeal with costs in all the three Courts. In so doing, we set aside the holding by the Court of Appeal that the Respondent had breached the duty of confidentiality and the award of nominal damages of K5,000.00. The costs are to be taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

.....
M. MUSONDA, SC
SUPREME COURT JUDGE

.....
N.K. MUTUNA
SUPREME COURT JUDGE