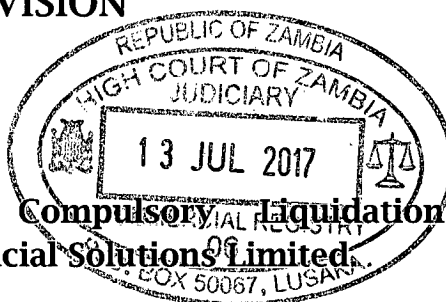


**IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HPC/BN/0035



In the Matter of: The **Compulsory Liquidation** of Graypages
Financial Solutions Limited.

In the Matter of: Sections 81, 82, 84A, 84B, 86, 101, 103, 104 and 105
of the Banking and Financial Services Act, Chapter
387 of the Laws of Zambia.

In the Matter of: An Objection to the Liquidation Schedule Pursuant
to Section 106 of the Banking and Financial
Services Act, Chapter 387 of the Laws of Zambia.

Between:

Citizens Economic Empowerment Commission **Applicant**

and

Bank of Zambia **Respondent**

Coram: The Hon. Lady Justice Dr. Winnie S. Mwenda in Chambers at
Lusaka this 13th day of July, 2017.

For the Applicant: Mrs. E. M. Mwansa, Legal Counsel

For the Respondent: Mr. C. K. Sikazwe, Senior Legal Counsel.

RULING

Cases referred to:

1. *NFC Africa Mining Plc v. Techro Zambia Limited*, SCZ Judgment No. 22 of 2009.

Legislation referred to:

1. Section 106 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.
2. Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.
3. The Citizens Economic Empowerment Act No. 9 of 2006.
4. Order 53, rule 10 (8) of the High Court Rules, Chapter 27 of the Laws of Zambia.

5. *Section 104 (3) (a) of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.*
6. *Section 107 (1) of the Banking and Financial Services Act.*
7. *Section 82 of the Banking and Financial Services Act.*

Publications referred to

Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition (West Group, 2004)

On 24th January, 2017 the Applicant herein filed a Notice of Objection to Liquidation Schedule filed by the Respondent on 5th January, 2017. The Notice was filed pursuant to Section 106 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia as read together with Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

The notice was to the effect that the Applicant was objecting to the Liquidation Schedule filed herein in its entirety on the grounds that the said Liquidation Schedule had omitted the return to the Applicant of its property, which step should have been the first step in the liquidation process.

Secondly, that the Liquidation Schedule had erroneously classified the Applicant as a general creditor to rank with competing claims rather than as a person in relation to whom fiduciary functions were performed by Graypages Financial Solutions Limited; and lastly, that the Liquidation Schedule had not, as a last resort, provided for payment to the Applicant out of the special reserve account, liability insurance or other undertaking as by law provided for.

In an Affidavit in Support of Notice of Objection deposed to by one Nchimunya Monde, the Director, Credit Control and Risk in the Applicant Commission, the Applicant states that it is a statutory body established under the Citizens Economic Empowerment Act, No. 9 of 2006 with a mandate of, amongst other things, substantially increasing meaningful participation by targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies in the economy thereby decreasing income inequalities.

In order to achieve this purpose, the Applicant is the custodian of the Citizens Economic Empowerment Fund (the "Empowerment Fund"), which is essentially a pool of public funds that consists of money appropriated by Parliament for achieving the Applicant's functions; money received by way of grants, fees, loans or donations; and interest accrued from any investment made by the Applicant or raised through the local stock exchange.

The Affidavit in Support of Notice of Objection further discloses that on or about 24th September, 2013, the Applicant entered into an agreement with Graypages Financial Solutions Limited (hereafter referred to as "Graypages"), whereby the latter would administer part of the Empowerment Fund as a fiduciary of the Applicant. The work of Graypages was to be carried out in North-Western Province, particularly Solwezi, Ikelenge and Kabompo Districts.

It was an express term of the fiduciary agreement in Clause 5.2.3 that Graypages would maintain a holding account for the Empowerment Fund and recoveries, including interest.

Based on the Fiduciary Agreement, the Applicant transferred a total of ZMW1,205,730.50 being part of the Empowerment Fund, for Graypages to administer in the said fiduciary capacity. The breakdown of when the money was sent to Graypages was as follows: ZMW313,084.50 on 19th November, 2013; ZMW554,789.09 on 12th May, 2014; and ZMW337,856.91 on 13th June, 2014 as evidenced by letters collectively exhibited as "NMZ" in the annexure to the Affidavit.

It was the Applicant's evidence that it transferred the said total amount of ZMW1,205,730.50 to First National Bank Zambia Limited Account No. 62282164632 held by Graypages at Kitwe Branch in the belief that this was the holding Account; that in any event, the total amount of ZMW1,205,730.50 was still the property of the Applicant, as custodian of the Empowerment Fund. In addition to Graypages maintaining the holding account, some of the

key fiduciary obligations of Graypages in respect of the Empowerment Fund were as follows: -

- (i) Under Clause 5.2.1 to provide a computerised loan management system with full functionality, including management of interest rates, loan history, changes in account, demographic information, etc;
- (ii) In clause 5.2.2 to establish and maintain a financial infrastructure for appraising and processing of Empowerment Fund loans to accurately reflect all financial transactions related to those loan accounts;
- (iii) Under Clause 5.2.4 to maintain the Empowerment Fund loan accounts and ensure that all individual Empowerment Fund loan accounts reflect all related financial transactions in a timely and accurate manner;
- (iv) Under clause 5.2.7. to securitise on behalf and in favour of the Applicant all loans to be granted;
- (v) At page 9 of the Agreement under item 4, to receive deposits and record payments on Empowerment Fund loan in the appropriate individual accounts or sub accounts within 2 business days;
- (vi) At page 9 of the Agreement under item 5 to maintain the loan status of each individual borrower separately along with their loan history;
- (vii) At page 9 of the Agreement under item 6 to prepare and print individual statement of accounts for each Empowerment Fund active loan in the system and provide these to the Applicant no later than the 10th day of the subsequent month; and
- (viii) To provide daily transactions detail reports on the holding account, individual loan statement report, aging analysis report, loan repayment reconciliation report, loan portfolio performance report and statement of account report.

According to the Applicant as deposed in the affidavit, Graypages warranted to the Applicant that all the said fiduciary obligations would be performed

completely and in accordance with industry standards. That Graypages did not at any point disclose to the Applicant that the holding account was overdrawn and it so happened that the Applicant sent money to the holding account at a time when the holding account was overdrawn in the amount of ZMW419,899.39. The Bank where the holding account was held applied the said ZMW419,899.39 to clear overdraft charges and as a result, the ZMW419,899.39 was never loaned to the Applicant's clients by Graypages. On 4th February, 2015 the Respondent took possession of Graypages but did not, at that point or to date return to the Applicant all assets held by Graypages as a fiduciary or ultimately settle Graypages' account with the Applicant.

It was the Applicant's further evidence that on or about 9th February, 2015, the Applicant requested for the assistance of the Director - Non Bank Financial Institutions at the Respondent regulator to ensure the return of ZMW419,899.39 to the Applicant but nothing was done. The Applicant exhibited a copy of the letter by which the Applicant made the said request as "NM3". That at 13h 25 on 24th August, 2015 the Respondent resolved to place Graypages in compulsory liquidation but did not, at that point, or to date return to the Applicant all assets held by Graypages as a fiduciary or ultimately settle Graypages' account with the Applicant. According to the deponent, he had sight of the Liquidation Schedule filed by the Respondent in respect of Graypages which states at page 6 as follows:

"The liability to CEEC represents funds owing to CEEC arising from a contract between CEEC and GFS in which GFS was engaged as an agent to grant loans to dairy farmers of CEEC in North Western Province. CEEC disbursed a total of ZMW1,205,730.50 to GFS under the scheme. The funds were channelled through a First National Bank (FNB) account which at that time was overdrawn to the tune of ZMW419,899.39. Of the total amount, GFS disbursed loans totalling ZMW785,831 whilst the sum of ZMW419,899.39 cleared GFS' overdraft with FNB,"

It is the Applicant's evidence that in spite of what has been explained above, the Respondent has not taken any steps to retrieve the said ZMW419,899.39

from First National Bank (FNB) and return the same to the Applicant, notwithstanding having extensive powers to do so, as outlined at page 2 of the Liquidation Schedule.

Further, that the Applicant has not seen any step taken in the liquidation scheme dealing with this issue. That instead, the Respondent has accepted the position that the ZMW419,899.39 from the Empowerment Fund discharged Graypages' liability with FNB, yet the money was never the property of Graypages. That it is apparent from the Liquidation Schedule filed in Court that the Applicant has erroneously been classified as a depositor, other creditor, safe-keeping services customer or bailor of property, owed ZMW419,899.39. This has relegated the Applicant to a general and unsecured body of creditors who are required to be paid according to a prescribed priority, and to a share in a pool of assets.

That the Respondent has gone on to propose under item 9.0 at page 10 of the Liquidation Schedule, that the only payments to be made are ZMW100,000 to the Respondent itself and ZMW40,000 to the Zambia Revenue Authority, which proposal the Applicant finds objectionable as it is of the view that in the circumstances, the Respondent ought to return a total sum of ZMW419,899.39 held by Graypages as a fiduciary of the Applicant.

As for the remainder of the Empowerment Fund administered by Graypages amounting to ZMW785,831.11, the Applicant considered that even though the same was disbursed, ensuring that the Applicant secures respective repayments of the amounts loaned out requires the Respondent to provide the Applicant with the relevant information which would be achieved by the Respondent providing the Applicant with the following: -

- (i) Current individual client loan statements;
- (ii) Individual loan files which should have -
 - concept note/CEEC application form;
 - filled out KYC form, copy of client's national registration card together with passport size photo;

- quotation to support payments made to suppliers on behalf of client;
- signed withdrawal slips to support all payments made directly to client by Graypages;
- signed deposit slips for all repayments made to Graypages by clients;
- loan repayment plan agreed with clients; and
- loan statement which will show how much the client has paid and how much is outstanding.

The deponent further averred that he has been advised by the Applicant's Counsel on record and verily believes the same to be true, that under statutory supervision of the Respondent, Graypages maintained, or at least ought to have maintained, a special reserve account to an amount which the Respondent as regulator considered adequate for situations such as these, in order to preserve and even improve public confidence in financial institutions. That he was also advised, which advice he verily believes, that failing the said special reserve account, or liability insurance instead, the Respondent may have accepted such other commitment or undertaking from Graypages that the Respondent considered adequate as a regulator.

The Respondent opposed the Notice of Objection and application to have the Liquidation Schedule modified to guarantee the return to the Applicant by the Respondent of ZMW419,899.39 as well as the documents listed in paragraph 20 of the Affidavit in Support. To this end, on 9th March, 2017 the Respondent filed in Court an Affidavit in Opposition to Notice of Objection deposed to by one Mwiza Mhango who is employed by the Respondent as Liquidation Manager of Graypages.

The Affidavit of Mwiza Mhango discloses that the agreement that Graypages entered into with the Applicant on 24th September, 2013 was not a fiduciary agreement *per se*, but was in fact, a Credit Management Service Agreement appointing Graypages as Credit Manager of the Empowerment Fund. That

although the Credit Management Service Agreement had a provision for Graypages to open a holding account for the Applicant's funds, Graypages did not actually create a holding account as the Account No. 622182164632 held at First National Bank Zambia Limited (FNB), Kitwe Branch was used for several other operational purposes of Graypages such as salaries, utility bills, investments, apart from receiving and disbursing the Applicant's funds, as evidenced by a copy of the bank statement for the period 31st August, 2013 to November, 2014 from Graypages Account No. 62282164632, FNB, Kitwe Branch.

The Affidavit further discloses that as a result of co-mingling of the funds, there were no identifiable funds connected to the Applicant and as at the date of possession, Graypages only had ZMW15.73 overdrawn balance on Account.

That the Graypages Account No. 62282164632 at FNB, Kitwe Branch was held in the name of Graypages with no reference whatsoever to the Applicant.

It is the Respondent's further evidence that although the Applicant transferred funds to Graypages through the said FNB Account, the Applicant did not notify FNB of the existence of the Credit Management Service Agreement or indeed the holding account and as proof of this averment exhibited a copy of the Defence of FNB in cause number 2015/HPC/0145 commenced by the Applicant. That the Credit Management Service Agreement between the Applicant and Graypages mandated the Applicant to monitor the performance of the Credit Manager - Graypages, through meetings, requests, audits, client visits in line with Clause 5.1.6 on page 8 of the Credit Management Service Agreement.

It is the Respondent's further assertion that the Applicant ought to have known that the account at FNB had been overdrawn considering that section 10.8 of the Credit Management Service Agreement required that the Applicant be provided with daily transactions report on the holding account. That the Applicant negligently and without any form of due diligence disbursed the

sum of K1,205,730.50 to the said Graypages account with FNB which was overdrawn.

The Respondent averred that it resolved to take possession of Graypages on 27th November, 2014 as the Liquidation Schedule 13 will show, on account of capital inadequacy and to protect the integrity of the financial system and there was no obligation on the Respondent at that stage to distribute the assets of to the Applicant, or indeed, any other stakeholder.

It is the Respondent's further averment that on 10th April, 2015 the Applicant commenced an action against and FNB under cause number 2015/HPC/0145 for the recovery of the sum of ZMW451,676.67 and that on 4th August, 2015 Graypages (In Possession) and the Applicant entered into a Consent Order which was endorsed by Hon. Mr. Justice William Mweemba whereby the parties agreed that Graypages (In Possession) will pay K419,899.50 and interest thereon.

That on 24th August, 2015 the Respondent decided to close and place Graypages (In Possession) in compulsory liquidation after 5 years of engaging the shareholders and Board of Directors to recapitalise. At the point of placing Graypages in compulsory liquidation, no assets or property of the Applicant was found on Graypages and the Account No. 62282164632 with FNB Kitwe Branch was still in an overdrawn position. It was the Respondents evidence Graypages that co-mingled the funds for its operations and management of the Applicant's loan scheme in its FNB Account No. 62282164632. That on 20th April, 2016 the Applicant wrote to the Respondent concerning the judgment sum to which the Respondent replied.

The Respondent avers that it is not within the jurisdiction of the Respondent to interfere in a matter which is before the Court of law as it is their belief that the matter between the Applicant and FNB is still subsisting under cause number 2015/HPC/0145. That one of the reasons which gave rise to the supervisory actions of the Respondent to take possession of Graypages and

subsequently compulsorily liquidate the company was due to its insolvency, in that it did not have any special reserve or insurance or any undertaking acceptable to the Respondent.

That in view of the foregoing, the Applicant cannot be classified in priority to all other claims but should retain its position in line, as stated in the said Liquidation Schedule herein.

In an Affidavit in Reply deposed to by Nchimunya Monde, the Applicant avers that it is the Applicant's case that the agreement entered into between the Applicant and Graypages was in the nature of a fiduciary agreement regardless of the actual title of the contract that the parties signed, and that the revelation by the Respondent that Graypages did not maintain a holding account as agreed by the parties is but one instance of the many dishonest and/or negligent acts committed by Graypages that has led the Applicant to the deplorable position it is in. That when the Applicant discovered that what had been represented as the holding account was in fact overdrawn the Applicant wrote to the Bank of Zambia.

Nchimunya Monde further deposed that the Applicant is expressing surprise and is somewhat disappointed that the Respondent has taken the position of merely rubber stamping and endorsing all the wrong things done by Graypages. This view is based on the fact that the Respondent was the regulator of Graypages and got a second chance to put things right when it placed Graypages in liquidation.

It is the Applicant's further evidence that it was at all times content to rely on the fact that Graypages warranted to the Applicant that all the agreed fiduciary obligations would be performed completely and in accordance with industry standard. That in any case, the Respondent cannot rely on its own default and that of Graypages to defeat the claims now being advanced before this Court.

In addition, that the Consent Order in Cause Number 2015/HPC/0145 specifically placed the obligation to pay on Graypages rather than FNB. Further, that when Graypages went into compulsory liquidation execution of the Consent Order was no longer possible and the Applicant has since waited for the time frames prescribed in the relevant legislation, culminating in the objection now before this Court.

I have meticulously examined the Liquidation Schedule filed in Court by the Respondent herein on 5th January, 2017; the Applicant's Notice of Objection to the Liquidation Schedule; the Affidavit in Support of Notice of Objection to the Liquidation Schedule and attached exhibits and also Skeleton Arguments in Support of the Notice of Objection, all filed in Court on 24th January, 2017.

I have likewise perused the Affidavit in Opposition to the Notice of Objection and the Skeleton Arguments in Opposition to the Notice of Objection, both filed in Court on 9th March, 2017 and the Applicant's Affidavit in Reply filed on 17th March, 2017. In addition, I have considered the oral arguments by learned Counsel on both sides. I am grateful to both parties for the comprehensive written arguments and oral arguments advanced in support of their respective cases.

The first issue I will deal with is the Respondent's argument that the Applicant's Skeleton Arguments are irregular and do not satisfy the rules as prescribed by Order 53, rule 10 (8) of the High Court Rules, Chapter 27 of the Laws of Zambia in that the Applicant has not stated the facts of the case in its Skeleton Arguments. That this is fatal in that the rule requiring the stating of facts in Skeleton Arguments is couched in mandatory terms by the use of the word "shall". The Respondent has cited the case of *NFC Africa Mining Plc v. Techro Zambia Limited*¹ where the Supreme Court held that: -

"Rules of the Court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed".

The Court went on to hold that: -

"The word "shall" as used in the section connotes that the obtaining of leave is mandatory".

The Respondent has argued that the Applicant's Skeleton Arguments have not complied with the mandatory requirement of stating facts and are therefore, irregular. The Respondent urged the Court not to entertain or consider the irregular Applicant's Skeleton Arguments.

Order 53, rule 10 (8) of the High Court Rules provides that: -

"An applicant in an interlocutory application shall file, together with the interlocutory application, skeleton arguments of the Applicant's case stating the facts, law and authorities relied upon with copies of such authorities, where possible." (underlining, the Court's for emphasis only)

A perusal of the Skeleton Arguments shows that the Applicant has indeed not stated the facts of the case. However, in the second line of paragraph 2.1 of the Skeleton Arguments, the Applicant states that "... The background to how and what money was transferred to Graypages Financial Solutions Limited ("Graypages") has been set out in the Affidavit in Support of Notice of Objection to the Liquidation Schedule filed in Court on 24th January, 2017 and deposed to be one Mr. Nchimunya Monde (the "Affidavit in Support)."

Therefore, even though the facts of the case are not stated, there is, in the Skeleton Arguments, reference to the fact that the facts are given in the Applicant's Affidavit in Support. The reader is thus directed to where the facts can be found. Therefore, notwithstanding that there is the use of the mandatory "shall" in the rule, I am of the view that the irregularity is not fatal in this instance in that the facts are fully given in the Affidavit in Support of Notice of Objection. Further, the type of irregularity in this case cannot be equated to the irregularity in the case of *NFC Africa Mining Plc v. Techro Zambia Limited* where leave of Court was not obtained when the same was required, which was a serious irregularity.

For this reason, the Respondent's application to disregard the Applicant's Skeleton Arguments for irregularity is denied.

Reverting to the crux of the matter, in my view the issues to be resolved by this Court are the following: -

1. Whether the relationship that existed between the Applicant and Graypages was of a fiduciary nature;
2. Whether the Respondent omitted to return to the Applicant its property as a first step in the liquidation process;
3. Whether the Liquidation Schedule erroneously classified the Applicant as a general creditor instead of a person in relation to whom fiduciary functions were performed by Graypages Limited.
4. Whether the Liquidation Schedule should have, as a last resort, provided for payment to the Applicant out of a special reserve account, liability insurance or other undertaking.

I am of the opinion that contrary to the Applicant's contention that the agreement entered into between itself and Graypages Financial Solutions Limited was to the effect that the latter would administer part of the Empowerment Fund as a fiduciary of the Applicant, the relationship that was created between the two parties was merely that of principal and agent, with the Applicant being the principal and Graypages being the agent. It is clear from the agreement itself that Graypages were engaged as Credit Manager of the Empowerment Fund. Further, according to exhibit "NM3" in the Affidavit in Support, the Applicant, in a letter dated 9th February, 2015 addressed to the Director - Non-Banking Financial Institutions at the Respondent Bank mentioned that the Agreement entailed that Graypages would disburse funds to clients on behalf of the Applicant. Graypages was therefore, engaged to disburse and recover funds on behalf of the Respondent at a fee.

The Applicant cited the definition of 'fiduciary' by Black's Law Dictionary 8th Edition which is defined in the following terms: -

“A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candour

2. One who must exercise a high standard of care in managing another's money or property”.

The above definition does not *per se* make the relationship between the Applicant and Graypages a fiduciary one because Graypages was simply acting as agent in the disbursement/management of the Empowerment Fund on behalf of the Applicant. Admittedly, an agent is also expected to carry out his duties with diligence and in the best interests of the principal but that cannot be equated to the trustee and beneficiary relationship where one owes to the other the duties of good faith, trust, confidence and candour. These attributes are at the core of a fiduciary relationship. Further, Graypages was not expected to hold any money on behalf of the Applicant but merely to disburse it to the Applicant's clients as and when instructed to do so. Therefore, the relationship between the two parties was that of agent and principal rather than trustee and beneficiary.

Regarding the second issue, namely whether the Respondent omitted to return to the Applicant its property as a first step in the liquidation process, I concur with the submission by the Respondent that whereas section 104 (3) (a) of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, places a duty on the Bank of Zambia to take necessary steps to terminate all fiduciary functions performed by the bank or financial institution, return to each owner all assets and property held by the bank or financial institution as fiduciary in relation to the owner, and settle its fiduciary account, at the time the decision was made by the Respondent to liquidate Graypages there did not exist any asset or property which the Respondent could have returned to the Applicant as the money deposited into Graypages account number 6228216432 held at FNB Kitwe Branch had been used by FNB to clear the overdraft which Graypages had with the bank as per banking practice.

Therefore, there was no asset held by Graypages that the Respondent could return to the Applicant as envisaged by section 104 (3) of the Banking and Financial Services Act. Indeed, the role of Graypages comes out in the Agreement as simply to disburse funds to successful applicants and not to hold assets for the Applicant. Therefore, there was no omission on the part of the Respondent to return the Applicant's property.

Moving on to the third issue, namely, whether the Liquidation Schedule erroneously classified the Applicant as a general creditor instead of a person to whom fiduciary functions were performed by Graypages Limited, my take on this is that, as the Respondent correctly submitted, the law relating to priority of creditors is well articulated under section 107 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia which provides as follows: -

"In any compulsory liquidation, winding up or dissolution of a bank or financial institution there shall be paid in priority to all other debts in the following order: -

- (a) Necessary and reasonable expenses incurred by the Bank of Zambia in the application of the provisions of this part;*
- (b) Taxes and rates due, whether payable to the Government or to a local authority;*
- (c) Wages and Salaries of officers and employees of the bank or financial institution for the three-month period preceding the effective date of seizure within the limit of an amount not exceeding one hundred thousand kwacha per person or such higher amount as may be prescribed by regulation;*
- (d) Fees and assessments due to the Bank of Zambia;*
- (e) Claims established under a deposit protection scheme;*
- (f) Other deposits; or*
- (g) Other claims against the bank in such order of priority as the Court may determine upon application by the Bank of Zambia."*

I therefore, find that the Liquidation Schedule did not erroneously classify the Applicant as a general creditor instead of a person in relation to whom fiduciary functions were performed by Graypages. Much as it is appreciated that part of the funds for the Applicant's Empowerment Fund come from money appropriated by Parliament for achieving the Applicant's functions and that it is the mandate of the Applicant to substantially increase meaningful participation by targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies in the economy thereby decreasing income inequalities, the agreement which the Applicant entered with Graypages was not a fiduciary one but simply one of agency.

It is an unfortunate but hard fact that the Applicant was negligent in not carrying out due diligence with respect to Graypages when the Agreement mandated them to do so by virtue of clause 10.8 thereof which provided that the Applicant was to be provided with daily transaction reports on the holding account. The Applicant should not have been content to rely on the warrant by Graypages that all the agreed obligations would be performed completely and in accordance with industry standard. Had the Applicant insisted on its right to be provided with daily reports on the holding account it would have discovered the misrepresentation about account being a holding account when it was in fact a general account. Clause 5.1.6 of the Credit Management Service Agreement shows that the Applicant had the mandate to monitor the performance of the Credit Manager, Graypages, through meetings, requests, audits and client visits. It is therefore, surprising that the Applicant was unaware that Graypages had not opened a holding account as it was required to do by the Agreement.

The last issue to be determined is whether the Liquidation Schedule should have as a last resort, provided for payment out of a special reserve, account, liability insurance or other undertaking as by law provided for. As submitted, under section 82 of the Banking and Financial Services Act, a bank or financial institution is required to maintain a special reserve account for the purpose

of making good any loss resulting from negligence or dishonesty of any of its directors, chief executive officer, chief financial officer, manager or employee.


While it is a requirement for every financial institution to maintain a special reserve account for the purpose of making good any loss resulting from the negligence dishonesty of any of its directors, chief executive officer, and other officers or employees or insure itself against such loss or undertake such commitment as the Bank of Zambia may consider acceptable for the purpose of section 82, Graypages did not do so. According to the Respondent, the reason why it took possession of and later liquidated Graypages, was its breach of the Banking and Financial Services Act.

Therefore, to all intents and purposes, the Applicant is an unsecured creditor and the Respondent was in order to rank the Applicant according to the classification in section 107 of the Banking and Financial Services Act.

Taking into account the above considerations, I find that the Applicant's objection is misplaced and I dismiss it accordingly. However, since the Respondent by virtue of its position has in its possession the information requested for by the Applicant in paragraph 20 of the Affidavit in Support, I see no reason why the same cannot be availed to the Applicant. Therefore, I hereby order that the Respondent furnishes the Applicant with the said information within 30 days of the date hereof to enable the Applicant secure repayments of the amount loaned out.

Each party shall bear its own costs.

Delivered at Lusaka this 13th day of July, 2017.


W. S. Mwenda (Dr)
HIGH COURT JUDGE