IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 16/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

STANBIC BANK PLC APPELLANT

AND

SAVENDA MANAGEMENT SERVICES RESPONDENT

Coram: Chisanga JP, Mchenga, DJP and Chishimba JA
This 4th day of May 2017 and 20th October 2017.

For the Plaintiff: *Mr. E.S. Silwamba SC, with Mr. J. Jalasi of Messrs Eric Silwamba Jalasi and Linyama, Legal Practitioners*
Ms. A. Theotis of Mesdames Theotis Mataka & Sampa, Legal Practitioners

For the Defendant: *Mr. M. Mutemwa SC of Mutemwa & Company*
Mr. Sinyangwe of Messrs Willa Mutofwe & Associates
Mr. K. Nchito of Messrs D. Bunting & Associates

JUDGMENT

CHISANGA, J.P. delivered the Judgment of the Court

Cases Cited:

1. ***Patel vs Rephidim Institute SCZ Judgment No 3 of 2011***
2. ***Homes Ltd vs Buildwell Construction Company Limited (1973) ZR 77***
3. ***Nkhata & Four Others vs Attorney General (1966) ZR 124***
4. ***Chimbo and Others vs The People (1982) ZR 20***
5. ***Attorney General vs Achiume (1983) ZR1***
6. ***Tournier vs National Provincial and Union Bank of England (1924) 1 KB62***
7. ***Gusta & Another vs The People (1988-89) ZR 78***
8. ***Chisata vs The Attorney General (1990-92) ZR 154***
9. ***Mwape vs The People (1976) ZR 160***
10. ***Shamwana & 7 Others vs The People (1985) ZR 41***
11. ***Subramanian vs Republic Prosecutor (1956) I W.L.R. 965***
12. ***Zambia National Building Society vs Ernest Mukwamataba Nayunda***

SCZ Judgment No. 5 of 1995

13. *Attorney General vs Abourbacar Tall and Zambia Airways Corporation SCZ Judgment No. 5 of 1995*
14. *Investrust Bank PLC vs Alice Sakala T/A Matunga Enterprises SCZ/8/317/2015*
15. *Stanbic Bank Zambia Limited vs A. S. and E. Enterprises and Others (2008) 1 ZR 259*
16. *Re Debtor Printline Of0fset Limited (1992) 2 AII ER 664*
17. *Muchabani Atra (A/T Kamara General Dealers) SCZ No. 23 of 2008*
18. *Turner vs Royal Bank of Scotland (1999) 2 All ER*
19. *Jere vs Shamayuwa and Attorney General (1978) ZR 204*
20. *Mweempe vs Attorney General & Other SCZ Judgment No 13 of 2012*
21. *Mazoka and Others vs Mwanawasa and Others (2005) ZR 138*
22. *Zesco Limited vs Redlines Haulage Limited (1990-92) ZR 170*
23. *July Danobo T/A Juldan Motors vs Chimsoro Farms Limited, SCZ Judgment No. 15 of 2009*
24. *Soko vs Attorney General (1989) ZR 158*
25. *Times Newspaper (Z) Ltd vs Lee Chisulo (1984) ZR 83*
26. *The Mediana (1900) AC 113*
27. *In Beaumont vs Greathead, (1846) 2 CB 494*

Legislation referred to:

1. *The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*
3. *The Evidence Act, Chapter 43 of the Laws of Zambia*
4. *The Rules of the Supreme Court, 1999 Edition.*

Other works referred to:

1. *Chitty on Contracts Vol 1, General Principles 28 & 30th Edition, Sweet & Maxwell, London*
2. *Halsbury's Laws of England 4th Edition Volume 3(1)*
3. *Granton Ross Principles of Banking Law, 2nd Edition Oxford University Press 2002*
4. *Paget's Banking Law, 13th Edition, (Reed Elservier (UK) Ltd 2007)*

5. ***Toulson R. G and Phipps CM, Confidentiality (2nd Ed, London, Sweet and Maxwell 2006)***

6. ***Powell's Principles and Practice of the Law of Evidence, 10th Edition (London, Butterworths & Co, 1921)***

7. ***Andrew, Kareen and Tweedale, A Practical Approach to Arbitration Law (Blackstone Press, 1999)***

8. ***Edward J. Imwinkelreid, Evidentiary Foundations (Lexisnexis)***

9. ***Mc Greggor on Damages, Eighteenth Edition (Sweet & Maxwell)***

This appeal arises from a decision of the High Court, at Lusaka, delivered on 17th August 2016, by which the trial Judge awarded the plaintiff all the reliefs it had claimed against the defendant.

The respondent was plaintiff in the court below, while the appellant was defendant. According to the statement of claim, the action arose in this way. The plaintiff was a customer of the defendant. It applied for and was granted a lease to buy back a printing machine at the cost of USD 540,000. The lease payments were to be serviced through an overdraft facility with the defendant. Although the plaintiff was servicing the lease by overdraft, the balance was not reducing. It was subsequently revealed by the defendant that the default on the plaintiff's account was being caused by a system shortfall at the defendant bank, because the debit order was not running to the credit of the lease account but instead defaulting to a suspense account.

The plaintiff's grievance was that despite acknowledging the error, the defendant did not rectify it, but negligently listed the plaintiff on the Credit Reference Bureau, and continued charging interest on the loan, thereby rendering the

plaintiff's account to be in default. As a result, the plaintiff lost out on a lot of funding opportunities because an entity listed on the Credit Reference Bureau does not qualify for any business lending, or any lending at all.

Additionally, the matter was referred to Arbitration as the plaintiff and defendant did not reach agreement regarding the cause of the default. The defendant was in those proceedings awarded K7,535,237.96, the equivalent of (US$1,363,350.49) in default of which the defendant was at liberty to foreclose on the property that secured the facility.

The plaintiff thus claimed K192,500,000.00 as damages for loss of business, an order that it be delisted from the Credit Reference Bureau, further damages for loss of business profits, damages for negligence, damages for injury to business reputation and any other relief the court may deem fit.

The defence was that the plaintiff was not consistent with its payments, and that the default on the plaintiff's account was not due to a system error, but failure to make the repayments that had been agreed upon. The defendant denied listing the plaintiff negligently on the Credit Reference Bureau, and averred that it was established that the defendant was in default, and further that the report to the Credit Reference Bureau was done in conformity with the relevant provisions of the law. It was also the defendant's position that a listing did not preclude the listed party from securing other funding and that had the default been due to a system failure, the arbitrator would have found in the plaintiff's favour.

After hearing the evidence, the trial Judge was of the view that the defendant owed the plaintiff a duty to use reasonable skill and care in providing services to the plaintiff, as its customer. This duty, according to the trial Judge, included confidentiality, subject to certain exceptions.

The trial Judge found that although the lease facility was availed to the plaintiff in September 2007, the issue of default only arose in October 2008. He observed that the Corporate Credit Report showed the delinquency date as 31st October 2008, and the account as non-performing. It was his view that the genesis of the problem as regards the default could be traced to that date. He referred to the letter in which the defendant had acknowledged that a system failure had occurred, causing the plaintiff's account not to be credited as the debit order was defaulting to a suspense account, and found as a fact that it was the system shortfall that gave rise to the default on the lease account, culminating into classification of the account as delinquent on 31st October 2008, and not the non-performance of the account at the time.

He opined that had the defendant taken necessary steps, it would have discovered that the cause of the default was the system failure, and not the reason assigned by the defendant. According to the trial Judge, negligence was proved on those facts. He also referred to **Section 50 of the Banking and Financial Services Act** and found that no consent had been obtained from the plaintiff that its confidential information could be given to the credit reference agency, in breach of that section.

The trial Judge also found that the plaintiff was not notified, as required by the **Credit (Privacy) Data Code**, that its account data would be retained by the credit reference agency. It was his view that the defendant had not taken any steps, despite their omissions, breaches and acts of negligence, to rectify the plaintiff's listing on the Credit Reference Bureau despite the evidence that the parties had engaged in restructuring of the credit facilities around October 2008, and immediately thereafter, and the fact that the debt was fully secured by legal mortgages. His view was that the plaintiff could not be said to have been unable to pay the debt, as the debt was fully secured, and restructuring of the facilities had been contemplated.

The trial Judge further opined that the defendant's honest opinion was that the plaintiff was credit worthy as stated in their reference letter to Standard Chartered Bank. He went on to state what he considered was common knowledge on operations of credit reference agencies. He noted that negative reporting, inaccuracies, deliberate or negligent information could result in difficulty in getting loans. His view was that the Credit Reporting System serves as a blacklisting mechanism as most lending institutions are not keen to advance money to any business or individual listed on the Credit Reference Bureau.

The trial Judge proceeded to hold that the listing adversely affected the plaintiff, who is specialized in global supply, chain management, and dependent on its business on financing from banks and financial institutions. As a result of being listed on the Credit Reference Bureau, the plaintiff could not access facilities

from banks and financial institutions. In the result, he awarded the plaintiff all the reliefs it had claimed for.

Aggrieved at that decision, the appellant lodged this appeal against the whole Judgment, on seven grounds. Heads of argument were also filed in by both parties. We will state each ground and the arguments advanced thereon sequentially to avoid unnecessary repetition. At the hearing, learned counsel on both sides relied on their respective heads of argument which they augmented.

Grounds 1 and 3 are argued together.

Ground one is that the trial Judge erred in fact and law:

(i) in finding that the appellant had acted negligently in determining that the respondent's loan was in default, and classifying it as a delinquent account;

(ii) in finding that the respondent should not have been listed on the Credit Reference Bureau as the debt was fully secured by legal mortgages;

(iii) in finding that the issue of default only arose in October 2008, when there was evidence indicating the respondent's default prior to that date;

(iv) in holding that the respondent was not indebted to the appellant by misconstruing the import of the letter dated 23rd April 2009 from the appellant to the respondent; and

(v) in holding that the respondent had suffered loss as a result of being listed on the Credit Reference Bureau despite the respondent's failure to prove any loss at trial.

Ground three is that the trial Judge erred in law and fact by ordering that the respondent be delisted from the Credit Reference Bureau notwithstanding the respondent's admissions in its statement of claim, confirming findings of indebtedness and or default in the Arbitration Proceedings under Cause number 2013/HP/ARB/14.

Learned counsel's arguments on these grounds are that the findings were against the weight of the evidence, and perverse as a result. This is on account of the evidence that the delinquency and listing dates were different. Delinquency referred to default. Further, all credit data, positive and negative requires to be reported, and no exemption is made for facilities secured by mortgages. The respondent was, by the facility letter at page 395, obliged to make full payment by 30th September 2008, failure to which the appellant could exercise all its remedies in terms of the Laws of Zambia. A mortgagee's reliefs are after all cumulative, and in any event, the issue whether or not the facility was mortgaged was not pleaded.

The appellant's further contentions are that the appellant duly notified the respondent of its default, and said notification was acknowledged by the respondent. The respondent had defaulted, and had consented in writing that its credit data could be submitted to licensed credit reference agencies. The trial

Judge recoursed extrinsic evidence in interpreting the appellant's reference letter of 3rd December 2008. ***Patel vs Rephidim Institute***[1] and ***Homes Ltd vs Buildwell Construction Company Limited***[2] are cited in that regard.

It is maintained that the trial Judge misconstrued the letter dated 23rd April 2009, and omitted the last paragraph, which clearly confirmed the respondent's default which arose before October 2008. The respondent did not dispute the loan, and this was confirmed by the adverse credit reference agency report availed to the respondent on request with the bureau. Two entries marked "Disputed? had the word 'No' indicated against them.

The trial Judge did not take this into account. PW admitted that they had challenges, and that US$100,000 was payment towards a fresh restructured facility after the facility availed in 2007 had been downgraded to non-performing status. The respondent led no evidence that it had paid any monies towards the lease facility in the sum of USD540,000. The system failure had nothing to do with the respondent's default on the loan as the accounts had already been downgraded to non-performing status as the respondent had remained in arrears, and the overdraft still in excess and consequently overdrawn.

The learned counsel refer to the statement of claim, and argue that the respondent conceded to the arbitration proceedings. They argue that the trial Judge ignored all the evidence which clearly demonstrated the indebtedness of the respondent prior to the system error. He also erred in finding that the interest

rate charged on deals 3 and 6 of the respondent was 23% when the uncontroverted forensic audit report clearly demonstrated that the respondent had charged the appellant 26.6%.

Learned counsel acknowledge that the grounds on which this court can interfere with the findings of a trial court are limited, as stated in ***Nkhata & Others vs Attorney General***[3], ***Chimbo and Others vs The People***[4], ***Attorney General vs Achiume***[5], among numerous cases which we need not cite here. We are, premised on these authorities, invited to interfere with the findings of the trial Judge for perversity.

In further argument, it is contended that the respondent failed to discharge the burden of proof resting on it with respect to the duty of care and breach of that duty allegedly owed to it by the appellant. It is learned counsels' view that the appellant did not owe a duty of care to the respondent, as its default was not on account of the system failure but failure to service the loan. Further, that the duty to use reasonable skill and care would have arisen if the appellant had listed the respondent purely on the basis of a system error.

We should state that Ground two of the appeal was abandoned. Ground four of the appeal is that the trial Judge misdirected himself in law when he proceeded to determine the issue of confidentiality under **Section 50 of the Banking and Financial Services Act,** when the issue was not pleaded, nor evidence led on it. The arguments on this ground are that the respondent consented to the disclosure of information to the credit reference agency, as shown at page 402 of

the Record of Appeal. Learned counsel further submit that the duty of confidentiality in the banker/customer relationship is not absolute. They refer to ***Tournier vs National Provincial and Union Bank of England***[6], where the court stated that there are four qualifications to the duty of confidentiality. It is contended that **Section 50 of the Banking and Financial Services Act** replicates the exceptions to the duty of confidentiality. According to learned counsel, it is inconceivable that a bank the size of the appellant would not have terms and conditions on confidentiality. It is argued that the letter from Bank of Zambia is clear that all negative and positive data on a loan facility must be reported to the credit reference agency. The trial Judge misdirected himself in Solding that the respondent's consent was not obtained. He quoted **Section 50 (1) of the Banking and Financial Services Act,** selectively and did not address his mind to the other exclusionary grounds relating to the duty of confidentiality.

Learned counsel's further argument is that having established that consent of the respondent was obtained, the issue of illegality did not arise. As such, the court should not have proceeded *suo motu*. Our attention is drawn to ***Gusta & Another vs the People***[7] and ***Chisata vs The Attorney General***[8] on the dangers of a Judge moving *suo motu*. We need not refer to all the cases cited on this point.

As an alternative argument on this ground, we are urged to imply a term into the loan agreement that the appellant had consented to being listed on the credit reference agency. **Chitty on Contracts, 28th Edition, Vol. 1, para 13 – 003** is relied upon in that respect. So is **Halsbury's Laws of England, 4th Edition, para**

355. According to learned counsel, as every loan must be reported to the credit reference agency, it must be implied that the respondent would be listed on the credit reference agency.

Ground five of the appeal is that the trial Judge erred in law and fact when he awarded the respondent damages for loss of business and profits, damages for injury to business reputation, and damages for negligence when the respondent adduced no evidence to support these claims, and after having acknowledged that the respondent had not addressed the court below on the requisite ingredients of negligence.

The arguments on this ground are that the trial Judge considered the letter from ECO Bank authored by Kim Kapela, the letter from Eiden S Engineers Ltd authored by Ronie Netanel, the letter from Smart Dynasty authored by Weber Merdaza and the report by one merchant house showing that the plaintiff had lost due to the report on the Credit Reference Bureau, in arriving at the decision attacked in Ground five. Learned counsel refer to **Evidentiary Foundations by Edward J. Imwinkelried**, and **Section 3 of the Evidence Act**. They argue that a foundation must be laid before a document is produced. They contend that the evidence relied on by the trial Judge was inadmissible hearsay, as the authors were not called to testify. Therefore, the argument proceeds, the trial Judge misdirected himself or otherwise erred in accepting the evidence he accepted, taking into account the evidence he did, without being alive to the fact that the letters and reports amounted to hearsay.

Learned counsel refer to a passage in which the trial Judge discusses how credit reference agencies obtain information and how this information helps lenders decide whether to extend credit to a business or approve a loan and determine the interest to be charged. They then submit that the trial Judge did not disclose the legal authority nor ratio decidendi of his findings, which amounted to a judicial notice statement not supported at law. The holding flew in the teeth of the law, and was contrary to the totality of the evidence adduced at trial. Reference is made to ***Mwape vs The People***[9], ***Shamwana & 7 Others vs The People***[10] among other cases in support of these arguments.

The view of the trial Judge that negative credit reports served as a blacklisting mechanism was attacked, as it was not an expression of common knowledge, so notorious that to lead evidence on it was unnecessary. In this case, the subject of that view was the crux of the dispute between the parties.

Ground six of the appeal is that the trial Judge erred in law by admitting an Expert Report which was filed in the absence of the requisite notices viz hearsay notice and expert report notice.

Learned counsel repeat the arguments under Ground five regarding the need to lay a foundation. They refer to ***Subramanian vs Republic Prosecutor*** [11]. They argue that as the expert report exhibited by the respondent was produced before the court below to establish the truth of the contents of the report, as proof the respondent's claim for damages, the court fell into error.

Ground seven of the appeal is that the trial Judge erred in law and fact when he did not adjudicate on all issues in controversy. These relate to the award of K192,500,000 and reference of the matter to the Learned Deputy Registrar for assessment of damages. Learned counsel argue that the trial Judge should have addressed his mind to the question whether the claim had been properly pleaded. It is argued that the sum of K192,500,000.00 could not stand as a liquidated demand, and that awarding that sum in the absence of evidence is not only gross failure to adjudicate, but will result in unjust enrichment of the respondent. Reference is made to ***Zambia National Building Society vs Ernest Mukwamataba Nayunda***[12], ***Attorney General vs Aboubacar Tall and Zambia Airways Corporation***[13] and other cases to support the arguments on ground seven. We are urged to allow the appeal.

The appellant's arguments are countered through heads of argument filed on behalf of the respondent. Their arguments on Grounds one and three of the appeal are that the trial Judge was on firm ground when he made a finding that the appellant had acted negligently when it determined that the respondent's account was in default and proceeded to classify it as a delinquent account. Learned counsel draw a distinction between being indebted, and being in default. They point out that it is not disputed that the respondent was indebted to the appellant at the material time. Being in default on the other hand connotes failure to make payments in accordance with the agreed terms and conditions. The trial Judge was on firm ground because as at 31st October 2008, the respondent was not in default. This position, according to learned counsel, is

confirmed by the payment made on 28th October 2008, in the sum of USD 16,563.17, and the total deposit of US$100,000.00 on 5th, 6th and 26th November 2008, respectively, made in order to facilitate the restructuring of the loan in January 2009.

Additionally, the appellant wrote to the respondent on 23rd April 2009, informing it that the lease ceased to be debited to the current account in November 2008. Therefore, the argument proceeds, the respondent was not in default, and thus, not delinquent on 31st October 2008.

In response to the argument that the respondent was bound by the terms of the facility letter appearing at page 402, it is argued that page 400 of the record clearly reveals that the facility letter was not accepted by the respondent. It is not bound by those terms as a result. Reliance is placed on an unreported case, ***Investrust Bank PLC vs Alice Sakala***[14] for this argument.

It is further argued that the appellant failed to follow the relevant law and procedure for listing a delinquent customer, as laid down in the **Banking and Financial Services Act** and **Credit Data (Privacy) Code**. Learned counsel counter that reference to mortgage law on cumulative remedies is not only irrelevant to the dispute, but also clearly falls short of the notification procedure under the Code. Breach of the Code by the appellant lies in the failure to notify the respondent as provided in the Code. There was no default on the part of the respondent, and no breach of any obligation to pay by 30th September 2008.

Additionally, written consent to submit the respondent's credit data to licensed credit agencies was not obtained.

Learned counsel argue, on the authority of ***Stanbic Bank Zambia Limited vs A. S. and E. Enterprises and Others***[15], that the Code is a binding regulatory mechanism on banks and breach of the Code is evidence of negligence.

The finding that the respondent should not have been listed on the Credit Reference Bureau because it was fully secured by legal mortgages is supported by learned counsel. Their support is premised on ***Re Debtor Printline Offset Limited.***[16] It is further argued that the respondent referred to the fact that property was security for the facility in its pleading. The alternative submission is that the said ground is irrelevant, redundant and superseded by the fact that the respondent was not in default on 31st October 2008, which is the delinquency date.

Learned counsel support the finding that the issue of default only arose in October 2008. They submit that there is no evidence on record to support the contention that the respondent had been in default prior to October 2008. The default was caused by a system shortfall, as admitted by the appellant in its letter of 23rd April 2009. The debit order was still running as at the date of the letter, and there was therefore no way the respondent could have been in default. It is argued that the trial Judge did not misconstrue the letter in issue. Learned counsel further go on to argue that the respondent could not have been in default of five installments unpaid because the overdraft and debit order was cancelled

on 23rd April 2009. In addition to USD 16,563.17, the respondent paid USD100,000,00 which was not taken into account by letter dated 23rd April 2009.

Learned counsel argue that the appellant bore the burden to prove that the respondent was in default at trial. It should therefore have produced documentary evidence to that effect. As the appellant had failed to discharge the burden, the decision on the point must be against it.

In response to the argument that the trial Judge erred in holding that the respondent had suffered loss as a result of the listing on the credit reference agency, learned counsel refer to the letter from Messrs Eidan Engineering Limited, the letter from Messrs Smart Dynasty, and the report prepared by Financial Consultants, and argue that the trial Judge was on firm ground to hold as he did.

Turning to Ground three, the respondent's submission is that the trial Judge was on firm ground when he ordered that the respondent be deleted from the Credit Reference Bureau because the respondent was not in default when it was listed. It is further argued that the respondent did not admit indebtedness in the arbitral proceedings. According to learned counsel, being in default is precedent to being listed. Had the system error not occurred, the respondent would not have been listed on the Credit Reference Bureau. The appellants, without counterchecking the respondent's account, negligently submitted the default to the Credit Reference Bureau, thereby creating a delinquency on the respondent's

account. Learned counsel proceed to argue that the decision to let the account remain in default was the appellant's.

Learned counsel submit that the trial Judge was on firm ground in holding that the letter dated 10th October 2008, fell far too short of the mandatory notification requirements as envisaged in the **Credit Data (Privacy) Code**, as it fell short of the relevant provisions of the Code. Therefore, acknowledgement of the letter by the respondent by letter of even date did not make good the omissions. It is further argued that failure to follow the Code amounts to negligence on the appellant's part. ***Stanbic Bank Zambia Limited vs A. S. & C. Enterprises Limited[16], Muchabani Atra (A/T Kamara General Dealers)[17]*** is recoursed in that regard.

Reliance is also placed on the statement in **Halsbury's Laws of England, 4th Edition, Volume 3(1)** where the learned authors state that disregard of the bank's own regulations is evidence of negligence.

Regarding the trial Judge's views on the letter dated 3rd December 2008, it is argued that he was on firm ground in stating that the appellant's honest view was that the respondent was credit worthy despite reference to the Credit Reference Bureau. Learned counsel proceeds to argue that the trial Judge correctly found the existence of a duty of care, which was breached, leading to consequential damage. That the appellant had a fiduciary duty, per **Granton Ross in Principles of Banking Law, 2nd Edition, page 15 to 16.**

In further argument, learned counsel submit that the respondent could not have disputed the amounts and the adverse report because they were not given written notification or reminder about any alleged arrears or default. The fact that there was no dispute cannot in itself satisfy the court that the respondent was in default, when the report was only accessed and learnt of by the respondent in 2010.

Learned counsel's further argument is that the facilities on which the respondent admitted indebtedness were not the facilities in issue, and have no bearing on the matter before the court. It is contended that the sum of USD 100,000 paid was to reduce the already overdrawn position and subject to other conditions being met before a restructured facility could be considered.

It is argued that even if the respondent were in default, without conceding that this was the position, the appellant would still be liable in negligence for failure to comply with the mandatory notification of default requirements under the Code, as breach of the Code is clear evidence of negligence.

Turning to Ground four, it is conceded that confidentiality between banker and customer is not absolute, but subject to exceptions as codified in **section 50(1) of the Banking and Financial Services Act**. It is contended however that the stated exceptions did not arise in this case. The Bank of Zambia did not request the appellant to disclose the respondent's credit data at the time, in pursuance of Bank of Zambia's functions. The appellant should therefore have obtained the

express consent of the respondent before divulging its credit data to the bureau. Therefore, the argument that the trial Judge should not have proceeded *suo motu* is misplaced, and the cases relied upon read out of context. Learned counsel argue that implied consent cannot be read into the agreement between the parties. They rely on ***Turner vs Royal Bank of Scotland***[18] to that effect. Further, **section 50 (1) of the Banking and Financial Services Act** clearly stipulates that express consent has to be obtained vis-à-vis being listed on the Credit Reference Bureau.

Moving to Ground five, it is argued that the appellant slept on its rights by allowing the evidence to be adduced without objecting to it being led, or before trial commenced. The trial Judge was not precluded from considering the evidence led in the general bundle of documents, referred to in PW's witness statement as no objection was made by the appellant's advocate. ***Jere vs Shamayuwa and Attorney General***[19] is relied upon to buttress the argument. Reference is equally made to ***Mweempe vs Attorney General & Other***[20] and ***Mazoka and Others vs Mwanawasa and Others***[21].

It is contended that the evidence relied upon by the trial Judge cannot be said to be hearsay as the witness had personal knowledge of the evidence or documents. The letters from Eco Bank, Eiden S. Engineers Ltd and Smart Dynasty were all addressed to PW in his capacity as director of the respondent, and he had personal knowledge of the contents of the said letters. It is further submitted that the trial Judge cannot be faulted as he relied on common

knowledge, and his views were dicta. In any event, the views were not contrary to the totality of the evidence at trial.

The arguments on Ground six are that PW referred to the report and was not cross examined on the same. The witness statement was exchanged with the appellants and discovery and inspection of documents was also done as evidenced by the plaintiff's list of documents on record. Learned counsel contend that the appellant had opportunity to and did waive their right to question the authenticity of the expert report when they opted not to do so at discovery. The trial Judge was therefore on firm ground in referring to the report. Learned counsel refer to ***Zesco Limited vs Redlines Haulage Limited***[22]. It is argued that in line with ***July Danobo T/A Juldan Motors vs Chimsoro Farms Limited***[23], the appellant should have recourse to its advocates.

On Ground seven, learned counsel argue that the amount of K192,500,000.00 was a liquidated claim, which was awarded. Additionally, general damages were awarded. The awards were in line with the principles stated in ***Zambia National Building Society vs Ernest Mukwamataba Nayunda***[11], ***Soko vs Attorney General***[24] and ***Times Newspaper (Z) Ltd vs Lee Chisulo***[25].

It is argued that the respondent proved their case and this court should not interfere with the award. The appeal should thus be dismissed with costs.

At the hearing, both sides augmented their written submissions with oral arguments. The appellant's written submissions where largely emphasized and

we need not repeat them as they had already been captured in the written submissions.

The learned counsel for the respondent equally emphasised certain aspects of the arguments. Our attention was drawn to cases that address the failure to object to evidence at trial and the power of the trial court in such an instance. It is equally unnecessary to reproduce the arguments, as they have been outlined above.

We have considered the grounds of appeal and the arguments of both parties, as well as the Judgment of the court below. As argued by both sides, the power of this court to reverse findings of fact made by a trial Judge is not without restriction. A trial Judge has the advantage of hearing from the witness first hand, and observing their demeanor. The impression witnesses make on him assists him in assessing their credibility and deciding where the truth lies. Thus, findings of fact properly arrived at will not be interfered with by an appellate court.

However, there are instances when interference with findings of a trial court is warranted. This occurs where the trier of fact has erred in accepting evidence, or has erred in assessing and evaluating the evidence by taking into account something he should not have considered. Findings of fact will also be reversed where the trial court did not take proper advantage of having seen and heard the witnesses or external evidence demonstrates that the Judge erred in assessing

the manner and demeanor of witnesses. See ***Nkhata & Four Others vs The Attorney General of Zambia***[3] referred to by both parties.

We note that the appellant invites us to interfere with the findings of fact made by the trial Judge, while the respondent spiritedly opposes this invitation. Ground one attacks findings of fact, while Ground three relates to an order consequential on the findings made by the trial Judge. It is necessary therefore for us to examine the evidence that was before the trial Judge so as to ascertain whether our interference with his findings is warranted.

The documentary evidence before the trial Judge was that the respondent was availed a liquidating lease facility in the sum of USD540,000.00, for the financing of a computerized sportsman, E12 station, 110 colour Press with complete accessories. The facility was to run for 48 months, from the 18th September 2007.

On 10th October 2008, the appellant wrote to the respondent concerning the banking facilities availed to the respondent generally. The letter is at page 403 of the Record of Appeal. Reference was made to a meeting held by the parties on 20th August 2008 regarding a review of the existing facilities and repayment of the arrears on the lease facility, and the excesses on the US Dollar and Kwacha current accounts.

The addressee was reminded that he had assured the authors of the letter that the arrears on all facilities would be brought up to date by September month end. Contrary to that assurance, financials had not been provided and the

payments made had not cleared all the arrears and excesses. The non-renewals of the facilities and the arrears, had put the facilities into irregular status and this was a concern not only to Stanbic Bank, but to the external regulator, Bank of Zambia.

The addressee was warned that if the arrears were not repaid and facilities reviewed by 30th October 2008, the bank would have no choice but to classify the facilities as non-performing and seek other avenues to recover the facilities.

A response was made on the same date, as shown by page 404 of the record of appeal. The concerns raised in the letter were appreciated and the commitment to settle the respondent's indebtedness reiterated. The delay in making repayments was attributed to external factors, such as the failure by KCM, Zain Zambia and Government to settle their indebtedness with Savenda Management Services. An appeal was made to the bank's understanding regarding the demand notice as the respondent considered other options of refinancing the facilities held with the bank, as it now seemed the bank was not willing to restructure the debt.

On 7th November 2008, the respondent wrote to the appellant relating to the short-term loan of US$170,000. It also requested the bank to note that it had continued to service interest on the overdraft account. The appellant was reminded that the respondent awaited a response to its application for restructuring of the facilities, and informed that as a fallback-on contingent plan, it was currently servicing orders for the total sum of K1.211 Billion excluding the

World Bank (Bootech Project) worth K1.2 Billion (US$368,000). This was aside from the total sum of US$847,316 for already delivered projects. The respondent stated that it would continue to pursue its debtors and its orders, to ensure that it brought the facilities in line.

There is yet another letter dated 11th November 2008, at page 407 of the record, written by the respondent to the appellant. The appellant was assured of the respondent's commitment, and its endeavor to improve its dented performance with the bank. The caption of the letter read, *'General Banking facilities at hand with the bank – Note of thanks.'*

A further letter dated 13th November 2008, was written by the respondent to the appellant. It related to banking facilities. Savenda Management Services wished to reconfirm its commitment to working with the bank. It acknowledged that it had a few challenges which were coming to an end as stated in their letter of 7th November 2008. It applied for an extension for liquidating the loan of US$170,000 to April 2009, and appealed to the bank to mark a limit at US$700,000 from the overdraft of US$675,000.00.

The record also contains, at page 411, a letter from Bank of Zambia, to the respondent dated 2nd December 2010. Bank of Zambia was responding to letters dated 2nd and 14th September 2010, addressed to the Governor of Bank of Zambia. Bank of Zambia observed that Savenda Management Services stopped servicing the loans immediately after the lease was granted, until about nine

months later. It was also observed that Savenda Management Services stopped servicing the facilities following the restructuring agreement in November 2009. A further observation was that although prior to 8th June 2009, Savenda Management Services made installment payments, the amounts deposited were not sufficient to clear both current and arrears of about USD 90,000, and that no agreement on restructuring was reached at the point of reporting Savenda Management Services to the Credit Reference Bureau in June 2009. It was further stated that as every loan must be reported to the Credit Reference Bureau, the information held on borrowers must reflect both positive and negative information.

We will not repeat other issues not relevant to the dispute before us in the said letter.

The respondent's response to that letter was one of dissatisfaction. Bank of Zambia's attention was drawn to the appellant's failure to furnish the respondent with the statement of the lease from 2007 and it was also pointed out that listing on the Credit Reference Bureau was prematurely done without reflecting the true picture with intent to prevent the respondent from accessing credit from other financial institutions to refinance the loans or banking facilities held with the bank.

In relation to Bank of Zambia's 'purported' findings that the respondent stopped servicing the loan immediately after the lease was granted until nine months later, it was stated that as the lease payments were being drawn from the

overdraft account, this meant that as long as the overdraft account was not in excess, there was no real need for Savenda Management Services to make any payments into the overdraft account.

Following this letter, Bank of Zambia wrote to the appellant, detailing the grievances the respondent had with appellant's service provision. The appellant was directed to address the allegations by providing information and explanations where necessary. The response was to be made to the respondent directly, and a copy availed to Bank of Zambia. This letter is at page 423 of the record.

The appellant obliged and responded directly to the respondent on 21st February 2011. The appellant indicated that its advocates had sent an amortisation schedule and statement of account for Lease Account No. 46750908 to the respondent's advocates.

Regarding the report to the Credit Reference Bureau, the appellant's response was that the outstanding exposure to the Credit Reference Bureau captured at the time was USD 917,829.19, USD 544,403.30 and ZMK 506,727. The ZMK 506,727 was listed in error and had since been corrected. In addition to this, the account status listed at the time was accurate as the account was non-performing.

The respondent was advised that a restructured account could only revert to performing status if the company met the revised repayment terms on a

consistent basis. It was further pointed out that the business signed a facility agreement dated 20th November 2009, with the bank on the 10th of December 2009. Acceptance of the terms and conditions at the time was evidence to the bank that Savenda Management Services was agreeable to the contents of the document including the balances stated therein.

The respondent's reaction to this letter was by letter dated 28th February 2011, at page 428 of the record. It confirmed receipt of the amortisation schedule and statement of account for lease No. 467500908.

Regarding the appellant's response on the listing of the respondent on the Credit Reference Bureau, the respondent's views were that Stanbic Bank effectively restructured its facilities on 23rd March 2010, only to recall the facility hardly a month after that, in April 2010. The respondent wondered whether that period which was less than a month could lead the appellant to conclude that the respondent was unable to meet the restructured terms on a consistent basis.

The respondent also stated that the balances were disputed even at the time the facility agreement was signed. The facilities were a compromise, and were signed under duress due to pressure from Stanbic Bank who were approaching the end of the year and needed to avoid provisioning.

The trial Judge's decision was driven by correspondence we will now refer to. There was the report by the Credit Reference Bureau. This report indicated that the listing date was 8th June 2009, while the delinquency date was 31st October

2008. The amounts listed under different references were USD 917,829,81 and USD544,402.30. The payment status was that no payment had been made. It was also indicated that these amounts were not disputed. On 17th November 2008, Stanbic Bank had written to Savenda Management Services concerning its BANK FACILITIES, and advised that Savenda Management Services' request to restructure the existing facilities had received support of the head of wholesale banking subject to Savenda Management Services making two deposits of USD 50,000 each for November and December 2008. The proposal was to be presented to the Credit Committee for approval and the restructured facility would be effective January 2009. Savenda Management Services was informed no more increases in the facility would be permitted.

Stanbic Bank had also received a query regarding Savenda Management Services from Standard Chartered Bank on 23rd October 2008. It responded in laudatory terms, on 3rd December 2008, describing Savenda Management Services as "a credit worthy company that enjoyed facilities in seven-digit figures domiciled in the US Dollar currency secured by first legal mortgages, floating charges and specific debentures".

Then there is the crucial letter dated 23rd April 2009, addressed to Savenda Management Services by Stanbic Bank. We should reproduce it:

23rd April 2009

Dear Sir

Lease Agreement No 467500908001

We refer to your letter incorrectly dated 21st April 2009 and would like to allay your feelings as the issue of your lease rental arrears is pretty straight forward as you will soon find out.

To this end, please find provisional statements of both your USD Current Account and the Lease Agreement marked 'A' and 'B' respectively. As you will note from the current account the debit order running thereon since inception of the lease ceased to be debited to the current account in November 2008 as the last debit order for the amount of $16,563.17 was raised on 28th October 2008. As explained during and after our meeting, owing to a system shortfall, we would have had the debit order running to the credit of your lease account in the absence of a corresponding debit against your current account. For the record, the debit was instead defaulting to an internal suspense account which anomaly has now been rectified to correctly throw the lease agreement in arrears of $80,050.34 being five installments unpaid. We have incidentally, cancelled the debit order with immediate effect and the lease will remain unpaid until we consider the current restructuring proposal from yourselves.

As you will appreciate, the effects of reversing the lease rentals does not in any way impact or distort your overall exposure to the bank. We therefore hope that the foregoing clarifies your query lest we divert attention from dealing with the more important task of resolving the impending resolution of your total indebtedness with us.

Yours faithfully

(Signed)
Augustine A. Chigudu
Head, Customer Debt Management

We should also refer to letter dated 2nd March 2010, at page 365. Part of the email reads:

"SAVENDA MANAGEMENT SERVICES LTD has grown from your support a record we are proud of but we are surprised that the bank has negatively ranked us as bad debtor and yet we are on recovery plans agreed together. We all know we have had recession and we were not spared in this

unfortunate situation but we agreed on way forward how then could you advise that these facilities have never performed? We may not have paid our installments on time but surely have endeavoured to do so as opportunity and cash flow improved and we are still working our way up as per our agreement."

This then was the evidence before the trial Judge. It amply demonstrates that the respondent, Savenda Management Services, had by the 20th of 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 the arrears on all facilities by the end of September 2008. The failure to settle its indebtedness was attributed to the failure by Savenda Management Services's 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, it was rendered clear that the respondent's performance on the facilities it had with the appellant bank was below expectations.

The respondent admitted to Bank of Zambia that it did not service the loans 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. When Stanbic Bank responded to Savenda Management Services indicating the outstanding amounts on which no payment had been made, Savenda Management Services did not dispute owing USD 917,829.19 and USD 544,403.30, stating only that it signed the restructured facility under duress.

We note that before the trial Judge, no evidence was led as to the correct indebtedness of the respondent to the appellant. We will address this issue later.

The question that arises is whether the trial Judge failed to take into account matters that he should have taken into account. Our considered response to this question is that the trial Judge overlooked the evidence before him, indicating that the respondent was in default in servicing the facilities availed by the appellant. By the end of October 2008, the respondent was in the unenviable position of appealing to the understanding of the appellant regarding the arrears it was required to settle on the facilities. The trial Judge's finding that the cause of the default on the account was the system error, and not the non-performance of the facilities was made without regard to the evidence that indicated otherwise.

We thus agree with the argument that this finding was perverse, as the respondent had defaulted in making repayments as they became due. Our interference with the finding is thus warranted. The respondent's argument that it was not in default as at 31st October 2008, is not borne out by the evidence. Payment of US$16,563.17 did not bring the account up to date. As for the sum of US$100,000 paid by the respondent, there was no indication that these payments were for settlement of all the arrears that were then outstanding. The US$100,000 was the deposit required to be paid before the facilities could be restructured. It will be noticed that the parties referred to banking facilities availed to the respondent, and not just the lease facility. Therefore, by 31st

October 2008, the respondent was delinquent. We discern no negligence on the appellant's part in classifying the respondent's facilities as deliquent.

The trial Judge relied heavily on the letter dated 23rd April 2009, in which the appellant indicated that a system shortfall had created an anomaly.

We agree with the argument that the trial Judge misconstrued the import of the letter. The letter clearly stated that the anomaly had now been rectified to correctly throw the lease agreement in arrears of US$80,050,34 being five installments unpaid. Our understanding is that despite the anomaly caused by the system error, the correct position was that the respondent was in arrears, as it had not paid five installments on the lease. We do not conceive the cancellation of the debit order to be confirmation that the respondent was up to date in its payments contrary to the arguments advanced on the respondent's behalf.

The appellant indicated that it had cancelled the debit order with immediate effect and the lease would remain unpaid until the appellant had considered the restructured proposal from the respondent. The respondent contends, from the bar, that the respondent could not have been in default of five installments because the overdraft and debit order was cancelled on 23rd April 2009. We find this argument unpersuasive. It is not premised on evidence led before the trial court, but is counsel's view, akin to giving evidence from the bar.

It was also argued that the appellant bore the burden to prove that the respondent was in default at trial. This argument cannot prevail, for the simple

reason that it was the respondent that contended that it was negligently listed as a delinquent debtor despite the acknowledgement by the appellant that the default was due to a system error. It placed reliance on the letter dated 29th April 2009. But that very letter stated that the respondent was in arrears of five installments. Having claimed that the default on the account was due to a system failure, it fell upon the respondent to prove that it had paid all the installments, and was not in five months' arrears as stated by the appellant. It will be recalled that the appellant availed the respondent the statement of account relating to the lease.

Even had the appellant not availed the respondent with the statements, the respondent would have been able to access it though the avenue of discovery had it intended to refer to the statement of account at trial. See **Order 24 Rules of the Supreme Court, 1999 Edition,** to that effect. It should additionally be borne in mind that as a rule, the party who in his pleading maintains the affirmative of the issue bears the onus to prove his allegation. A negative is usually incapable of proof. See **Powell's Principles and Practice of the Law of Evidence, 10th Edition, at page 134**

We thus reject the argument that the appellant was required to prove that the respondent had not paid some installments and was in default as a result.

The **Credit Data (Privacy) Code** makes no indication that a creditor whose debt is fully secured by legal mortgages should not be listed on the credit reference agency. In fact, clause 2.5.3.3 authorises the provision of account data relating

to a mortgage loan where a current material default exists. A material default is defined in the Code as default in payment for a period in excess of 60 days. The trial Judge's holding in that respect was clearly a misdirection.

We equally agree with the argument that the date of delinquency is different from that of listing. This is discernible from the Corporate Report at page 97. The listing date is 8th June 2009, while the delinquency date is 31st October 2008. As demonstrated above, the respondent was in default in 2008. It will be noticed that the Credit Report was not confined to the lease facility in issue. It extended to another considerable sum of USD 917,829.81.

The respondent averred that the matter was referred to arbitration wherein the appellant was awarded the sum of K7,353,850.49. It is the appellant's contention that the trial Judge should not have ignored the fact that the respondent conceded to the arbitration. The appellant's argument is persuasive. 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. See **A Practical Approach to Arbitration Law, Andrew & Keren Tweedale, at page 176.**

It is contended that the respondent consented to disclosure of information to the credit reference agency in the document at page 402 of the Record. We have perused the said document. It contains the general terms and conditions attached to the facility letter dated 18th September 2007, addressed to the respondent. The facility that was being offered to the appellant was a general short-term banking facility in the sum of USD 450,000.00. We note that it was signed by the Head Corporate Banking and Acting Head Credit Support on behalf of the appellant.

Although the document was initialed on every page, the identity of the persons who initialed the document was not addressed before the trial Judge. Additionally, no one signed the facility letter to signify acceptance of the terms on which the facility was being availed. Worse still, it remains unknown whether or not the respondent received the loan offered under this facility letter. The argument that the respondent agreed to be bound by the general terms and conditions which provided that its credit data could be disclosed to the credit reference agency is as a result unsustainable. We thus agree with the respondent that it did not at that stage, consent that its credit data could be disclosed to the credit reference agency.

In arguing that it is inconceivable that a bank the size of the appellant would not have terms and conditions on confidentiality, learned counsel suggest that those terms should be implied into the lease facility availed for the printing press. Terms will be implied in the contract depending on the intention of the parties.

The intention will be discerned from the words of the agreement surrounding circumstances. In some contracts of a defined type, certain terms will be implied unless the implication to do so would be contrary to the express words of the agreement.

The attention of the trial Judge was not drawn to terms that could properly be implied into the banker-customer relationship between the parties. No effort was made by the appellant, to show that even though the facility letter at page 402 containing the general conditions had not been signed on behalf of the respondent, other facilities availed to it were on those terms. Had that been the case, it would have been competent to imply inclusion of the general terms and conditions into the October 2007, facility letter. As no evidence was led that it was a practice to attach the general conditions whenever a facility was availed, and the respondent having not conceded that this was so, the trial Judge could not have properly implied the general conditions into the facility letter in question.

While we agree that certain terms may be implied into the banker-customer relationship by reason of custom or practice of bankers, we are not persuaded this a proper case in which to imply consent to disclose negative credit data to a credit reference agency. We say so because in the restructured facility letter, the appellant expressly stated that the general conditions would be applicable, and the respondent asked to sign the letter in acceptance of those conditions. It

seems to us therefore that these terms required to be agreed to in view of the duty of confidentiality between the parties at the time.

The trial Judge, of his own motion, referred to **Section 50 of the Banking and Financial Services Act**, and is criticized for having done so. Our view is that this is unjustified. A reading of the statement of claim, and the evidence led before the trial Judge reveals that at the crux of the matter before him was breach of confidentiality by the appellant. It was alleged that it had disclosed data to a third party, when the respondent was not in default, and without its consent.

Section 13 of the High Court Act, enjoins the court to award a party all such relief 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.

The trial Judge was thus obligated to consider the doctrine of confidentiality, and was entitled to examine the extent to which statute had made inroads or qualified the duty of confidentiality in a banker- customer relationship.

Section 50 of the Banking and Financial Services Act, as amended by **Act No. 18 of 2000** provides as follows:

> ***50. (1) A bank or financial service provider and every director, chief executive officer, chief financial officer, manager, 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 the 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.***

These provisions embody the qualifications to the duty of confidentiality articulated in ***Tournier vs National Provincial and Union Bank of England***[6] by Bankes LJ. In that case, the plaintiff was a customer of the defendant bank. A cheque was drawn by another customer of the defendants in favour of the plaintiff, who instead of paying it in to his own account endorsed it to a third person who had an account at another bank. On the return of the cheque to the defendants, their Manager inquired of the last-named bank who the person was to whom it had been paid and was told it was a book maker. That information the defendants disclosed to third persons. It was held that that disclosure constituted a breach of the defendant's duty to the plaintiff, for though the information was acquired not through the plaintiff's account but through that of the drawer of the cheque, it was acquired by the defendants during the currency of the plaintiff's account and in their character as bankers.

The instances where a bank may disclose confidential information according to ***Tournier*** are:

1. Where disclosure is under compulsion of law;
2. Where there is a duty to the public to disclose;
3. Where the interests of the bank require disclosure; and

4. Where the disclosure is made by the express or implied consent of the customer.

The Credit Data (Privacy) Code, issued by the Bank of Zambia in the exercise of powers conferred by **section 125 of the Banking and Financial Services Act,** regulates the provision of credit data to credit reference agencies. At the material time, it was a requirement that a credit provider who availed a person's credit data to a credit reference agency or a debt collection agency, in the event of default, had on or before collecting the credit data, to take all reasonably practicable steps to provide to such person a written statement setting out clearly that the data may be so supplied. The person concerned, had the right to be informed and to be provided with further information to enable the making of a data access and correction request to the relevant credit reference agency or debt collection agency.

The credit provider was moreover, required to inform the person that in the event of any default in repaying, unless the amount in default was fully repaid before the expiry of 60 days from the date the default occurred, the account 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. In addition, the person had to be informed that he would have the right to instruct the credit provider to make a request to the credit reference agency to delete any account data relating to the terminated account after seven years after the account would have been

terminated by full repayment, on condition that the person would not have made material default within that period of seven years.

We should reproduce **clause 2.3 of the Credit Data (Privacy) Code**:

> ***"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 the person's discharge from bankruptcy as notified to the credit reference agency whichever is earlier."***

The trial Judge referred to the letter dated 10th October 2008, in which the appellant stated that if the arrears were not repaid and facility not reviewed by 30th October 2008, the bank would have no choice but to classify the respondent's facilities as non-performing and seek other avenues to recover the facilities. His view was that the said letter fell short of the notification envisaged by clause 2.3, nor did it refer to the credit reference agency.

We agree with the trial judge that the respondent was not within 30 days informed that if it did not settle the outstanding amount within 60 days, its data would be referred to the credit reference agency, and that the data would be retained by the credit reference agency. We however note that this was recommended practice. A recommendation is a suggestion or advice. Adherence to it is not mandatory as a result. It will be recalled that in the statement to be provided to the concerned person, these matters would have already been brought to his attention. Nothing therefore turns on the failure to notify the

defaulting customer of the consequences, as he would have already been notified when the statement was availed to him. It is clear that a person who was notified of the consequences of default, but nonetheless proceeded to obtain the credit would have impliedly consented that his credit data be so availed to a credit reference agency at the time.

While we acknowledge that a mortgagee's remedies are cumulative, we fail to discern what effect this had on the recommendation that a delinquent creditor be notified as stipulated in the **Credit Data (Privacy) Code**.

Although the appellant notified the respondent that its facilities would be listed as non- performing, and if this be taken to refer to the credit reference agency, the respondent was not informed that it had to settle its indebtedness within 60 days failure which its credit data would be referred to the agency. Be that as it may, that was only recommended practice.

In our view, the more important requirement was that of providing a statement to a would-be creditor that its credit data may be availed to a credit reference agency in the event it defaults in repayment of the facility to be availed to it. Breach of the Code lay in not availing the said statement to the respondent, thereby impliedly obtaining the required consent, and not the failure to notify the respondent on default. As we see it, what was breached by the appellant was the duty of confidentiality because express or implied consent is not disclosed on the evidence on the record.

We note that the respondent had accessed other facilities with the appellant. The terms on which those facilities were accessed were not laid before the court. It is as a result impossible to imply that the respondent had consented that its data could be disclosed to the credit reference agency at the time.

There is evidence however that the respondent later consented that the general terms and conditions would apply to the facility it had with the appellant, by a letter dated 20th November 2009. The facility letter reads in part:

> ***"Stanbic Bank Zambia Limited registration number 6559 (the bank) offers to provide Savenda Management Services Limited bearing registration number 37666 (the borrowers) with banking facilities set out in clause 1 below ("the facilities) subject to the terms and conditions set out in this letter (this facility letter") and on the general terms and conditions attached to this facility letter at Appendix 1 ("the general Term and Conditions") which constitutes an integral part of and is not divisible from this facility letter.***

The facilities were stated to be general short term banking facilities, incorporating but not limited to overdrafts. The figure stated against this description was USD 400,000.00. The second was stated simply as facility, and against it was the sum of USD 851,082.00.

The purpose of the facility was to restructure the existing debts pertaining to the overdraft with a limit of USD 400,000 that was payable on demand. The security required for these facilities was a supplemental Debenture over printing machinery and all fixed and floating assets of the Borrower for USD 730,000.00. The facility letter was signed on behalf of Savenda Management Services, immediately under these words:

"We are pleased to accept the offer for the facility on the terms and conditions contained in this facility letter and on the attached general terms and conditions."

The guidance Note No. 1 of 2014 issued by Bank of Zambia appearing at page 71 of the record states, in clause 4 as follows:

4. *Utilisation of the Credit Reporting System*
   In accordance with the Banking and Financial Services (Provision of Credit Data and Utilisation 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 and
   (ii) Submit both positive and negative information on the repayment behaviour of every borrower.

We have taken judicial notice of the contents of **The Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive 2008,** issued on 10th December 2008. The directive was issued in exercise of the powers contained in **section 125 of the Banking and Financial Services Act**. It provides the following:

All financial service providers shall –

(i) At all times use the services of a credit reference agency before granting credit to any customer, and

(ii) Submit credit data to a credit reference agency in respect of all credit granted to a customer after the coming into force of this directive.

The Bank of Zambia considers that the omission or failure by any credit provider to adhere to or comply with this directive constitutes an unsafe and unsound practice and may attract Supervisory Action in terms of Section 77 of the Banking and Financial Services Act.

The import of this directive is that when it came into force, the appellant 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. As pointed out to the respondent by Bank of Zambia in its response to the respondent's complaint on the manner the appellant was handling the respondent's accounts, it was a requirement that restructured facilities be reported to the credit reference agency. Therefore, when the respondent's facilities were restructured by the appellant, the appellant was obligated to report the restructured facilities to the credit reference agency as directed.

The question that arises in this appeal is: **What was the effect of disclosing the negative data to the credit reference bureau?** The position at law is that a bank which gives a reference without the customer's consent is in breach of contract. The learned authors of **Paget's Law of Banking, 13th Edition, page 166,** express the view that, if the reference is accurate, it is difficult to see what foreseeable loss the customer will suffer because if the giving of the reference causes loss. (e.g. the loss of a transaction between the customer and the third party to whom the reference is given), the bank's refusal to give a reference (because its customer does not consent) would probably have caused the same loss. If so the customer would have suffered loss in any event.

According to **Toulson R. G and Phipps CM, Confidentiality, 2nd Edition, at paras 3-092 to 3-097)**, 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.

Our considered opinion is that analogy can be drawn between giving an unauthorised reference and disclosure of negative credit data to a credit reference agency, which is recoursed by lenders.

In the case with which we are presently engaged, the data provided to the credit reference agency was accurate. The respondent was in default as exemplified by the correspondence passing between the parties, and the valid arbitral award referred to by the respondent in the statement of claim. Additionally, the negative credit data was only accessed by banks and other financial institutions after November 2009, when the respondent's credit data, both positive and negative was mandatorily required to be availed to an agency. It will be recalled that on 10th December 2008, all financial institutions in Zambia were obligated by the Bank of Zambia directive to conduct a search on the credit reference agency before availing credit to an applicant. All credit data was to be availed to the credit reference agency for facilities availed after issuance of the directive. It will also be remembered that restructured facilities required to be listed, as earlier pointed out.

Therefore, when the respondent's facilities were restructured, the appellant was obliged to provide the information to the credit reference agency. As at 2nd March 2010, the respondent was on recovery plans, as revealed by an e-mail from the

respondent to the appellant at page 365(c) of the record. According to the respondent, the appellant recalled the facility in April 2010.

Ecobank, which was bound by the Bank of Zambia directive to conduct a due diligence search on the credit reference agency before lending to the respondent enquired about Savenda Management Services status on the non performing facilities on 21st September 2010.

Ecobank had on 2nd June 2010 requested the respondent to obtain clearance from the Credit Reference Bureau for the non-performing loans which the respondent said had been restructured as per the document availed to Ecobank by the respondent. The letter is at page 368 of the Record. Needless to state, the Credit Reference Bureau could only have 'cleared' the respondent upon receipt of information that the facilities had been restructured and were performing.

Investrust Bank PLC was approached on the 7th December 2010, after the respondent's credit data had become listable on the credit reference agency by force of the directive issued by Bank of Zambia.

It will be noticed that Smart Dynasty indicated in its letter to Savenda Management Services that its agents in Zambia had conducted due diligence and found that it had been listed as a negative customer. The letter was written after 2009, and the reference was: **Stanbic Refinancing Loan**. It will equally be observed that N & J International Ltd conducted due diligence and found the

appellant listed on the Credit Reference Bureau as disclosed by letter dated 23rd August 2016 at page 582.

The correspondence referred to reveals that the proposed refinanciers and funders of the respondent accessed the respondent's negative credit data after The Directive issued by Bank of Zambia mandated Stanbic Bank to avail all credit data to credit reference agencies. Furthermore, the facilities having been restructured, the appellant was obligated to list them.

Ross Granton in **Principles of Banking Law, at page 185,** states that information which is common knowledge is not subject to the duty of confidentiality. He gives an example where A has given security to Bank X and this is recorded in a Public registry.

Similarly, the directive by Bank of Zambia as mandated by statute having abrogated the common law duty of confidentiality and thereby rendered the credit data of a bank's customer accessible to other financial providers, as of 10th December 2008, it follows that an action for breach of confidentiality is unsustainable in that respect.

Our further considered view is that as the negative data that was disclosed before the 10th December 2008, on the Credit Reference Bureau was accurate, we fail to conceive what damage was inflicted on by the respondent by that disclosure. This is on account of the fact that at the time the negative credit

data was accessed by financial service providers approached by the respondent for financing, the financial service providers to which the Bank of Zambia directive applied were mandatorily required to use the services of credit reference agencies before lending to the respondent, as directed.

Furthermore, even those financial service providers to which the directive did not apply like, Smart Dynasty and N and J International Limited, conducted due diligence enquiries before availing the respondent credit, as a matter of sound business practice. Inevitably, the respondent's performance regarding the facilities it had with the appellant would have been disclosed to those entities.

On the foregoing, although the appellant breached the duty of confidentiality before the facilities were restructured, and before it became mandatory for the appellant to report all credit data to credit reference agencies, no damage can be said to have been suffered by the respondent. In addition to this, there is no evidence that the respondent was denied funding by any would-be financiers in the period before the Bank of Zambia directive, and the respondent's facility's restructure in November, 2009. The respondent is thus entitled only to nominal damages as a result.

This view is predicated on the principle that where breach of contract is proved, but no actual damage is proved, the claimant is entitled to nominal damages. See **Chitty on Contracts, General Principles, Vol. 1, 13th Edition, para 26-008.** We will return to the quantum to be awarded later in the Judgment.

It is contended that the order that the respondent be delisted from the credit reference agency was a misdirection. We agree. This is on account of the mandatory requirement that all credit facilities availed after 10th December 2008 be listed. It is equally mandatory that all credit providers conduct a search on the credit reference agency before availing facilities to a customer. The respondent having had its facilities restructured after December 2008, thus liable to be listed, it cannot be delisted. The order to delist flies in the teeth of the evidence, and the directive by Bank of Zambia.

We have dealt with Grounds 1 (1) to (iv), 3 and 4. We now move to Ground 5. Having found that the respondent would have been unable to prove what damage it would have suffered for the assigned reasons, it is otiose to address Ground 5. We will only do so because we have referred to letters from Eco Bank and Dynasty. The appellant's argument is that these letters, as well as the one from Eiden, and are hearsay, as the authors were not called to testify.

We do not agree with the appellant's argument that the trial Judge erred in referring to the letters. Learned counsel refer to **Evidentiary Foundations by Imwinkelried.** The learned author states, at page 2, that the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item of evidence. For example, the proponent of a letter must present proof of the letter's authenticity before offering the letter into evidence. Proof of the letter's authenticity is part of the letter's "foundation" or "predicate"; Substantive evidence law makes proof of

authenticity a condition precedent to the letter's admission into evidence. Whenever evidence law makes proof of a fact or even a condition to the admission of an item of evidence, that fact or event is part of the foundation for the evidence admission.

We agree with this statement of the Law. We are equally alive to the mechanism put in place by the **Rules of the Supreme Court, 1999 Edition,** whereby the authenticity of documents intended to be relied upon at a hearing is dealt with. **Order 27 rule 4,** of the said rule, provides the following:

> ***4.- (1) subject to paragraph (2) and without prejudice to the right of a party to object to the admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of Order 24 shall, unless the Court otherwise orders, be deemed to admit –***
>
> ***(a) that any document described in the list as an original document is such a document and was printed, written, signed or executed as it purports respectively to have been, and***
>
> ***(b) that any document described there as a copy is a true copy. This paragraph does not apply to a document the authenticity of which the party has denied in his pleading.***
>
> ***(2) If before the expiration of 21 days after inspection of the documents specified in a list of documents or after the time limited for inspection of those documents expires, whichever is the later, the party on whom the list is served serves on the party whose list it is a notice stating, in relation to any document specified therein, that he does not admit the authenticity of that document and requires it to be proved at the trial, he shall not be deemed to make any admission in relation to that document under paragraph (1).***

We have perused the record but have seen no notice of non-admission. As objection was not made regarding authenticity of the documents, we take it that none was taken. The letters in question were thus rendered authentic. Whether or not they could be relied upon as establishing the truth of their contents is however another matter.

The Evidence Act, provides, in Section 3, instances when a statement made by a person in a document intended to establish that fact may be admitted in evidence. These are when the maker had personal knowledge of the matters dealt with or made the statement in performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have personal knowledge of the matters.

The provision states that the maker may not be called as a witness if he is dead or unfit by reason of bodily or mental condition to attend as a witness. It provides that a statement in a document is to be deemed to have been made by a person only if the document or material part thereof was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

The provision is as follows:

> ***3. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:***

(a) if the maker of the statement either-

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Zambia and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may, at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence-

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(4) For the purposes of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inferences from the form or contents of the documents in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner, and, where the proceedings are with the aid of assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

The letters in issue must be viewed in the light of these provisions. The letter written by the Chief Executive Officer of Dynasty to the respondent appears to fall within those statements contemplated by the section. The letter referred to a matter within the knowledge of the author, viz the Stanbic Refinancing loan. The same applies to the letters from Ecobank and N and J International Limited. The matters communicated about appeared to be within the knowledge of the authors.

We note that **Subsection (2) of Section 3 of the Evidence Act** confers power on the court to admit statements in evidence where the maker is available but is not called as a witness. The trial Judge made no indication that he was alive to the provisions of the **Evidence Act** and opted to proceed without making an order. Subsection 2 of Section 3 of the Act, however, confers power on him to proceed as done.

Although the letter authored on behalf of Eidan S. Engineers was equally admitted in evidence, not much weight could have been attached to it, as it was not clear, and began in the middle.

Having found that the respondent suffered no damage as a result of the disclosure of its credit data to the Credit Reference Bureau before it's consent was obtained, we now move to consider appropriate damages. The learned authors of **McGregor on Damages, 18th Edition, para 10-001**, advert to Lord Halsbury's words in ***The Mediana,[26] at page116,*** where he defined nominal damages as follows:

> ***"Nominal damages" is a technical phrase 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 you no right to any real damages at all, yet gives you a right to the verdict or judgement because your legal right has been infringed."***

In Beaumont vs Greathead,[27] at page 499, Maule J said:

> ***'Nominal damages' means a sum of money that may be spoken of, but that has no existence in point of quantity,'***

We have expressed our considered view that no damage is conceivable as having been inflicted on the respondent as a result of the breach of confidentiality by the appellant between June 2009 and 20th November 2009. The respondent is thus only entitled to nominal damages as earlier intimated. In our estimation, the sum of K5,000.00 sufficiently answers the breach of confidentiality committed by the appellant. We therefore set aside the award of K192,500,000.00 as well as all the relief granted to the respondent. In its place, we award the respondent the sum of K5,000.00 as nominal damages, with

interest at the short-term deposit rate from the date of Judgment and thereafter, at the current bank rate until full settlement.

We need not consider the other grounds of appeal, as our decision renders it unnecessary to do so. This appeal succeeds to the stated extent, which is substantial and not apparent. It is, as a result, appropriate to award the appellant costs. We accordingly award the appellant costs in this court, to be agreed and in default taxed. As the respondent's success in the court below would have been apparent rather than real, we reverse the costs order and direct that each party bears own costs in the court below.

Leave to appeal is granted.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

.....

F.M. CHISHIMBA
COURT OF APPEAL JUDGE