**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO. 64 OF 2020**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

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|---|---|
| **FIRST NATIONAL BANK ZAMBIA LIMITED** | **APPELLANT** |
| **AND** | |
| **LIBIAN AFRICAN INVESTMENTS COMPANY ZAMBIA** | **RESPONDENT** |

**CORAM: Chashi, Sichinga and Banda-Bobo, JJA**

**ON: 15th June 2021 and 22nd July, 2021**

*For the Appellant:* *No appearance*

*For the Respondent:* *M. Katolo and K. Tembo, (MS) Messrs Milner and Paul Legal Practitioners*

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# J U D G M E N T

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**CHASHI JA, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Royal British Bank v Turquand (1856) 6 E and B 327**

2. **B P Zambia PLC v Interland Motors Limited - SCZ Judgment No. 5 of 2001**
3. **Mwansa v Zambian Breweries PLC - SCZ Appeal No. 153 of 2014**
4. **Examination Council of Zambia v Reliance Technologies Limited - SCZ Appeal No. 194 of 2010**
5. **Inutu Etambuyu Suba v Indo Zambia Bank Limited - SCZ Selected Judgment No. 52 of 2017**
6. **Ruben v Great Fingall Limited (1906) UKHL 616**
7. **Baden Delvaux et Lecuit v Societe General (1983) WLR, 509**
8. **Taher Ahmar Mohammed Khalil and Clement v Labian African Investments Company Zambia Limited Two (2) Others - CAZ Appeal No 123 of 2019**

**Legislation referred to**:

1. **The Companies Act Chapter 388 of The Laws of Zambia (Repealed)**
2. **The Bankers Association of Zambia Code of Banking Practice, 2010**
3. **The Evidence (Bankers' Books) Act, Chapter 44 of the Laws of Zambia**

**Other works referred to**:

1. **McGregor on Damages, 16th edition (1997) Sweet and Maxwell**

## 1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of Honourable Lady Justice Dr. W. S. Mwenda, High Court, Commercial Division

in cause number 2018/HPC/0036 which was delivered on 24th February 2020, in which the Respondent, who was the plaintiff in the court below, had partial success.

## 2.0 BACKGROUND

2.1 On 1st February 2018, the Respondent commenced an action against the Appellant who was the defendant in the court below, by way of writ of summons claiming the following reliefs:

(i) Payment of the sum of K2,568,992.12, K200,000.00, US$5,000.00 and US$110,000.00 being monies wrongly paid out by the Appellant from the Respondent's bank accounts.

(ii) Loss of profits, damages for negligence, breach of fiduciary duty and duty of care.

(iii) Interest and costs.

2.2 According to the attendant statement of claim, the Respondent opened two Kwacha accounts in March 2016, as a result of problems they were experiencing with the accounts they held at Finance Bank Zambia Limited, which were being

interfered with by two of their employees, namely Taher Khalil and Clement Wonani.

2.3 After the accounts became operational, the Respondent on 6th May, 2016, wrote a letter to the Appellant informing them of the two former employees as fraudsters who should not be allowed to interfere and/or have access to the Respondent's accounts. Attached to the letter was a restraining Order from the Industrial Relations Court restraining Clement Wonani from interfering with the affairs of the Company. The letter stated that the Appellant should not deal with the two former employees and if any problem arose because of the two, the Appellant should inform the author of the letter who was the Respondent's Managing Director.

2.4 In July 2016, the two former employees fraudulently changed the Respondent's list of directors at PACRA and arising from that, also managed to change the signing mandate at the Appellant bank. They then went on to withdraw the sums of K200,000.00 and US$5,000.00 over the counter and transferred the sums of K2,568,992.12 and US$110,000.00 to the Respondents old bank accounts at Finance Bank

Zambia Limited. That is what gave rise to the Respondent's action in the court below.

## 3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the submissions by the parties, the court below identified the following three issues for determination:

(i) Whether or not the Appellant as a bank, owed the Respondent a duty of care and/or fiduciary duty.

(ii) If so, whether the Appellant breached those duties and/or was negligent.

(iii) Whether the Appellant was liable for damages and the Respondent entitled to profits and interest on the sums paid out from the accounts.

3.2 The Court below, arising from the relationship between the parties, found that the Appellant owed the Respondent a duty of care and fiduciary duty which duties the Appellant breached. The learned Judge then went on to consider and assess the Appellant's conduct at the material time and opined that the Appellant had notice about the activities of the two former employees and that should have raised doubts

about the validity of the instructions they received from the two on the change of the signing mandate and therefore fell under the exceptions to the indoor management rule and could not claim the benefit of the rule under **Royal British Bank v Turquand**[1] case.

3.3 The learned Judge ordered the Appellant to pay the Respondent the sums of K200,000.00 and US$5,000.00 with interest, which monies were cashed over the counter by Wonani. The learned Judge also awarded damages for breach of duty of care and fiduciary duty; to be assessed and costs.

3.4 The learned Judge dismissed the claim for US$110,000.00 as the monies were returned to the Respondent's account by Finance bank Zambia Limited. The claim for K2,568,992.12 was also dismissed as the evidence of the loss was not provided by the Respondent.

## 4.0 THE APPEAL

4.1 Disenchanted with the Judgment, the Appellant has appealed to this court advancing two grounds of appeal couched as follows:

(i) The court below misdirected itself in law and fact when it held that the Appellant was liable to the Respondent in the sums of K200,000.00 and US$5,000.00 being the sums of money withdrawn over the counter by Clement Wonani, acting as an agent of the Respondent, despite evidence on record and the court's own finding of fact that Mr. Taher Khalil and Mr. Clement Wonani acted with authority on behalf of the Respondent by virtue of the changes effected on the Respondent's record at PACRA.

(ii) The court below misdirected itself in law and fact when it held that the Appellant was negligent and caused loss to the Respondent as it breached its duty of care and fiduciary duty owed to the Respondent when it dealt with Mr. Taher Khalil and Mr. Clement Wonani contrary to the evidence before the court.

## 5.0 THE CROSS APPEAL

5.1 The Respondent being dissatisfied with a portion of the Judgment filed the Respondent's notice of cross appeal, advancing two grounds as follows:

(i) The court below erred in law and fact when it refused to award the claim for K2,568,992.12 in light of the unchallenged evidence on record that the said sum was transferred from the Respondent's Finance Bank account by Taher Khalil and Clement Wonani to their Advocates.

(ii) The court below erred in law and fact when it relied on the Appellant's submissions that the Respondent did not tender any evidence before the court to prove loss, when there was oral evidence on oath that the money had been transferred out of the Respondent's Finance Bank account.

## 6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 At the hearing of the appeal, Counsel for the Appellant was not before Court. We however proceeded with the hearing of the appeal upon being satisfied that the Appellant's Advocates were notified of the hearing by the Court and the Respondent's Advocate. In proceeding, we took into consideration the Appellant's heads of argument filed into Court on 24th April 2020. In arguing the first ground of appeal, it was contended that it is not in dispute that at the time the withdrawal of funds was effected, Khalil and Wonani were the legally appointed

agents of the Respondent in line with the official PACRA records availed and independently confirmed by the Appellant. That from 18th July 2016 to 20th July 2016, the two former employees acted as the authorised agents of the Respondent and therefore the Respondent should be bound by the actions of its authorised agents.

6.2 It was argued that the Appellant did not deal or act on any of the instructions issued by Khalil and Wonani and their Advocates before and after the warning letter of 6th May 2016, which referred to Khalil and Wonani as imposters, as there was no basis to deal with them, until 19th July 2016, when the changes were made and the two became agents. That by the changes at PACRA, the two became the authorised agents and on 21st July 2016 became the authorised signatories on the accounts after they provided the required documents for change of signatories.

6.3 It was submitted that the two became authorised agents of the Respondent and signatories on the Respondent's accounts. That as such, the Appellant was legally obligated to deal with them. That it was during this period between 19th and 27th July 2016 that the two withdrew K200,000.00 and

US$5,000.00 from the accounts. According to the Appellant, the Respondent should not be penalised for dealing with authorised agents. Reliance was placed on the case of **B P Zambia Plc Limited v Interland Motors**[2] where the Supreme Court made the point that a company is bound by the acts of its human agents even though it is a separate legal entity.

6.4 It was the Appellant's contention that, between 15th and 26th July 2016, Mr Shukri and Mr Bwalya had been removed and Khalil and Wonani were the duly authorised agents and therefore the letter of 6th May 2016 relied upon by the court did not proscribe the Appellant from dealing with Khalil and Wonani at the point, as they were the duly authorised agents of the company and not imposters. That as such the Appellant was under no obligation to notify Shukri and Bwalya.

6.5 According to the Appellants, they took extra steps required of a bank to confirm that the changes presented on behalf of the Respondent were indeed changes effected and reflecting at the Respondents' official records at PACRA. It was the Appellant's contention that it was a misdirection on the part of the court to hold that the Appellant should have been put on alert by

the letter of 6th May 2016 as the warning in the letter was overtaken by the legal changes that had been effected.

6.6 It was the Appellant's argument that the trial court misdirected itself in the manner it applied Section 25 of the repealed **Companies Act**[1] by disregarding the fact that the changes were effected at PACRA and independently confirmed by the Appellant. That the Appellant cannot therefore be faulted for dealing with the two as agents and as such the issue of Section 25(a) does not arise.

6.7 As regards the second ground of appeal, the Appellant argued that the evidence adduced in the court below was not sufficient to satisfy the finding of liability for negligence. According to the Appellant, there is no dispute that the Appellant owed the Respondent a duty of care and fiduciary duty arising from the banker customer relationship. That what is disputed is the finding of breach of the duties. Our attention was drawn to the case of **Mwansa v Zambia Breweries Plc**[3] where the Supreme Court held as follows:

> *"On the authority of BONOGIRTE case, it is trite that for an action in negligence to succeed, it must be shown that the defendant owed a duty of care to the Plaintiff; that, that*

*duty had been beached; and, that the Plaintiff had suffered damage by that breach."*

According to the Appellant, the finding of breach of duty of care and fiduciary duty is not supported by the evidence on record and as such was arrived at after improper evaluation of the evidence.

6.8 Relying on the learned authors of **Black's Law Dictionary** where negligence is defined as:

*"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; and conduct that falls below the legal standard established to protect others against unreasonable risk or ..., except for conduct that is intentionally, wantonly or wilfully disregardful of others' right; the doing of what a reasonable and prudent person could not do under the particular circumstance."*

Counsel submitted that the Appellant acted reasonably and legally in the circumstances and cannot be said to have acted negligently.

6.9 The Appellant submitted that in making the finding of negligence, the Court bellow placed total reliance on the letter of the 6th May 2016 disregarding the charges that took place at PACRA which ultimately culminated in changes being made in the signing mandate. That by so doing, the court undertook an improper evaluation of the evidence before it. Our attention was drawn to the case of **Examination Council of Zambia v Reliance Technologies Limited**[4] and submitted that an appellate court can interfere with the finding of fact of the lower Court when there was no proper evaluation of evidence. Reliance was also placed on **The Bankers Association of Zambia Code of Banking Practice**[1] in particular clause 7.1.1 as regards provisions for the signing mandate.

6.10 It was the Appellant's submission that this is a proper case for this Court to find that the finding of fact made by the court below was not supported by evidence. That the finding is based on an improper evaluation of the evidence and should be set aside for being perverse.

**7.0 ARGUMENTS IN OPPOSING THE APPEAL**

7.1 In opposing the appeal, Mr. Katolo, Counsel for the Respondent, relied on the Respondents' heads of argument. In response to both grounds of appeal, Counsel submitted that, the Appellant was put on inquiry of possible interference with the accounts by the two imposters through the letter of 6th May 2016. That the Appellant ignored the inquiry and proceeded to entertain the imposters by allowing them to withdraw and transfer monies in huge sums.

7.2 The Respondent argued that the argument by the Appellant, that the two imposters had authority between 21st and 26th July 2016 is flawed because at no point did the Respondent appoint the two to act on its behalf. Counsel submitted that, there was no evidence in the court below of the appointment of the two by the Respondent. That, what was apparent in the evidence and was rightly held by the learned Judge, was that it would on the face of it appear that the imposters were appointed by the Respondent when in fact not.

7.3 According to the Respondent, it never made any representation to the Appellant that the imposters were its

authorised agents. It infact alerted the Appellant on the anticipated interference from the imposters. Counsel submitted that from the letter of 6th May 2016, it is clear that the Respondent was not silent on the fact that the imposters were unscrupulous and were people the Appellant should not transact with over the Respondent's accounts. That the Respondent clearly instructed the Appellant not to transact with the two named imposters.

7.4 It was further submitted that the **Turquand** rule (indoor management rule) cannot be relied on by the Appellant to avoid liability, as the circumstance of this case falls within the exceptions to the rule. In arguing the exception of having knowledge of the irregularity, reliance was placed on Section 25 of **The Companies Act** which was the applicable law then, in that the Appellant had knowledge of the irregularity.

7.5 According to the Respondent, the letter of 6th May 2016 and the restraining Order, warned the Appellant to avoid dealing with imposters. That the Appellants therefore were made aware of and had knowledge of the possible interference with the Respondent's accounts by the imposters.

7.6 Counsel further submitted that the Appellant being an outsider, who had been put on inquiry, had been negligent and cannot therefore rely on the **Turquand** rule, as it would have discovered the irregularities if it had made proper inquiries. That further, the circumstances surrounding the transaction were very suspicious and this should have invited an inquiry into all the facts until there was certainty. That because of the letter of 6th may 2016, the Appellant should have acted more diligently than it did. Counsel further submitted that upon receiving instructions from the imposters to change the signing mandate, the Appellant should have made an inquiry on the validity and genuineness of the instructions. That the failure on the part of the Appellant to make enquiries was pure negligence and that is evident from the fact that the Appellant found the Respondent's warning and instructions of no value and effect.

7.7 Counsel cited the case of **Inutu Etambuyu Suba v Indo Zambia Bank Limted**[5] where the Supreme Court held that:

> *"A banker is under a statutory duty to act in good faith and without negligence and exercise such care and skill*

*as would be exercised by a reasonable banker. The test of negligence is whether the transaction of paying coupled with circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused them to make an inquiry."*

Counsel contended that, there were circumstances that should have aroused doubts in the Appellant's mind and caused them to make an inquiry. That some of the circumstances antecedent include the fact that prior to the letter of 6th May 2016, the Appellant had received letters from Khalil on 3rd and 5th May 2016 requesting for change of signatories and the Appellant did not bring this to the attention of the Respondent. According to Counsel, the circumstances antecedent were so alarming and clearly out of the ordinary that they should have raised an inquiry. That having not raised an inquiry upon being approached by the imposters and their lawyers when there was a red flag was negligent and therefore the Appellant did not act in good faith when it allowed the changes to the signing mandate.

7.8 It was further submitted that the work permit by Khalil indicated that he was an employee of the Embassy of Libya and not the Respondent. That, that should have raised doubt. According to Counsel, it is undisputed that there was a fraud carried out by the imposters, who carried out a forgery at PACRA, following which the Appellant negligently caused the signing mandate to be changed from the properly appointed directors to the imposters. That therefore the exception in **Turquand** rule comes in; in that the rule does not apply where there has been forgery as the documents relied upon from inception are a nullity and cannot be fortified at law. Reliance to that effect was placed on the case of **Ruben v Great Fingall Limited**[6].

## 8.0 ARGUMENTS IN SUPPORT OF THE CROSS APPEAL

8.1 In arguing the cross appeal, the Respondent reiterated its arguments in opposing the appeal. Counsel contended that, the court below erred when it found that the Appellant was not liable to refund the sum of K2,568,992.12, because the loss was not proven, when there was oral evidence as well as

overwhelming evidence in support of the oral evidence proving that the money was lost.

According to Counsel, the Respondent's witnesses had testified that the sum of K2,568,992.19 transferred on 26th July 2016 to Finance Bank has never been retrieved as immediately it was transferred, the imposters again transferred it to their advocates. That there was no evidence to the contrary. That the testimony of the witnesses was never rebutted in cross examination and should therefore have been admitted as the truth of the facts alleged.

8.2 Counsel submitted that there were also letters from the Respondent dated 8th and 10th August 2016 where the Respondent demanded that the Appellant reverses or recall the transfer and there was no evidence on the part of the Appellant that they even attempted to reverse the transfer. Our attention was drawn to the learned authors of **McGregor on Damages**[1] where it is stated that:

> *"The Plaintiff has the burden of proving both the fact and the amount of the damages before he can recover substantial damages. This follows from the general rule*

*that the burden of proving a fact is upon him who alleges and not upon him who denies it ....”*

Counsel submitted that whilst being aware of the aforestated principle, it was his contention that the Respondent proved its case through the unrebutted evidence of its witnesses and the surrounding evidence. We were urged to reverse the finding of the learned Judge that the Respondent had not proven the loss of K2,568,992.19.

## 9.0 CONSIDERATION AND DECISION OF THE COURT ON THE APPEAL

9.1 We have considered the Judgement being impugned and the arguments by the parties. We shall consider the two grounds of appeal together as they are entwined, but under two limbs as follows:

(i) Whether there was breach by the Appellant of its duty of care and fiduciary duty owed to the Respondent.

(ii) Whether the imposters acted with authority on behalf of the Respondent when they effected changes on the Respondents records at PACRA which led to the change of the signing mandate and

withdrawal of the sums of K200,000.00 and US$ 5,000.00.

9.2 From the onset it is not in contention from the arguments before this court that the banker, customer relationship between the parties existed and therefore, the Appellant as a bank owed the Respondent a duty of care and fiduciary duty. What is in issue is whether that duty of care and fiduciary duty were breached by the Appellant.

9.3 The learned Judge in the court below in determining the issue on whether or not the Appellant breached the duty of care and fiduciary duty, took into consideration the Appellant's conduct at the material time. According to the learned Judge the evidence which was before her revealed that the Appellant received a special resolution dated 13th June 2016, which on the face of it was validly passed by the Respondent, wherein Khalil and Wonani were respectively appointed as managing director and company secretary and directors in place of Shukri and Bwalya. That the Appellants also received instructions on the Respondent's letterheaded paper instructing the

Appellant to change the signing mandate. The Appellant then conduced a search at PACRA which confirmed the changes.

9.4 According to the learned Judge, the circumstances antecedent was not so out of the ordinary that they would have aroused doubts in the mind of the Appellant. The learned Judge then went on to state that, however the Appellant had notice about Khalil and Wonani's activities and that should have raised doubts about the validity of the instructions it received from the two regarding the changes to the signing mandate.

9.5 The learned Judge cited the **Royal British Rank v Turquand**[1] case, which alluded to the indoor management rule, which gives effect to the notion that people transacting with companies are entitled to assume that internal company rules are complied with even if they are not, as due diligence is satisfied upon examination of documentation presented. The learned Judge however, acknowledged that there are exceptions to the indoor management rule and these are as follows:

*"(i) Knowledge of the irregularity (by the person dealing with the company).*

*(ii) Negligence on the part of the outsider. Thus, a person cannot claim the benefit of the rule in Turquand case in circumstances under which he would have discovered the irregularity if he had made proper inquiries. Further where circumstances surrounding the transaction are suspicious and therefore invite … the outsider cannot claim the benefit of the rule"*

9.6 The learned Judge was of the view that the letter of 6th May 2016, by the Respondent placed the Appellant in the position that it cannot claim the benefit of the indoor management rule. According to the learned Judge in right of the warning, it cannot be said that the diligence was satisfied upon examination of the documentation filed at PACRA.

9.7 The learned Judge made reference to the definition of negligence by the learned authors of **Black's Law Dictionary**[2] which is as follows:

*"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a*

*similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk or harm, except for conduct that is intentionally, wantonly or wilfully disregardful of others' rights; the doing of what a reasonable and prudent person could not do under the particular circumstances."*

9.8 We note from the record that, at the time of opening the accounts at the Appellant's bank, the two mandated signatories were Shukri and Bwalya. On 3rd May 2016, Khalil wrote a letter to the Appellant on the Respondent's letter head advising that the signatories had changed and the new signatories were now Khalil and Wonani. This was followed by another letter asking the Appellant to cancel the current cheque books and reissue new ones. This was followed by a letter from J & M Advocates who purported acting on behalf of the Respondent, urging the Appellant to act on the letters by Khalil and warning them of the consequences that would follow if they did not act accordingly.

9.9 Whilst the aforestated correspondence was being directed to the Appellant, the Respondent on its part, on

6th May 2016, Shukri, a signatory at the time and managing director wrote a letter to the Appellant, whose contents we are of the view that we need to recapitulate in order to put proper context to the matter. The letter read as follows:

> *"Dear Sir/Madam,*
>
> *LAICO IMPOSTERS-TAHER KAHIL & CLEMENT WONANI*
>
> *Reference is made to the above captioned matter.*
>
> *We write to advise that there are some unscrupulous people who are carrying themselves as employees of our company the Libian African Investment Company Zambia Limited. The said individuals are Mr. Tahar Khalil, a Libian national who was General Manager of LAICO (Z) LTD from 2005-2011 and Mr Clement Wonani, a Zambian, whose job as Accounts Manager was terminated in 2013. The two named persons do not represent the company in any way and please do not transact with them in any business. One Clement Wonani has a restraining Order obtained*

*from the Industrials Relations Court in 2014. Additionally, we have commenced legal proceedings to the court of law against the named individuals on several offences and crimes occasioned from February 2016.*

*Please do not hesitate to contact the undersigned who is the duly appointed and incumbent managing director for any clarification. Herewith attached find a copy of the said court order of 2014".*

9.10 Our understanding of the explicit letter is that, it was an authoritative instruction from the managing director of the Respondent, who at the time was a mandated signatory to the account, not to deal with the two named and identified imposters; as they were not representatives of the Respondent. The letter went on to inform the Appellant that they should not hesitate to contact the undersigned for any clarification. Attached thereto was a restraining order. The Appellant does not deny having received the correspondence from the Appellants and the Respondent's letter of 6th May 2016.

9.11 It is evident that at the time of receiving the letter of 6th May 2016 from the Respondent, which letter was clear and not ambiguous in its content, the Appellant never cared to inform the Respondent that in fact they had already started experiencing the interference the Respondent had mentioned. Equally, the Appellant never bothered to accost the two imposters with the said letter. The Appellant instead of acceding to the letter which had raised a red flag and put them on alert, chose to deal with the two imposters and in the process changed the signing mandates, reissued the cheque books and allowed the two to make transactions. We do not agree with the Appellant that they performed due diligence by confirming the records at PACRA when all that was required was to inquire with the signatories at the material time as was required of them as per the letter of 6th May 2016.

9.12 Our view is that the learned Judge was on firm ground when she made the finding of negligence as the Appellant in its dealings owe a duty to its customers to use reasonable skill and care when performing services

for customers, which they neglected by ignoring and not acting on the Respondent's mandate contained in the letter of 6th May 2016. The Appellant went on to entertain and transact with the two imposters, despite having been equipped with actual knowledge of the two being imposters and fraudsters.

9.13 In the English case of **Baden Delvaux et Lecuit v Societe General**[7] the court looked at various forms of knowledge which could be attributed to a party when considering a rectification. According to the court, knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved are:

(i) actual knowledge wilfully shutting one's eyes to the Obvious

(ii) wilfully and recklessly failing to make inquiries as an honest and reasonable man would make

(iii) knowledge of circumstances which would indicate the facts to an honest and reasonable man.

(iv) knowledge of circumstances which would put an honest and reasonable man on inquiry.

The court held as follows:

(1) The relevant knowledge had to be knowledge of the fact. Recklessly refraining to make inquiries that a reasonable banker would have made would be enough to indicate knowledge of something awry.

(2) A banker had an obligation to comply with lawful instructions save in exceptional circumstances, in which it came under a duty to inquire about the true nature of the transaction.

9.14 Taking into consideration the circumstances in this matter and the antecedents to the transaction which led to the loss of monies, we are satisfied that having been alerted by the letter of 6th May 2016, the Appellant had actual knowledge, but wrongly and recklessly failed to make inquiries with the signatories at the material time as an honest and reasonable man would make. The Appellant having been alerted knew that a design having the character of being fraudulent and dishonest was being perpetrated and the Appellant's failure to inquire assisted in the implementation of the design. In this respect, we agree

with the learned Judge that the Appellant cannot find solace under the **Turquand** rule as they fell under the exceptions. Furthermore, that they breached the duty of care and fiduciary duty they owned to the Respondent.

9.15 Having confirmed the breach on the first limb, it goes without saying on the second limb that the two imposters having acted fraudulently had no authority to act on behalf of the Respondent when they effected changes at PACRA. Neither did they have authority to effect changes of the signing mandate which led to the withdrawals of the sums of K200,000.00 and US$ 5000.00.

9.16 In a related matter, in the case of **Taher Ahmer Mohammed Khalil and Clement Wonani v Libian African Investment Company Zambia Limited and Two (2) Others**[8], an appeal by the Appellants, who are the two imposters in *casu*, we in our Judgment delivered on 18th August 2020 upheld the learned Judge in the court below, that the two Appellants were not legally

appointed and that therefore the withdrawals of monies were unlawful.

9.17 We note that this appeal comes after we had delivered our aforestated Judgement and therefore is caught up in our said Judgement. That being the case, we cannot now cloth the two imposters with authority in the face of our Judgement.

**10.0 CONSIDERATION AND DECISION OF THE COURT ON THE CROSS APPEAL**

10.1 The two grounds in the cross appeal attacks the finding by the learned Judge that the Appellant was not liable to refund the sum of K2,568,992.12 because the loss was not proven. The contention by the Respondent is that the Respondent's witnesses adduced overwhelming oral evidence at the trial to prove that the money was lost.

10.2 The old axiom that he who alleges must prove, applies to this matter. In addition, it is the normal rule of evidence that the burden of proof lies on he who alleges to prove his case. Furthermore, we should not lose sight that the Appellant is a bank, whose dealings are mainly

through documentation which leaves a proper paper trail. In addition, the law of evidence relating to the banks is provided for under **The Evidence (Bankers' Book) Act**.

10.3 Under this Act the mode of proof of entries in all proceedings is by way of bankers' book as recorded by the bank, for maintaining records is an integral and essential part of banking instructions.

10.4 The Act goes on to provide particularly under section 3, that in all legal proceedings, a copy of any entry in the banker's book such as transactions, accounts shall be treated as a *prima facie* evidence of such entry.

10.5 Apart from adducing oral evidence, the Respondent did not produce any documentary evidence in line with the Act to prove its claim, such as bank statements, which would have been reliable pieces of evidence. There was no documentary evidence to show the transfer of monies to Finance Bank Zambia Limited nor from the said Bank to the two imposters' Advocates. In the view that we have

taken, we find no basis on which to fault the court below. The cross appeal is therefore dismissed for lack of merit.

**11.0 CONCLUSION**

11.1 Both the appeal and the cross appeal having failed and dismissed; this is a proper case to order each party to bear its own costs.

**J. CHASHI**
**COURT OF APPEAL JUDGE**

**D. L. Y SICHINGA**
**COURT OF APPEAL JUDGE**

**A. M. BANDA - BOBO**
**COURT OF APPEAL JUDGE**