IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 127/2020**
HOLDEN AT LUSAKA **CAZ/08/131/2020**
(Civil Jurisdiction)

BETWEEN:

MELISSA SUPERMARKET LIMITED **1ST APPELLANT**
PHILOMENA PETSAS **2ND APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM : Chashi, Chishimba and Sharpe-Phiri JJA
On 26th January, 2022 and 15th March, 2022

For the Appellants : Mr. B. C. Mutale, SC, M. Mukaka and Mr M. Sitali of Messrs Ellis & Co.
Mr. J. Zimba of Messrs Makebi Zulu Advocates

For the Respondent : Mr. J. Jalasi and Mr M. Chileshe of Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners

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J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1) Konkola Copper Mines Plc v Mitchell Drilling International Limited & Another Selected Judgment No. 22 of 2015 (SCZ Appeal No. 156/2013)
2) Mhango v Ngulube (1983) ZR 61

3) Finance Bank Zambia Limited v Simataa Simataa SCZ Selected Judgment No. 21 of 2017
4) Chrismar Hotel Limited v Stanbic Bank Limited SCZ Selected Judgment No. 6 of 2017
5) Stanbic Bank Zambia Limited v A.S and C Enterprises and Other (2008) ZR Vol 1 259
6) Savenda Management Services v Stanbic Bank Zambia Limited Selected Judgment No. 10 of 2018
7) Minister of Home Affairs & Attorney General v Lee Habasonda & Others (2007) ZR 207
8) Mohammed v Attorney General (1982) ZR 49
9) Sithole v The State Lotteries Board 1975 ZR 106
10) Wasamunu v The People (1978) ZR, 200
11) Mabuya v Council of Legal Education- SCZ Judgment No 1 of 1985
12) Zambia Seed Company Limited v Chartered International (Pvt) Limited (1999) ZR, 151
13) Wilson Masauso Zulu v Avondale Housing project Limited (1982) ZR 172
14) Paul Roland Harrison v The Attorney General (1993-1994) ZR, 68
15) Saviour Chibiya v Chrystal Garden Lodge & Restaurant SCZ Appeal No. 97 of 2013
16) Laston Phiri v Tropical Diseases Research Centre SCZ Appeal No. 5 of 2014
17) Zambia Export And Import Bank Limited v Mukuyu Farms Limited, Ellias Andrew Spyron & Mary Ann Langley Spyron (1993 - 1994) Z.R. 36
18) Friday Mwamba v Sylvester Nthenge, Monica Kaping'a & Derrick Chekwe SCZ Judgment No. 5 of 2013 (Appeal No. 174/2010)
19) National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo SCZ Appeal No. 79/2001
20) MTN Zambia Limited v Investrust Bank Plc SCZ Appeal No. 155 of 2015
21) Nkhata & Four Others v The Attorney-General Of Zambia (1966) Z.R. 124
22) The Attorney-General v Marcus Kampumba Achiume (1983) Z.R.1
23) Michael Chilufya Sata v Zambia Bottlers Limited (2003) ZR 1
24) Continental Restaurant and Casino Limited v Arida Mercy Chului SCZ No. 28 of 2008
25) Sylvester Musonda Shipolo v Masstores (PTV) Limited (Mass Discounters Zambia Game) SCZ Appeal 157 of 2014
26) A Vander Walt Transport (Namibia) Limited v Dar farms & Transport Limited SCZ Appeal No. 187 of 2015
27) Savenda Management Services v Stanbic Bank Zambia Limited SCZ Selected Judgment No. 10 of 2018 (Appeal No.37/2017)

28) Lt. General Wilford Joseph Funjika v The Attorney General (2005) Z.R. 97
29) Benjamin Mwila v Victor Brandbury (2013) 3 ZR 1
30) Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda & Paul Ngandwe (2012) 1 ZR 404
31) Kitwe City Council v William Ng'uni (2005) Z.R. 57
32) Association of British Travel Agents Limited v British Airways PLC (2002) 2ALLER 204.

LEGISLATION CITED:

1) The Competition and Consumer Protection Act No. 24 of 2010
2) The High Court Act, Chapter 27 of the Laws of Zambia
3) The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia (repealed)
4) The Court of Appeal Rules, 2016
5) The Banking and Finanacial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive, 2008
6) Banking Litigation David Warne 2nd Edition

OTHER WORKS REFERRED:

1) Chitty on Contracts, General Principles. Vol. 1, 28th edition (1999)
2) Halsbury's Laws of England. 4th edition, Volume 34.
3) McGregor on Damages 16th edition. London. Sweet and Maxwell (1997)

1.0 INTRODUCTION

1.1 This is an appeal against the judgment delivered by the Hon. Mr. Justice K. Chenda on 3rd April, 2020 dismissing the claims sought by the appellant, save for the award of nominal damages in the sum of K9, 999.00. The judge further ordered that the 1st appellant's bank accounts at the respondent be audited in respect of the period from 30th September 2016 to 30th June 2017. The court awarded costs to the 1st appellant.

2.0 **FACTUAL BACKGROUND**

2.1 The 1st appellant and respondent were in a long term relationship of customer and banker for a period of over ten years. The 2nd appellant is the registered owner of Stand No. 194, Kabulonga, Lusaka the property on which the 1st appellant operates a supermarket.

2.2 Over a period of ten years, the 1st appellant was accorded a number of banking facilities by the respondent to finance its working capital and for acquisition of motor vehicles, various machinery and equipment. The loan facilities were secured by way of a mortgage-debenture creating a fixed and floating charge on stand number 194, Kabulonga. The parties to the mortgage-debenture of 15th July 2003 were the 1st appellant as mortgagor/borrower and the respondent as mortgagee.

2.3 A further mortgage-debenture dated 12th July 2005 indicated the 1st and 2nd appellants as borrower and mortgagor respectively. On the same date, the appellants executed a deed of rectification to the mortgage-debenture of 15th July 2003 to include the 2nd appellant as mortgagor in favour of the bank, as mortgagee.

2.4 Facility letters were issued by the respondent when the 1st appellant obtained loan facilities. Of relevance to the dispute is the facility letter dated 4th October 2016 for an overdraft facility of K1,800,000.00 and medium term loan facility of US$62, 500.00. The appellants averred in the statement of claim that the facility letter obligated the respondent to settle insurance premiums by debiting the 1st appellant's bank account. According to the appellants, this position was confirmed by practice.

2.5 On 9th December 2016, stand number 194 Chindo Road, Kabulonga, Lusaka was gutted by fire which completely destroyed the property together with much of the equipment and stock. Subsequently, the appellants discovered that insurance cover on the property had not been renewed. As a result, neither the appellants nor the respondent could receive any compensation. The appellant averred that the bank acted negligently and breached its mandate to insure the property.

2.6 Further, during the tenure of the facilities, the 1st appellant detected a number of irregularities on its banks account held with the respondent, for instance cheques not being timeously

credited into the account, mistakes on debits to the account and other disputed charges being levied to the account. According to the 1st appellant, upon deterioration of its relationship with the respondent, they sought to move their accounts to other banks but were unable to do so on account of an adverse Credit Reference Bureau (CRB) report.

3.0 **CLAIMS IN THE COURT BELOW**

3.1 Arising from the above set of facts, the 1st and 2nd appellants commenced an action by way of writ of summons (re amended) seeking the following reliefs against the respondent:

(i) Damages for the replacement cost of the supermarket infrastructure which was gutted by fire on 9th December, 2016;

(ii) Damages for cost of removing debris from Stand 194, Chindo Road, Kabulonga, Lusaka;

(iii) Damages for the value of the stock in trade;

(iv) Cost of replacement machinery and equipment destroyed by the said fire;

(v) Damages for negligence and breach of banker/customer relationship in the failure and/or omission to insure the Supermarket at Stand No. 194, Chindo Road, Kabulonga, Lusaka which on 9th December, 2016 was destroyed after it was gutted by fire;

(vi) Damages for breach of banker/customer relationship in disclosing the 1st appellant's confidential information to third party financial institutions;

(vii) ***Damages for breach of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and the Credit Data (Privacy) Code;***

(viii) ***Damages for the respondent's failure to notify the 1st appellant of its intention to refer the 1st appellant's credit data to the Credit Reference Agency;***

(ix) ***Damages for loss of goodwill;***

(x) ***Damages for loss of income/business profits;***

(xi) ***An order of mandatory injunction directing the respondent to delete or remove the 1st appellant's credit data with the Credit Reference Agency;***

(xii) ***An order that the 1st appellant's account with the respondent be comprehensively audited;***

(xiii) ***Damages for defamation and injury to the 1st appellant's corporate status;***

(xiv) ***Punitive and exemplary damages;***

(xv) ***Interest on the said sums at the current bank lending rate;***

(xvi) ***Further relief the court deems fit; and***

(xvii) ***Costs.***

3.2 In its re-amended defence, the respondent denied the claims against it alleging that the loss and damage was caused by the negligence of the appellants through the following:

(i) ***Failure to insure Stand No. 194 Chindo Road, Kabulonga, Lusaka which property was pledged as security in accordance with the Bank facility conditions precedent;***

(ii) ***Failure to allow the relevant authorities to undertake conclusive investigations in order to ascertain the true cause of the fire;***

(iii) Poor account conduct by the 1st appellant on account of frequent unauthorized overdraft limits;

(iv) Constant unauthorized overdrawing of the account;

(v) Failure to service the banking facilities as per the agreed terms and conditions; and

(vi) *Failure to communicate queries to designated officers of the defendant with respect to account queries.*

4.0 THE EVIDENCE ADDUCED IN COURT BELOW

4.1 During the period that the 1st appellant enjoyed the facilities from the respondent, the bank had twice arranged insurance for the 1st appellant. The first was for equipment and machinery for the period January to March 2013 which was cancelled on 18th March 2013 by the 1st appellant who claimed to have made its own arrangements.

4.2 The second was for the period August 2015 to September 2016 upon discovery that there were no insurance cover notes or proof of own insurance for the period 2014 to 2015. This was forced on the 1st appellant upon the bank realizing the level of risk exposure six months post the insurance renewal date. The 1st appellant's account was debited due to failure to provide evidence of its' own insurance arrangements made in respect of the subject property.

4.3 The evidence showed that during the period the 1st appellant enjoyed facilities from the respondent, it had made its own insurance arrangements for the property for the periods June 2005 to June 2006 and March 2006 to March 2007; and June 2005 to June 2006 and March 2009 to March 2010 for stock at the supermarket.

4.4 In September 2016, the respondent changed its core Banking System to the Finacial System which does not allow payments being processed on unfunded accounts. The new system instead marks a lien holding anticipated funds equivalent to the debit instrument to be paid. Upon discovery that the account is underfunded, the system automatically generates a charge of K900.00 for each instrument issued.

5.0 **DECISION OF THE COURT BELOW**

5.1 The learned Judge in the court below considered the pleadings, the evidence adduced and was of the view that the issues for determination were as follows:

(i) Which party bore the responsibility to ensure that the property remained insured for the duration of the facilities under the facility letter;

(ii) Whether the 2nd appellant had any legal relationship with the respondent or was otherwise owed a duty of care by the respondent;

(iii) Whether the respondent made a disclosure of false and malicious confidential information about the 1st appellant to third party financial institutions and caused a rejection of the 1st appellant's applications to migrate its accounts from the respondent; and

(iv) Whether the respondent had in any way reached its banking duties to the 1st appellant.

5.2 With respect to the issue of insurance, the trial court considered Clauses 6.7 and 7.4 of the facility letter. He found that Clause 7.4 provided that for the duration of the facilities or while any obligation remained outstanding to the respondent, the 1st appellant bore the obligation to ensure that any assets pledged as security to the respondent remained fully insured.

5.3 He rejected the argument by the appellants that there was an established practice, prior to the facility letter, whereby the respondent would be involved in arranging for insurance on the basis that the terms of a written agreement were to be construed

within its four corners, instead of extrinsic evidence that contradicts or varies the written terms.

5.4 As regards whether there existed any legal relationship between the 2nd appellant and the respondent, the court below found that the parties to the facility letter were the 1st appellant and the respondent. The 2nd appellant was not a party. The responsibility to ensure that the property remained insured during the tenure of the facility was on the 1st appellant. Therefore, the 2nd appellant not being a party to the facility agreement, the respondent could not be said to owe the 2nd appellant any duty of care.

5.5 In regard to the issue of disclosure of confidential information by the respondent to third parties, the lower court found that the available evidence on record did not support the allegations and grievances pleaded by the appellants. The lower court also found that the appellants did not go further to lead evidence that the respondent shared any information about the 1st appellant with a Credit Reference Agency.

5.6 On the issue of whether the respondent breached its banking duties to the appellants, the court below held that the freezing

of the 1st appellant's accounts in September 2016 was due its unresolved issues with the Zambia Revenue Authority (ZRA). Citing the case of **Konkola Copper Mines Plc v Mitchell Drilling International Limited & Another** (1), the lower court was reluctant to hold the respondent accountable for the delay in informing the 1st appellant of the freezing of its accounts. Doing so would be allowing the 1st appellant to benefit from a situation brought about by its own actions with the ZRA.

5.7 The court below in respect of the allegations of irregularities in the management of the account held by the 1st appellant between in January and June 2017 averred in paragraphs 58 and 59 of PW1's amended witness statement, held that the same were substantiated by bank statements and email complaint of 10th July, 2017.

5.8 With respect to the charges of K900.00, the lower court found that while the facility letter did not expressly provide for such, clause 4.4.2 reserved the right of the bank to alter any fees or charges at any time with written notice. The court found no evidence of any such written notice by the respondent to the 1st appellant. In this regard, the court below held that the

'unauthorised overdraft fee' of K900.00 was wrongly imposed by the respondent on the 1st appellant and were thus unlawful.

5.9 As regards the claims for damages for loss of income etc, the court below found that the appellants had not led evidence to prove its loss or that it had suffered injury from the respondent's breach of duty to provide banking services with reasonable care and skill. Following the decision of the Supreme Court in **Mhango v Ngulube** [2] and **Finance Bank Zambia Limited v Simataa Simataa** [3], the lower court was of the view that the 1st appellant was only entitled to nominal damages.

5.10 In conclusion, the lower court found that the appellants were not entitled to the claims in the statement of claim: (i) to (v); that in the absence of a foundation it was unsafe and unsound to make a determination on claims (vii) and (viii); that as the claims in (ix), (x), (xi), (xiii) and (xiv) were dependent on the success of claims (vi) and (viii) which had failed, it followed that (ix), (x), (xi), (xiii) and (xiv) had no limb on which to stand and were accordingly dismissed.

5.11 Having found that **section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010** makes it mandatory

for providers of services in Zambia to provide such services with reasonable care and skill, the court below found a pattern of delinquency by the bank in the provision of banking services to the 1st appellant. On that basis the court below awarded the 1st appellant nominal damages of K9,999.00 with interest against the respondent for the period 30th September, 2016 to 30th June, 2017. This was because the court found that there was no evidence of actual injury led. The court therefore found no basis to order an assessment of damages.

5.12 The award of nominal damages was granted under any other relief and the powers vested in the court under **section 13 of the High Court Act Chapter 27 of the Laws of Zambia**. The court below further ordered an audit of the 1st appellant's account with the respondent bank for the period 30th September, 2016 to 30th June, 2017.

5.13 In its discretion, the court below awarded costs to the 1st appellant on the basis that the respondent had failed to discharge its banking duties to the 1st appellant with due care and skill. The cost of the audit by an independent auditor to be chosen by the parties was to be borne by the respondent.

6.0 **GROUNDS OF APPEAL**

6.1 The appellants, being aggrieved with the decision of the lower court, have advanced fifteen grounds off appeal as follows that:

1. ***The Judge in the court below erred in law and fact when he failed to assess and to evaluate all the evidence adduced by the parties and the parties' submissions;***
2. ***The learned Judge in the court below misdirected himself in law and fact when he failed to consider the uncontested evidence of PW1;***
3. ***The court below misdirected itself in law and fact when it failed to consider the consent order dated 23rd August, 2018 joining the 2nd appellant to the action and also the failure to consider the ruling of Mr. Justice W. S. Mweemba dated 27th June, 2019 on the status of the 2nd appellant;***
4. ***The learned Judge erred in law and fact in holding that the 2nd appellant had no contractual relationship with the respondent and that the respondent did not owe the 2nd appellant any duty of care;***
5. ***The learned Judge erred in law and fact in invoking the literal rule in interpreting clauses 4.5, 6.7 and 7.4 of the relative facility letter and by holding that the 1st appellant had the duty to insure the property in issue;***
6. ***The court below misdirected itself in law and fact when it failed to invoke the "contra proferentum" rule in the interpretation of the aforesaid clauses of the said facility letter;***
7. ***The court below misdirected itself in law when it failed to consider extrinsic evidence in its interpretation of the said facility letter;***

8. ***The court below erred in law when it failed to consider that the respondent had varied the terms of the facility letter when it insured the 2nd appellant's property in 2015;***
9. ***The court below misdirected itself in law and fact when it failed to consider that the respondent accorded the 1st appellant the credit facilities as the 1st appellant had complied with all the conditions in the facility letter;***
10. ***The court below erred in law and fact when it held that there is no evidence on record of any lender refusing to extend credit facilities to the 1st appellant;***
11. ***The court below misdirected itself when it disregarded all references to the Banking and Financial Services Act (repealed), Banking and Financial Services Act, 2017, the Banking and Financial Services Act (Provision of Credit Data and Utilisation of Credit Reference Services) Directives 2008 and the Credit Data (Privacy) Code in relation to the 1st appellant's claim for unlawful disclosure of confidential information to third parties;***
12. ***The court below erred in law and fact in awarding the 1st appellant nominal quantified at K9, 999.00 for the respondent's breach of duty to provide services with reasonable care and skill;***
13. ***The court below misdirected itself by disregarding the evidence of the injury/damages/loss that the 1st appellant suffered as a consequence of the respondent's breach of duty to provide services with care and skill;***
14. ***The court below erred in law and fact in ordering an audit of the respondent for only the period of 30th September, 2016 to 30th June, 2017; and***
15. ***The learned trial Judge erred in law and fact in holding that the period showing 'a pattern of delinquent banking services' by the respondent was from 30th September, 2016 to 30th June, 2017.***

7.0 **APPELLANTS' ARGUMENTS**

7.1 The appellants filed heads of argument dated 20th July, 2020. Grounds seven and eight were abandoned. The rest of the grounds were argued in clusters. Grounds one, two, six, nine, ten, eleven and thirteen were argued together as they are concerned with the alleged failure of the trial court to assess and evaluate the evidence adduced and the submissions made by the parties. The appellants submit that the judgment appealed against is devoid of assessment and evaluation of the evidence and submissions of the parties. Specific areas said not to have been assessed and evaluated were then addressed.

7.2 The first regards the claim in respect of the bank's failure to insure the mortgaged property. The appellant submits that paragraphs 10 to 21 of PW1's witness statement were not considered by the lower court. Further, the evidence of PW2 and PW3 was referred to who testified that the 1st appellant gave the respondent the mandate, in accordance with Clauses 4.5 and 6.7 of the facility letter, for the bank to debit the 1st appellant's account with the cost of insurance premiums. In this regard, the 1st appellant passed a board resolution authorizing the

respondent's head of collateral to debit the 1st appellant's account with the costs of the facility, such as insurance. That the bank failed to renew the insurance of the property.

7.3 It was argued that the fact that the respondent was obliged to insure the property is confirmed by it having previously insured with Madison Insurance for the period 4th May, 2015 to 30th September, 2016 as per Policy No. P/01/1001/134573/2015, the said policy gave the respondent the option to renew the insurance cover on expiry for any period. As per the aforesaid practice, the respondent debited the 1st appellant's account with the sum of K9, 288.27 on 1st September, 2015 as five and Allied Premium Insurance policy. That all this evidence was confirmed by documentary evidence and unopposed by the respondent.

7.4 The judgment subject of appeal glossed over the above evidence and failed to take into account the appellant's submissions which addressed the fact that the facility letter of 4th October 2016 was in fact a renewal of the facility of 2015. The lower court is contended to have failed to assess and evaluate the evidence adduced by the parties; misdirected itself in failing to consider the uncontested evidence of PW1 and DW2 on the

condition precedent which had been satisfied. That the onus was on the bank to ensure timeously debit of its account.

7.5 The appellants went on to argue that the court below failed to invoke the *contra proferentum rule* in interpreting clauses 4.5 and 7.4 of the facility letter which were said to be at variance; and failing to consider that the 1st appellant had complied with all the conditions in the facility letter. The following case authorities on the application of the *contra proferentum rule* were cited namely:

(i) **Association of British Travel Agents Limited v British Airways PLC (2002) 2 ALLER 204**

(ii) **Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Limited 1966**

(iii) **Cornish v Accident Insurance Company (18890 23 QB**

7.6 In the latter cited case, the court held that where there is real doubt, the policy ought to be construed against the insurers because they frame the policy and insert the exceptions. The appellants argued that by the court failing to invoke the *contra proferentum rule* in the interpretation of the clauses in the

facility letter in issue, the court below misdirected itself in law and fact.

7.7 The second area alleged to have been glossed over by the lower court relates to the claim in respect of the failure of the respondent to manage the 1st appellant's account with the requisite standard of care and skill. The appellants submit that the lower court glossed over the evidence adduced by PW1 in his witness statement. For emphasis, paragraphs 20 to 76 of PW1's witness statement were copiously reproduced, which we have taken into consideration and particulars of loss and damages sought in the claim. The appellants contend that documentary evidence traced the mismanagement of their interest well before September 2016, as per email dated 16th March 2016.

7.8 It was submitted that DW1 confirmed in cross-examination that the delays by the respondent in correcting errors on the account resulted in additional expense to the 1st appellant. Reference was made to the appellants' submissions in the court below where reliance was placed on the case of **Chrismar Hotel Limited v Stanbic Bank Limited** [4] which condemned the

imposition of bank charges on customers that are not expressly agreed to by customers. The definition of negligence by the learned authors of **Ross Cranston's Principles for Banking Law** was referred to namely a breach of any obligation arising from express or implied terms of a contract to take reasonable care or exercise reasonable skill in the performance of the contract. The statutory duty by a Banker to act in good faith espoused in the case of **Stanbic Bank Zambia Limited v A.S and C Enterprises and Other** [5] was cited.

7.9 The third area in which the judgment is submitted to be devoid of assessment, evaluation of evidence and submission is the claim in respect of the respondent's publication of false and injurious information. For this, reference was again made to paragraphs 62 to 75 of PW1's witness statement and the submissions in the lower court which addressed the alleged inaccurate reporting made to the Credit Reference Agency (CRA) which the lower court was said not to have assessed and evaluated in its judgment.

7.10 The appellants submit that the respondent was duty bound to ensure that the information it gave to the CRA was accurate as

per clause 2.6 of the Credit Data (Privacy) code. We were referred to the case of **Savenda Management Services v Stanbic Bank Zambia Limited** [6] where in reference to Clause 2.1 of the Credit Data (Privacy) Code, the Supreme Court guided that the clause compels a credit provider, prior to or at the time of providing credit, to inform the customer of the consequences of obtaining the credit, being that the customer's data may be availed to a credit reference agency. The contention by the appellants being that the Credit Data Code having been issued pursuant to **Section 50 of the Banking and Financial Services Act**, the duty by the respondent to exercise reasonable care and skill is statutory. The court should not have disregarded all references to the Act cited in relation to the claim for unlawful disclosure of confidential information to third parties. Additionally, the court ought not to have disregarded the evidence of injury, damages and loss that the 1st appellant suffered as a consequence of the breach of duty to provide services with care and skill.

7.11 The appellants contend that in terms of the guidance given by the court in the case of **Minister of Home Affairs & Attorney**

General v Lee Habasonda & Others [7], the lower court failed to reveal its mind to the evidence before it, owing to its failure to review the evidence, summary arguments and submissions as well as reasoning on the facts and application of the law. The court below in ignoring the uncontroverted evidence adduced by the appellants and their submissions, made findings that went against the weight of the evidence, and without basis in law.

7.12 On the authority of **Mohammed v Attorney General** [8], we were urged to reverse and set aside the findings and conclusions of the lower court made in the absence of assessment and evaluation of the evidence and submissions. The appellant cited the cases of **Sithole v The State Lotteries Board** [9], **Wasamunu v The People** [10] **and Mabuya v Council of Legal Education** [11] where the Supreme Court stated that where the question is purely one of inference from the facts about which there is no dispute, an appellant court has both the right and duty to substitute its own views for those of the tribunal below. The appellant went on to highlight the undisputed facts and uncontroverted evidence earlier alluded to and submitted that

we should set aside the holding by the court below made in the absence of assessment and evaluation of the evidence.

7.13 With respect to grounds three and four, the appellants contend that the 2nd appellant was joined to the proceedings by way of a consent order and ruling dated 27th June, 2019. That the consent order was unassailable unless challenged by way of an action specifically to set it aside as held in the case of **Zambia Seed Company Limited v Chartered International (Pvt) Limited** (12) and stated at paragraph 1672 of the **Halsburys laws of England.** Further, that the said consent order was accepted by the appellants who neither challenged it by way of appeal nor set it aside.

7.14 In arguing that there was contractual relationship between the 2nd appellant and the bank, reference was made to the ruling of the court on an application to strike out the pleadings. That the court below held that there was a contractual relationship between the 2nd appellant and the bank on the basis of the mortgaged property belonging to the 2nd appellant.

7.15 It was further argued that a perusal of the amended statement of claim shows that the 2nd appellant's claims were not confined

to the realm of contract law but included negligence on account of damage caused by breach of a duty of care whether the duty arose out of the terms of a contract or not. Thus there was a dereliction of duty on the part of the lower court by shutting the door in the 2nd appellant's face without considering her claims.

7.16 Citing the case of **Wilson Masauso Zulu v Avondale Housing project Limited** [13], it was argued that the court below did not adjudicate upon every aspect of the suit between the parties ensuring that every matter in controversy is determined in finality. We were urged to overturn the finding of the lower court, and in its place, find that the respondent owed the 2nd appellant a duty of care in its dealings with the mortgaged property, which the respondent breached resulting in loss to the 2nd appellant.

7.17 With respect to ground five, the appellants contend that the learned judge departed from well settled principles of law on the interpretation of contracts in finding that the 1st appellant had the duty to insure the property in issue.

7.18 The learned authors of **Chitty on Contracts Vol. 1, 28th edition** was cited, and submitted that the object of construction

of the terms of a written agreement is to discover the intention of the parties. Further, that the question is not what either of the parties meant or understood by the words used, but that meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been availed to the parties in the situation in which they were at the time of the contract. The appellants went on to draw our attention to the following cases on principles of law in respect of the interpretation of contracts.

1. **Reardon Smith Line Ltd v Yngvor Hangsen-tangen 1976 IWIR 989**
2. **Prenn v Simmonds (1971) 3 ALLER**
3. **Investors compensation Scheme v West Promivich building Society (1990) 1 ALLER 98**
4. **Indo Zambia Bank Limited v Muhanga**

7.19 The appellant in respect to the interpretation by the court below of clauses 7.4 and 4.5, referred us to the judgment, the analysis and the refusal to imply any terms based on previous practice on the basis that the general conditions expressly excluded implying of terms on the agreement.

7.20 The appellants contend that the import of Clause 4.5 of the facility letter is to prohibit the amendment, variation or cancellation of any of the provisions of the facility letter, and not the operation of the express terms thereof. Therefore, the appellants claim in respect of insurance was founded on the terms of the written contract between the parties.

7.21 The evidence of debits towards insurance is proof of the 1st appellant's performance of the obligations regarding insurance in the context of the facility letter. It follows that neither the 'entire agreement' clause nor the authority on extrinsic evidence were of any relevance herein. We were urged to reverse the finding of the lower court to the effect that the obligation to insure the property was on the 1st appellant.

7.22 Lastly, with respect to grounds twelve, fourteen and fifteen, the appellants submit that in awarding nominal damages and ordering an audit, the lower court effectively dismissed the claim for compensatory damages, special damages, punitive and exemplary damages.

7.23 The appellants contend that the bank's failure to pay the insurance premium or inform the appellants to take out their

own insurance; the delinquent banking practices of the respondent and reporting inaccurate data to the CRA and the failure to correct the same, reflect the appellants' loss. For this reason, the appellants are entitled to an award of general and special damages together with punitive and exemplary damages.

7.24 In support of this, the case of **Paul Roland Harrison v The Attorney General** [14] was cited in which the court stated that:

(iv) An appellant court will not interfere with an assessment of damages unless the lower court had misapprehended the facts or misapplied the law or where the damages are so high or so low as to be an entirely erroneous estimate of the damages to which the Plaintiff.

(v) In Zambia, exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the Plaintiff's rights.

(vi) Special damages must be specifically pleaded in Writ of Summons and Statement of Claim.

Further, reference was made to Mcgregor on Damages on the object of awarding exemplary damages to merit punishment where a party's conduct discloses malice, fraud, cruelty or insolence. The conduct of the respondent in failing to pay premium as mandated, the delinquent banking practices and

inaccurate credit data report was contended to point to malice, impudence and disregard of the appellants rights, resulting in loss. That the award of nominal damages was an erroneous estimate of the damages occasioned to the appellants.

7.25 In addition, it was argued that there was no basis for the lower court to restrict the audit period from 30th September, 2016 to 30th June, 2017. This was because the evidence traced mismanagement of the appellants' interests to well before September 2016 according to the email of 16th March, 2016 shown at page 259 of the record of appeal. We were urged to order that the audit period should commence from February 2016 to 30th June, 2017.

7.26 The appellants prayed that judgment of the lower court be overturned and entered in their favour with costs to be borne by the respondent.

8.0 **RESPONDENT'S ARGUMENTS**

8.1 The respondent filed heads of argument dated 25th September, 2020. It is submitted that the judgment of the court below was sound and should not be overturned. It was stated that ground nine is a narrative and offends the provisions of **Order 10 Rule**

9(2) of the Court of Appeal, 2016. This is because the ground does not specify which point of law or fact was wrongly decided by the court below thereby rendering the said ground speculative. As held in the case of **Saviour Chibiya v Chrystal Garden Lodge & Restaurant** [15], such a ground is deemed to be non-complaint of the rules and is unacceptable. Further, it offends the provisions of **Order X Rule 9(2)** of the Court of Appeal in respect of what a memorandum of appeal shall set out.

8.2 In addition, the respondent observed that while the appellants indicated that they would argue grounds 1, 2, 6, 9, 10, 11 and 13 together, a perusal of their 58 page heads of argument shows that there has been no reference to ground nine. The Supreme Court in **Laston Phiri v Tropical Diseases Research Centre** [16], frowned upon the practice of lumping grounds together and arguing them as one ground. The practice of not even referring to the ground in the heads of argument, is unacceptable and untidy.

8.3 In response to grounds 1, 2, 6, 9, 10, 11 and 13, the respondent vetierated that the lumping of seven grounds together is

extremely untidy and denies the respondent the opportunity to respond in a concise and precise manner. To demonstrate this, the respondent briefly restated each ground as follows, that grounds one and two are on the alleged failure of the lower court to assess and evaluate the evidence adduced by the parties, and the uncontested evidence, while ground six relates to the alleged failure of the court below to consider the *contra proferentum rule*. Ground ten is with respect to the alleged failure to consider the evidence of any lender refusing to extend credit to the 1st appellant while ground eleven is concerned with the alleged refusal to consider references to the Banking and Financial Services Act and Code in relation to disclosure to the Credit Reference Bureau. Ground thirteen relates to disregard of evidence relating to evidence of injury/damages or loss occasioned to the appellant.

8.4 While these grounds raise separate issues, the respondent submits that they all relate to an attack on the findings of fact by the court below, or put differently, on the assessment of the evidence and findings of fact. It is trite that an appellate court will only overturn findings of fact where it is shown that they

are perverse. The respondent contends that the lower court's assessment of the evidence was not perverse at all.

8.5 With respect to the claim of the respondent bank's failure to insure the mortgaged property, the respondent submits that the factual evidence adduced by the appellants in the court below was in fact controverted. It was submitted that in cross-examination, PW1 stated that he did not know who paid the insurance for the property. When shown clause 7.4 and the board resolution, he conceded that the responsibility to pay insurance was on the 1st appellant, as borrower. The said board resolution was executed by Andreas Petsas and the 2nd appellant in their capacities as Managing Director and Director of the 1st appellant to abide by the terms and conditions of the facility letter.

8.6 In further cross-examination, PW1 confirmed that the 1st appellant had previously paid for its own insurance and conceded that the respondent had at some point force insured the property. It was submitted that this was because it was part of the respondent's mandate to debit the 1st appellant's account for the payment of insurance.

8.7 As regards PW2 and PW3, it was submitted that in cross-examination they accepted that the 1st appellant had the obligation to insure the property. Both also stated that they signed a board resolution in relation to the facility letter of 4th October, 2016. DW2 was also referred to the facility letter in issue and stated that the 1st appellant had the obligation to insure its own property or that they could ask the bank to obtain their insurance for them. DW2 referred to clauses 4.5, 6.7, 7.4 and the general terms and conditions.

8.8 DW2 testfied that the insurance policy for the period 4th May, 2015 to 30th September, 2016 at page 699 to 700 of volume two of the record of appeal, was taken out by the respondent who force insured the property. Upon expiry, the bank did not renew the policy. DW2 explained that, at the time the respondent had force insured the property because the 1st appellant did not bring insurance cover valid for the period under review.

8.9 The respondent submitted that the evidence of PW1, PW2, PW3 and DW2 established on a balance of probabilities that the duty to insure the property in issue fell on the appellants.

8.10 In addressing the argument advanced, that the court below did not correctly assess and evaluate the evidence on the duty to insure the property, the respondent submitted that the onus to insure the premises was on the appellants. The obligation on the appellants is both a condition precedent to the facility letter under clause 6.7 and a continuing obligation under clause 7.4 of the said facility letter.

8.11 Clause 6.7 and 7.4 expressly stated that placement of insurance cover on the secured asset, being Stand No. 194 Chindo Road, Kabulonga, Lusaka was the responsibility of the 1st appellant. With full knowledge of the risk of damage by the act of failing to insure the property, the 1st appellant voluntarily consented to accept such risk and to waive any claim in respect of any injury or damage that may be occasioned to the 1st appellant by reason of failure to insure the property.

8.12 The 1st appellant executed the facility letter having read and understood the contents of it and PW1 and the 2nd appellant executed a board resolution in their capacities as director, shareholder and company secretary, agreeing to abide by the terms of the facility letter in issue. PW1 led evidence to the effect

that, the 1st appellant had previously taken out its own insurance cover and confirmed that the respondent had force insured the property because it had been given the mandate to debit the account for the purpose of insuring the property.

8.13 PW2 and PW3 also confirmed that clauses 6.7 and 7.4 of the facility letter placed the obligation to insure the property on the 1st appellant and that PW2 signed the board resolution. Therefore, the respondent contends that the facility letter of 4th October, 2016 and its clauses, terms and conditions are not in dispute. That the obligation to insure the property lay on the 1st appellant.

8.14 It was argued that the failure by the 1st appellant to satisfy the condition precedent in clause 6.7 and 7.4 to insure the property, does not shift the obligation to the respondent as there is no provision to that effect in the facility letter. That clause 4.5 and the board resolution do not in any way impose an obligation to insure the property but merely grant authority to the respondent to recover costs from the 1st appellant's account should the respondent incur the same on the appellants' behalf. It is for this reason that on 11th October, 2016, the 1st appellant

executed a compliance certificate with the requirements of the facility letter. The said certificate is at page 718 to 719 of volume 2 of the record of appeal.

8.15 We were referred to the learned authors of **Chitty on Contracts, General Principles. Vol. 1, 28th edition (1999) paragraph 12.002** at page 583 who state as follows:

> ***"When a document is signed, the parties are bound by the terms of that document whether or not they had been ignorant of their precise legal effect."***

Reliance was also placed on the case of **Zambia Export And Import Bank Limited v Mukuyu Farms Limited, Ellias Andrew Spyron & Mary Ann Langley Spyron** [17] where it was held that:

> ***"An agreement is signed freely if it is signed in the course of business practice and the respondent had a choice to not sign."***

8.16 It was argued that the respondent had demonstrated through the evidence of PW1, PW2, PW3 and DW2 that on several occasions the 1st appellant had arranged its own insurance cover in line with the conditions of the facility letter with the respondent. The bank only force insured the property twice.

This demonstrates that the duty to insure lay with the 1st appellant, and not the respondent.

8.17 It was submitted that clause 4.5 relates to costs attached to the transaction, that is expenses of the facility, or the pricing and costs of the bank approving the facility. The clause is a recovery prevision which when the bank pays on behalf of a borrower, it can recoup by force debiting the 1st appellant's account. It was argued that the appellants' reliance on clause 4.5 would amount to a unilateral variation of the contract in the facility letter. That, the court below had properly assessed and evaluated the evidence before it, which evidence was controverted to the requisite standard.

8.18 With respect to the interpretation and use of the *contra proferentum rule*, the respondent submits that the appendix to the facility letter appearing at pages 416 to 417 (in particular page 417) contains a clause entitled ***"Whole Agreement, Variation of Terms, No Indulgence".*** Further that the evidence of PW1 in cross-examination shows that in regard to the said clause, the parties had not agreed in any way to amend

or vary the terms of the facility letter in issue. Therefore, there was no ambiguity on interpretation of the clause.

8.19 In response to the submission that the lower court misdirected itself in failing to invoke the *contra proferentum* rule in interpreting clause 6.7 and 7.4, it is submitted that the argument is misplaced. The applicable rule is in fact *generalibus specialia derogant.* Clause 6.7 and 7.4 are specific as to insurance and are the only ones that cover insurance in the facility letter, while clause 4.5 is of a general character dealing with costs of the facility. Bennion on Statutory Interpretation, 6th edition, page 1038 was referred to the court.

8.20 The case of **Friday Mwamba v Sylvester Nthenge, Monica Kaping'a & Derrick Chekwe** [18] was called in aid where the Supreme Court, citing its earlier decision in **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo** [19] held that:

> ***"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract".***

8.21 In referring to the case of **MTN Zambia Limited v Investrust Bank Plc** [20], the respondent contended that for a party to rely on the *contra proferentum rule,* there must be a *sine qua non* or condition precedent that has to be satisfied by the party: being that the party must first establish that the agreement or legal instrument which is the subject of being construed has an ambiguity. There is no ambiguity in the facility letter to warrant the use of the *contra proferentum rule.* In fact, the appellants sought to attack the assessment of the evidence by the trial court in wanting to establish ambiguity and relying on the contra proferentum rule. A court should not disturb findings of facts supported by a proper assessment of evidence.

8.22 The respondent cited the cases of **Nkhata & Four Others v The Attorney-General of Zambia** [21] and **The Attorney-General v Marcus Kampumba Achiume** [22] to demonstrate that the appellants had not met the threshold upon which this court could overturn or reverse findings of fact made by the trial court, considering that grounds 1, 2, 6. 9, 10, 11, 13 and 15 are based on findings of fact.

8.23 With respect to the claim that the respondent mismanaged the 1st appellant's account, the respondent argued that it handled the 1st appellant's account with the requisite standard of care and skill, and that there is evidence to that effect. It was submitted that PW1 testified that errors made on the account were corrected such as the reversal made on 5th October, 2016 for a wrong entry of 3rd October, 2016 and that cheques deposited but not credited were eventually credited.

8.24 It was further submitted that the record will show that PW1 testified that an email from Sylvia Lumbwe to Nicholetta Petsas, who had earlier raised complaints, was dealt with by the respondent. Further, the errors referred to in paragraphs 52 to 56 of PW1's witness statement were also reversed and rectified as per the testimony of PW1. PW2 equally testified that the errors referred to in paragraph 6 of her witness statement were rectified.

8.25 In addition that PW2 stated in cross-examination that it was difficult to clarify what loss the 1st appellant had suffered when the bank continuously rectified the errors. PW2 also stated that the issue involving the vehicles was resolved though at a very

late stage. PW2 could not tell the court below how much damage and loss it suffered when its accounts were frozen by ZRA for two days.

8.26 The respondent contends that the appellants were informed of the migration of the account to the Finacle System and that there was documentary evidence that the account was constantly overdrawn beyond the limit of K1,500,000.00 to as high as K2,200,000.00.

8.27 As regards the evidence by DW3, it was submitted that her evidence shows that the respondent took 8 to 23 days to rectify or reverse errors. DW3 also testified that the 1st appellant's account was constantly overdrawn, contrary to the terms of the facility letter, and hence charges being imposed on the account which were later reversed. Therefore, there was no financial loss to the appellants in the long run.

8.28 The respondent also contended that there is no merit in the argument that there was lack of care and skill, and irregularities in the management of the 1st appellant's account for the reason that while there was indeed irregularities, the same were for a short period and were corrected by the respondent. The

appellants cannot succeed on their claim for damages for negligence as they have not proved the loss suffered. Reliance was placed on the cases of **Michael Chilufya Sata v Zambia Bottlers Limited** [23], **Continental Restaurant and Casino Limited v Arida Mercy Chului** [24] **and Sylvester Musonda Shipolo v Masstores (PTV) Limited (Mass Discounters Zambia Game)** [25] where the Supreme Court guided that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages.

8.29 The respondent contends that because the 1st appellant's account was constantly overdrawn, the appellants should also be faulted and apportioned with blame or damages as guided by the Supreme Court in **A Vander Walt Transport (Namibia) Limited v Dar farms & Transport Limited** [26]. As the account being overdrawn resulted in the new system charging the account, which charges were subsequently reversed and the monies returned to the 1st appellant's account, the respondent submitted that it is entitled to damages. In support of this, we were referred to **Halsbury's Laws of England. 4th edition, Volume 34, paragraph 69** where the learned authors state:

> ***"The negligence must be contributory. In order to establish contributory negligence the defendant had to prove that the plaintiff's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon common sense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether the plaintiff in the ordinary plain commonsense of the business contributed to the damage."***

8.30 The respondent contends that it was in no way negligent in the way it handled the 1st appellant's accounts, as the 1st appellant issued cheques to its clients on an insufficiently funded account resulting in the cheques not being processed. The fees imposed on the 1st appellant for issuing cheques on an insufficiently funded account are provided for in Clause 5 of the **National Payment Systems & Directives on Cheques and Direct Debit Instructions**. Therefore, the 1st appellant cannot complain over statutory fees that should have otherwise been imposed on

them and later reversed in an effort to maintain the business relationship.

8.31 With respect to the claim of publication of false and injurious information, the respondent submits that it acted within the ambits of the law when it reported the 1st appellant to the Credit Reference Bureau (CRB) and that the CRB report produced by the appellants in the court below contained errors. That the appellant failed to adduce evidence that indeed the respondent bank had given erroneous information to CRB.

8.32 It was argued that the appellants failed to show the lower court that the CRB report they produced contained information that was provided to the CRB by the respondent. In cross-examination, PW1 and PW3 conceded that the report had errors with respect to the shareholding and name of the company. PW1 stated that notice at the bottom of the report was addressed to all that would read it. The witness also testified that he did not see any correspondence from the respondent to the CRB that was provided to the CRB. The respondent contended that the 1st appellant had obtained a facility from Cavmont Bank Limited which demonstrates that it did not suffer any damage.

8.33 The respondent further submits that in terms of **The Banking and Finanacial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive, 2008** promulgated under the repealed **Banking and Financial Services Act Chapter 387**, it is obliged, as a financial service provider, to use the services of a credit reference agency before granting credit to any customer and to submit credit data to the credit reference agency in respect of all credit granted to a customer.

8.34 To anchor the point, we were referred to the case of **Savenda Management Services v Stanbic Bank Zambia Limited** [27] were the Supreme Court opined that the law places an obligation on a credit provider to report defaulting creditors to the credit reference agency. The respondent submits that it was duty bound to report the 1st appellant to the CRB on account of frequent unauthorized overdrawing of the account, failure to service the banking facilities as per the terms and conditions, and failure to communicate queries to designated officers of the bank with respect to account queries.

8.35 In response to grounds three and four, the respondent submits that the ruling of Justice W. S. Mweemba dated 27th June, 2019 is an interlocutory ruling to which the court below is not bound neither could the same ruling supplant a final determination of a matter. The same ruling further stated that the issues in contention would be dealt with and determined after receiving evidence at trial.

8.36 The said consent order to join the 2nd appellant as 2nd defendant did not mean that the lower court had determined that there was a relationship between the 2nd appellant and the respondent as the parties were in court. The onus was on the 2nd appellant to adduce evidence at trial to prove that a banker and customer relationship existed between them.

8.37 With respect to ground five, the respondent submits that this ground was adequately addressed under the issues of grounds one and two relating to the interpretation and use of the *contra proferentum rule*. Further that the court below was on firm ground to use the literal rule to interpret clauses 4.5, 6.7 and 7.4.

8.38 In support thereof, we were referred to the case of **Lt. General Wilford Joseph Funjika v The Attorney General** [28] where the court stated that:

> ***"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained from the words used by legislature interpretation that recourse can be had to the other principles of interpretation."***

8.39 In response to grounds twelve and fourteen, the respondent submits that the evidence on record regarding the delinquent period is very clear and that the court below was on firm ground in awarding nominal damages of K9, 900.00. It was argued that the evidence shows that the appellants did not suffer any loss in the period that there were purported errors on the 1st appellant's bank account which errors were rectified and the 1st appellant suffered no loss, as a result.

8.40 The respondent referred us to the learned author, **McGregor on Damages (1997) 16th edition. London. Sweet and Maxwell** at page 281 who states as follows:

> ***"Technically, the law requires not damage but an injuria or wrong upon which to base a judgment for the plaintiff, and***

therefore an injuria, although without loss or damage, would entitle the plaintiff to judgment. Since a judgment awarding money was practically the only judgment which the common law could bestow, a judgment for a nominal sum of money or for "nominal damages" was given.

The best statement as to the meaning and incidence of nominal damages is given by Lord Halsbury L.C. in The Mediana where he said:

'Nominal damages is a technical phrase which means that you have negative anything like a 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 judgment because your legal right has been infringed."

8.41 We were referred to the **Savenda Management Case** (supra) where the court reversed the award of K5,000.00 in nominal damages having found that the respondent bank had not breached its duty of confidentiality. We were urged to dismiss the appeal with costs to the respondent.

9.0 **APPELLANTS' ARGUMENTS IN REPLY**

9.1 On 2nd October, 2020, the appellants filed heads of argument in reply. With respect to grounds 1, 2, 6, 9, 10, 11 and 13, being argued together and the objections raised, the appellants contended that the arguments are untenable for the reasons

that the seven grounds in issue are related; concerned with the inferences drawn by the court below from primary facts and documents. The absence of the assessment and evaluation of primary facts and documents, which is also a question of law; the prayers in respect of each ground is the same; the evidence and submissions in respect of each claim have been set out under a sub-heading; and there being grouped together enhances cohesiveness in the arguments. Therefore, the objections to the grouping of the seven grounds of appeal are without basis, frivolous and vexatious, and ought to be dismissed.

9.2 The appellants further contend that, the respondent has not demonstrated in its heads of argument that the facts set out in the appellants' heads of argument were rebutted or pointed out where in its judgment, the lower court assessed or evaluated the evidence and submissions of the appellants. The respondent was said to have mischaracterized the evidence adduced by the appellants with a view to persuading this court to reverse the findings in the absence of a cross-appeal. Citing the case of **Benjamin Mwila v Victor Brandbury** [29], it was submitted that

this was an indication that the respondent accepted the decision of the lower court.

9.3 As regards the question whether the appellants were obliged to insure the property, it was submitted that the issue is not what the parties or their witnesses understood paragraphs 6.7 and 7.4 of the facility to mean, or which terms of the letter are couched in stronger language but the meaning of the clauses against the background of the surrounding circumstances, including the insurance policy taken out by the respondent and the authority to debit.

9.4 With respect to the *contra proferentum rule*, the appellants submit that clause 4.5 makes specific, express reference to insurance premiums. Therefore, it cannot reasonably be argued that clauses 6.7 and 7.4 create an exception or are 'more specific' on matters regarding insurance. Further, that the *contra proferentum* rule applies where it was drafted by one of the parties. Therefore, the maxim *generalibus specialia derogant* is inapplicable.

9.5 With regard to grounds three and four, the appellants' position is that there is no principle to the effect that a court may ignore

or reverse at will, its own decision, whether the same be an interlocutory decision or not. Further, that neither the consent order joining the 2nd appellant nor the ruling of 27th June, 2019 was an interim order, and thus liable to be set aside following trial.

9.6 With respect to ground five, the appellants relied on their arguments in the first set of seven grounds.

9.7 As regards grounds twelve, fourteen and fifteen, the appellants contend that the respondent has neither engaged with the submissions of the appellants nor commented on the documentary evidence filed into court signifying the respondent's breaches of duty dating as far back as March 2016. It was prayed that the appeal be upheld with costs to the appellants.

10.0 **THE DECISION OF THIS COURT**

10.1 We have considered the record of appeal, the evidence adduced in the court below, the arguments advanced by the Learned State Counsel and Advocates on record, as well as the plethora of authorities cited.

10.2 The undisputed facts as earlier stated are that the 1st appellant and 2nd respondent were in a long term bank/customer relationship. Several loan and overdraft facilities were obtained and advanced by the bank to the 1st appellant. The facilities were secured by an equitable third party mortgage over stand number 194 Chindo Road Kabulonga (hereinafter referred to as the property'). The said property is owned by the 2nd appellant a shareholder and director in the 1st appellant.

10.3 It is further not in issue that on 9th of December 2016, a fire erupted, engulfing the property premises where the 1st appellant operated a supermarket.

10.4 The 1st appellant upon inquiring on the policy of insurance was notified by the bank that the property was not insured. Further, that the 1st appellant bore the responsibility to insure the property subject of the mortgage. This affected the parties who could not claim compensation.

10.5 The disputed facts arose from the contention by the parties of which party bore the responsibility to insure the property. Though thirteen grounds of appeal have been raised (grounds 7

and 8 having been abandoned) the main issues for determination are as follows:

(1) Whether the court below failed to assess and evaluate all the evidence adduced by the parties, particularly PW1's alleged uncontested evidence and the appellants' submissions.

(2) Which of the parties between the 1st appellant and respondent bore the responsibility to insure the property in issue.

(3) The nature of the contractual relationship between the 2nd appellant and the respondent bank and whether by virtue of the said contractual relationship the bank owed the 2nd appellant a duty of care, if so whether the said duty of care was breached.

(4) Whether the court below erred by invoking the literal rule in interpreting clauses 4.5, 6.7 and 7.4 of the Facility letter instead of the *contra proferentum rule.*

(5) Whether the respondent bank unlawfully disclosed confidential information to third parties and the alleged loss suffered as a result of the said disclosure.

(6) Whether the court below erred in law and fact by awarding nominal damages in the sum of K9, 990=00 for breach duty of care to provide services with reasonable care and skill and whether the court below disregarded the evidence of injury, damages and loss suffered by the 1st appellant as a consequence of the aforestated breach of duty to provide services with reasonable care and skill.

(7) Whether the court below ought to have ordered an audit of the 1st appellant's bank account for the period earlier than 30th June 2017 ordered by the court in respect of the period showing a pattern of delinquent banking services by the Respondent.

10.6 In grounds one and two, the contentions are the alleged failure of the lower court to assess and evaluate the evidence adduced and to take into account submissions made by the appellants. In the case of **Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda & Paul Ngandwe** (30), the Supreme Court had occasion to guide on the structure of a judgment and referred to an article by the Hon. Mr. Justice M.

M. Corbett, the former Chief Justice of the Supreme Court of South Africa, entitled: "Writing a judgment", in which the learned judge stated that a judgment comprises of the following elements:-

1. An introductory section;
2. A setting out of the facts;
3. The law and the issues;
4. Applying the law to the facts;
5. The relief; and
6. The Order of the Court.

10.7 We have perused through the judgment of the lower court at pages 17 to 56 of the record of appeal. The learned judge divides it in the following segments: introduction and background; facts and issues for determination; analysis and findings (in which he addresses the main issues in contention); and the conclusion and orders.

10.8 As regards the evidence adduced, the learned Judge in the court below stated as follows at paragraph 2.1 at page J5 (21 of the record of appeal):

2.1 Owing to the peculiar facts of this matter and the scope of controversy disclosed in the pleadings, I propose to dispense with a copious reproduction of the evidence and will instead analyse the relevant portions when dealing with the respective issues for determination."

10.9 This approach is evident at page J8 (24 of the record of appeal) when he refers to the testimony of PW3 and at page 25 of the record in reference to that of DW2 and other portions of the judgment. We are of the view that this shows that the learned Judge did consider, assess and evaluate the evidence before him. Though the learned Judge does not specifically refer to the evidence of PW1, a reading of the judgment shows that he did take into account all the evidence before him. We are further of the considered view that a judge need not reproduce in copious detail the evidence adduced in court to show that he has assessed and evaluated the same in arriving at his decision.

10.10 As regards the alleged non assessment and evaluation of the oral and written submissions of the parties, we refer to the case of **Kitwe City Council v William Ng'uni** [31] where the court guided that:

"The court is not bound to consider counsel's submissions because submissions are only meant to assist the court in arriving at a judgment."

In our view, the issue to be determined is whether, the court properly analysed or assessed the evidence in arriving at the decisions assailed. Determining the other grounds raised will ascertain whether the court below failed to assess and evaluate the evidence in issue specific to the grounds.

10.11 Grounds three and four are connected as the appellants contend that the lower court ought to have found that the 2nd appellant had a contractual relationship with the respondent. This argument is informed by the fact that the 2nd appellant was made a party to the proceedings by the consent order of 23rd August, 2018 and the ruling of Justice W.S. Mweemba dated 27th June, 2019.

10.12 The consent order in issue appears at page 788 in volume 2 of the record of appeal. The order simply joins Philomena Petsas as 2nd plaintiff (2nd appellant herein) to the proceedings and does not determine any other rights due to the 2nd appellant by virtue of the said relationship.

10.13 We have also read the ruling dated 27th June, 2019 appearing at page 888 to 922 of volume 2 of the record appeal. The ruling arose from an application by the defendant (respondent herein) to strike out pleadings. After considering the affidavit evidence, skeleton arguments and authorities cited, Judge Mweemba stated the issues for determination as follows;

(i) Whether or not the appellants had causes of action against the respondent

(ii) *Whether the respondent's application to strike out pleadings was an abuse of court process.*

10.14 At page R30 of the ruling (page 917 of volume two of the record of appeal) Judge Mweemba found that there was ***"... indeed no banker/customer relationship between her and the defendant"*** but that there was a ***"... contractual relationship between the 2nd plaintiff and the defendant."*** That this ***"relationship arose because the 2nd plaintiff agreed to offer and did in fact offer her property namely Stand No. 194 Chindo Road, Kabulonga, Lusaka as security for the facilities the defendant availed to the 1st plaintiff."***

10.15 Judge Mweemba also found that an equitable mortgage was created by virtue of the 2nd appellant's deposit of her title deeds

with the respondent with the intention that they be used as security. At page R31 of the ruling, the learned judge went on to hold that ***"(T)he undisputed fact of ownership of the property offered to the defendant as collateral gave the 2nd plaintiff an interest in this matter, and therefore a cause of action."***

10.16 In our view, it is not in dispute that the lower court found that there was a contractual relationship between the 2nd appellant and the respondent on the basis that an equitable mortgage was created between them. On that basis, the 2nd appellant and respondent owed duties towards each other based on the mortgage relationship only. This relationship did not extend to the loan facility letter between the 1st appellant and respondent bank. The 2nd appellant is not a party to the said facility agreement. Therefore, the 2nd appellant cannot seek to enforce the terms of the facility letter on the basis that she is an equitable third party mortgagor. Neither can she claim to be owed a duty of care by the respondent under the facility letter.

10.17 The 2nd appellant argued that the respondent owed a duty of care in its dealing with the mortgaged property, which it

breached, resulting in loss. Therefore her claims for replacement cost of the supermarket infrastructure, cost of removal of debris and other claims ought to have been upheld. The appellant does not specify which duty of care was breached. We can only assume it is the alleged failure to insure the property gutted down by fire. We must state that the duty of care owed by the bank to the 2nd appellant as mortgagor are those derived under the contractual relationship of mortgagor/mortgagee. Such as those owed in respect of dealings with the mortgaged property.

10.18 Assuming that the breach of duty of care alleged is from failure to insure the property subject of the mortgage, recourse is had to what the 2nd respondent as mortgagor covenanted with the appellant in respect of insurance for the property pledged as security.

10.19 In *casu*, the mortgage/debenture deed dated 1st July 2003, amended in 2005 by a supplemental deed reflecting the 2nd appellant as mortgagor and the appellant bank as mortgagee. The clauses, covenants and warranties attributed to the mortgagor henceforth became attributed to Philomena Petsas

the 2nd appellant. Under clause C of the mortgage deed dated 2003, the duty during the continuance of the security to keep all assets and buildings comprised in the charged assets and property subject of the security insured with the insurers approved by the banks against loss of damage by fire or such other risks was stated to be the borrowers or the persons deriving title under it. It is trite that due to the mortgagee's interest in the security to ensure that it is insured, terms relating to the mortgagor providing insurance for the property are commonplace.

10.20 We therefore cannot fault the court below for holding that the 2nd appellant not being a party to the facility agreement, the bank did not owe her any duty of care. We find no merit in grounds two and three. Further, that there was no breach of any duty of care by the bank to the respondent pursuant to the contractual mortgagee/mortgagor relationship. For these reasons, we find no merit in grounds three and four.

10.21 In ground five and six, the appellants contend that the lower court ought to have invoked the *contra proferentum rule* in interpreting the clauses 4.5, 6.7 and 7.4 of the facility letter as

opposed to the literal rule so as to hold that the respondent had the duty to insure the property.

10.22 We shall begin by setting out the provisions of clauses 4.5 and 7.4 of the facility letter to first determine whether the contra *proferentum rule* ought to have been invoked and then proceed to determine the core issue of which party between the 1st appellant and the bank bore the duty to insure the property. Clause 4.5 of the facility letter provides that

CLAUSE 4.5 COST:

Any costs, which may arise such as mortgage costs, valuation costs, insurance premiums, lawyer's fees or any other costs, overdue ground rent and or property rates fees or disbursement incident also to this transaction will be for the borrower's account, held with the bank.

CLAUSE 6 CONDITIONS PRECEDENT:

The Bank will make the facilities available to the borrower subject to the fulfilment of the following conditions precedent to the satisfaction of the bank:

6.7 All risks insurance cover for the full market value over any assets which the bank holds as security, with an insurance company approved by the Banks and with the bank's interest noted as first loss payee and.....

CLAUSE 7 SPECIAL CONDITIONS:

"While the Facilities remain available or any amount or commitment remains outstanding to the bank, the borrower will:
7.4 ensure that the assets over which the bank holds as security are fully insured to the satisfaction of the bank;"

10.23 The facility letter set out the terms and conditions including the conditions precedent on which the bank was prepared to and advanced the loan facility to the borrower. It is trite that under the literal rule of interpretation, words should be given their natural meaning. As regards the latin maxim *verba cartarum fortius accipiuntur contra proferuntum*, the principle that the words of documents are to be taken strongly against the one who puts forward, it is a principle of justice. See the case of **Association of British Travel Agents Limited v British Airways** [(32)]. That any ambiguity in the documents will be construed against the interest of the party responsible for it.

10.24 We had earlier in paragraph 10.22 set out the provisions of clauses 4.5, 6.7 and 7.4 of the facility letter and will have recourse to it in determining whether the *contra proferentum* rule ought to have been invoked and then proceeding to determine the core issue of which party between the 1st

appellant and respondent bank bore the duty to insure the property.

10.25 The issue is whether the provisions under clauses 4.5, 6.7 and 7.4 can be said to be ambiguous, such that they be construed most strongly against the bank for the purpose of removing doubt. In our view, clause 4.5 relates to costs which may arise such as mortgage costs, valuation costs and insurance premiums to mention a few. These were stated to be incidental to the transaction and would be for the borrower's account. Further, upon the signing of the facility letter, the borrower gave consent to the Bank to debit its account with such costs.

10.26 Clause 6.7 stipulated that the bank would make available to the 1st appellant as borrower the facilities subject to fulfilment of a number of conditions precedent to the satisfaction of the bank. The relevant condition being that all risks insurance cover for the full market value over any asset held as security, with an insurance company approved by the bank, noting the bank's interest as first loss payee.

10.27 Clause 7.4 provided that whilst the facilities remained available or any amount outstanding to the lender, the 1st appellant as

borrower will ensure that the assets over which the bank holds as security are fully insured to the satisfaction of the bank.

10.28 We have considered Clause 4.5 of the facility letter and find that it relates to costs that may arise and who is to be responsible for them. The clause places the obligation to settle the costs, which include mortgage costs, valuation cost, insurance premiums, lawyer's fees and any other on the borrower. The clause further gives the bank the authority to debit the borrower's bank account with such costs.

10.29 In over view, the above cited clauses 4.5 and 7.4 of the facility letter are clear and not ambiguous. They are not at variance. Clause 4.5 relates only to costs of the transaction including insurance premiums which the bank could recover in a situation where it has paid the premiums. Whereas clause 7.4 placed an obligation on the 1st appellant as borrower to ensure that the assets pledged as security remained fully insured whilst the facility remained available or there was any outstanding amount. We see no variance or ambiguity in the said clauses.

10.30 The appellants also contended that the evidence of PW1 was not considered by the court below. Namely the established practice prior to the facility letter of October 2016 of the bank previously insuring the security property. The evidence of PW1 gave a history of the transactions and facilities by the 1st appellant obtained from 2003. That in the past the bank had paid for the insurance policy and debited its' account with the premiums. Therefore, that the bank had the obligation to insure. PW1 alluded to the mandate given to the bank to debit its account.

10.31 In our view, the court below did consider this evidence and rejected it accordingly on the basis that it could not imply terms based on previous practice because by the entire agreement clause, in the General Conditions the parties expressly excluded the implying of the terms. Further, there being no evidence of amendment of clause 7.4, the court below was unable to accept the appellants proposition.

10.32 In our view, rejection of PW1's evidence and others on the previous practice of the bank providing insurance cover does not mean that the court below did not consider the witnesses' testimonies or failed to properly evaluate the evidence. The

learned judge in the court below cannot be faulted for holding that the 1st appellant and the respondent must be taken to be bound by the facility letter.

10.33 We now revert to the issue of which party between the 1st appellant and respondent bore the responsibility to insure the property held as security for the facility, keeping in mind that we earlier held that there was no basis to invoke the *contra proferentum rule*. Insurance plays roles in managing risks where the borrower has provided physical securities such as a mortgage over real property. The lender will require insurance to protect them against loss of damage. The lender and borrower are both concerned that physical securities should not be lost or damaged. Their interests are different, the lender is concerned only with access to the security for repayment, whereas the borrower may be using the security in its business as in *casu*.

10.34 In the absence of an express covenant, a mortgagor is not obliged to insure the mortgaged property, but the lender will normally require insurance as a condition of accepting the security. Thus a standard charge document will contain a

covenant by the mortgagor such as to keep the mortgaged property insured against loss or damage by fire and other risks and that if the mortgagor fails to maintain or insure the property, the bank may do so at the expense of the mortgagor without becoming a mortgagee in possession. And any such payment by the bank shall be added to and form part of the moneys secured.

10.35 The purpose of a covenant for insurance is to ensure that if the value of the security should be depreciated by the occurrence of a fire or other insurable risk, the proceeds of the policy will provide a fund to make up the shortfall. This purpose can be achieved only if the covenant gives the mortgagee an interest by way of charge in the proceeds. We refer to the learned authors of **Banking Litigation David Warne 2nd Edition**.

Where the borrower and mortgagor have covenanted to insure and has neglected to do so, the mortgagee is not under any duty to insure the security.

10.36 A reading of clauses 6.7 and 7.4 cited earlier clearly provided that the borrower (1st appellant) would provide all risks insurance cover and ensure that the assets held as security by

the bank is fully insured. The fact that previously the bank debited the borrower for the insurance premium does not entail that the bank is responsible for the insurance. The bank was compelled to force insure the property when it realised that the 1st appellant, as borrower had neglected to obtain insurance cover contrary to clauses 6.7 and 7.4 of the facility letter. Therefore, the appellants cannot be heard to argue that since the respondent had previously force insured the property and debited the 1st appellant's bank account, then it followed that the obligation to insure the property fell on the respondent. The obligation to insure the property always remained on the 1st appellant. We accordingly find that the 1st appellant as borrower had the obligation and responsibility to insure the property pledged as security. In view of the above, grounds five and six are devoid of merit and are dismissed.

10.37 In ground nine, the 1st appellant contends and argues that it complied with all the conditions in the facility letter. Having earlier held that the 1st appellant bore the obligation and responsibility to insure the property and failed to comply with the provisions of clause 6.7 and 7.4 when it did not provide

insurance cover, we find no merit in this ground. The 1st appellant failed to comply with the conditions in the facility letter.

10.38 In grounds 10 and 11, the appellants contend that the court below misdirected itself by disregarding all references to the **Banking and Financial Services Act(repeal) Banking and Financial Services Act 2017, The Banking and Financial Services Act (provision of Credit Data and Utilisation of (Credit References Services) Directives 2008** and the **Credit Data (Privacy) Code** in relation to the claim for unlawful disclosure of confidential information to the third parties and the holding that there was no evidence on record of any lender refusing to extend credit facilities to the 1st appellant.

10.39 In the pleadings, the appellants claimed for damages for breach of banker/customer relationship in disclosing the 1st appellants' confidential information to third party financial institutions, damages for failure to notify the 1st appellant of its intention to refer the plaintiff's credit data to a credit reference agency as well as damages for loss of goodwill, and income. The 1st appellant in its witness statement stated that the

information communicated to CRB that it was owing the sum of US$1,561,691.92 and the balance outstanding was US$ 1,871,624.46 was inaccurate and misleading because no such amount was owing to the bank. That the bank failed to obtain consent from the 1st appellant prior to listing the information on CRB. Further, that it also failed to notify it prior to the listing. The said listings are dated 27th February 2012.

10.40 The issue to be determined is whether the bank breached the banker/customer relationship by disclosing the said information to CRB.

10.41 It is not in dispute that the respondent did avail the Credit Reference Bureau information relating to Melisa Supermarket. The said report appears at pages 496 to 499 volume one of the record of appeal, which show the listing entity as Stanbic. There are other listings by Zambia National Commercial Bank. The pleadings show that aside from alluding to the statutory obligations under the Act to notify and seek consent prior to listing information with CRB, the 1st appellant does not plead breach of the same as correctly observed by the court below. However, it proceeds to claim damages for breach of the said

obligations and failure to notify it of the intention to refer it to CRB.

10.42 In its Defence the respondent pleaded that it has a statutory obligation to disclose information to third parties such as CRA.

10.43 The Supreme Court in **Savenda Management Services v Stanbic (supra)** discussed the provisions of the **Banking and Financial Services Act** in detail. **The Credit Data (Privacy) code, Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reporting System**. In fact, ground 11 in this appeal mirrors ground 1 raised in the **Savenda** case almost verbatim.

10.44 It is trite that a banker owes a customer a duty of confidentiality. Clause 2.1.1 to 2.14 of the code compels a credit provider before or when providing credit to notify the customer of the consequences of obtaining credit including that the data will be provided to a CRA. The Supreme Court in **Savenda** case stated that the rationale for the above is ***"that it serves as an express consent from the customer to the credit provider that its confidential information can be given to a third party."***

10.45 **Paragraph 4 of The Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive, 2008** which is pertinent states that:

> ***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.***

Guidance note No 1 of 2014 mandated that 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***

10.46 The Supreme Court in discussing the above provisions stated that;

> ***"the directive 2008 does not only mandate credit providers to provide both negative and positive credit data, but also mandates them to use the services of a credit reference agency before giving credit to any court"***

10.47 The Supreme Court took the position that Directive 2008 has the force of law having been issued pursuant to section 125 of **Banking and Financial Services Act** and ***"thus did away***

with the requirement of providing a written statement of accessing credit to a Customer by a credit provider."

10.48 On the basis of the above we therefore hold that the respondent did not breach the duty of confidentiality by the failure to notify or seek the 1st appellant's consent prior to listing it on the CRA. There was no unlawful disclosure of confidential information or breach as alleged. The respondent is mandated to report both negative and positive credit data.

10.49 As regards issue of inaccurate information, no evidence was adduced to show that the bank provided inaccurate data to CRA pertaining to shareholding in the 1st appellant company. In fact, PW1 gave conflicting evidence as to the structure of shareholding in the company.

10.50 The other credit data contended to be inaccurate is the listing showing that the 1st appellant obtained the principal sum of US$1,561,691.92 and the balance outstanding of US$ 1,871,624.46 when no such amount was owing to the respondent. The respondent refuted that it is the entity that submitted the data to CRB, though it is listed as the reporting institution.

10.51 Clause 2.6 of the credit data privacy code stipulated that;

> ***"Before credit provider provides any credit data to CRA it shall have reasonably practicable steps to check the said data for accuracy. If subsequently the credit provider discovers any inaccuracy in the data which it has provided to CRA, it shall update such data held in the data basis as soon as possible"***

10.52 Further, clause 2.7 provides for the consequences of failure to check accuracy of data or to update data before and after discovering the said inaccuracy as giving rise to a presumption of contravention of DPPZ.

10.53 In our view, the bank disputes having furnished this inaccurate information. No evidence was laid before court to prove that the respondent bank gave the said inaccurate information to the CRB. Even assuming that having been listed as the reporting entity, we accept that the bank gave the information to CRA, no evidence was lead of alleged damages suffered as a result of the inaccurate credit data submitted to prove the said damages.

10.54 If any financial service provider, having availed itself of the credit data of the 1st appellant from the CRB, elected not to give credit to the 1st appellant, the respondent bank cannot be held responsible. No evidence of such disclosure to third parties

was adduced. For these reasons, grounds ten and eleven are without merit.

10.55 Grounds twelve and thirteen shall be dealt together. The appellants contend that they should have been awarded punitive and exemplary damages instead of nominal damages. It is not in dispute that the respondent levied the 1st appellant's account with charges for cheques that were issued on an insufficiently funded account. It is also common cause that there were instances when the respondent debited the 1st appellant's account wrongly. The evidence on record shows that the respondent later reversed the said charges and erroneous debits.

10.56 It is also evident that the charges imposed on the 1st appellant's account were due to its failure to adhere to the terms of the facility which required it to maintain its account at agreed levels of liquidity. The respondent, argued that the 1st appellant contributed to it being levied with the charges as it operated its account in breach of the terms of the facility. The respondent attempted to counter-claim contributory negligence, but this was not pleaded and we shall not consider this defence.

10.57 Further, it is not in dispute that the respondent reversed all the charges levied on the 1st appellant including amounts for cheques that were wrongly debited. Apart from complaining about these charges and erroneous debits, the 1st appellant led no evidence to prove the loss complained of, to enable the court to determine the value of that loss with a fair amount of certainty as guided in **Philip Mhango v Dorothy Ngulube & Others** (2).

10.58 Having led no evidence of the loss it suffered due to the erroneous debits on its account and breach of duty of care to provide banking services with reasonable care and skill, the 1st appellant cannot expect an award of damages for loss of income/business profits and loss of goodwill. As regards punitive damages sought of appellants, we see no conduct on the part of the respondent to warrant such. The same applies to exemplary damages. The court below was on firm ground to dismiss the said claims.

10.59 The nominal damages awarded for the breach of duty of care to provide banking services with reasonable care and skill in our view suffices. Further, the award of K9,999 as nominal

damages is adequate and we refuse to disturb the award by the court below.

10.60 Grounds fourteen and fifteen shall be dealt with together as they relate to the period of the audit ordered. The lower court ordered an audit of the 1st appellant's account for the period 30th September, 2016 to 30th September, 2017. The appellants contend that the period of mismanagement started from as far back as March 2016 and placed reliance on an email dated 16th March, 2016 appearing at page 259, volume 1 of the record of appeal. For its part, the respondent suggested no specific period.

10.61 The email of 16th March, 2016 does show that the 1st appellant was discontented with interest and commissions that had been levied on them. The email further complains of ***"...major mistakes ... on a lot of debits by double debiting ... or over crediting, then transacting and then making it correct."*** The complaint goes on to allege that ***"... each transaction is then deducting off a certain percentage end of the month."***

10.62 Though we were not referred to specific transactions on the 1st appellant's account, we are of the view that this email shows

that the complaints began much earlier than 30th September, 2016. We find merit in grounds fourteen and fifteen. We set aside the period of audit by the court below and vary the finding of the lower court to that effect. We accordingly substitute it with the period of audit to commence from 1st March, 2016 to 30th September, 2017.

11.0 **CONCLUSION**

11.1 We find no merits in grounds 1 to 13, save for grounds 14 and 15 relating to the period of the audit of the 1st appellant's account. Each party shall bear its own costs.

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J. Chashi

COURT OF APPEAL JUDGE

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F. M. Chishimba

COURT OF APPEAL JUDGE

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N. A. Sharpe-Phiri

COURT OF APPEAL JUDGE