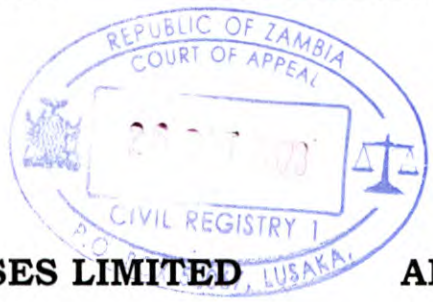
IN THE COURT OF APPEAL **APPEAL NO./063/2021**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)



BETWEEN:

NETPHARM ENTERPRISES LIMITED **APPELLANT**

AND

STANDARD CHARTERED BANK PLC **RESPONDENT**

CORAM: KONDOLO SC, NGULUBE, BANDA-BOBO JJA
On 15th March, 2022 and 26th October, 2023

For the Appellant: *Mr. C. Kamfwa of Wilson & Cornhill Advocates*

For the Respondent: *Mr. K. Wishimanga and Ms. T. Mukuka of Messrs AWM & Company Legal Practitioners*

J U D G M E N T

KONDOLO SC, JA *delivered the Judgment of the Court*

CASES REFERRED TO:

1. **Chrismar Hotel Limited v Stanbic Bank Zambia Limited SCZ/155/2016**
2. **Mwale v Mtonga and Another SCZ/25/2015 (unreported)**

3. **Mazoka and others v Manawasa and Others (2005) ZR 138**
4. **Ram Sarup v Risnun Navain Inter College AIR (1987) SC 1242**
5. **Mundia v Sentor Motors Limited (1982) ZR 66, 69**
6. **Undi Phiri v Bank of Zambia SCZ/21/2007**
7. **Attorney General v. Marcus Achiume (1983) ZR 1**
8. **Spider Machisa v Zambia National Commercial Bank SCZ/32/1990**
9. **Gibbons v West Minister Bank Ltd (1939) 2 ALL ER 577**
10. **Kpohraror v Woolwich Building Society [1996] 4 AER 119**

STATUTES REFERRED TO:

1. **Financial Intelligence Center Act No. 46 of 2010 (FICA)**

BOOKS REFFERED TO:

1. **Halsbury Laws of England 4th edition**
2. **Black's Law Dictionary**
3. **Chitty on Contracts, Volume I**

1.0 **BACKGROUND**

1.1. This is an appeal against the Judgment of the High Court delivered by the honorable Mrs. Justice W.S. Mwenda on 31st December, 2020 in which she denied the Plaintiff's claims against the Defendant Bank.

1.2 The dispute between the parties arose when the Defendant declined to honor a cheque issued by the Plaintiff on an account with sufficient funds. The Plaintiff was informed that its account had been restricted because it had failed to provide information requested by the Defendant whilst it was conducting a customer due diligence on the Plaintiff's account.

1.3 The Appellant and Respondent were Plaintiff and Defendant respectively in the Court below.

2.0 **PLAINTIFF'S CLAIM**

2.1. On 30th August, 2017, the Plaintiff issued a writ of summons against the Defendant, seeking the following relief;

1. A declaration that the Defendant's action of blocking or restricting the Plaintiff account number 0100122064500 without notice and justification is

unlawful and in breach of the Defendant's duty to the Plaintiff;

2. **Damages for breach of duty to honour the Plaintiff's cheque number 801966 dated 3rd August, 2017.**
3. **Punitive and exemplary damages.**
4. **An Order of injunction directing the Defendant to unblock or remove the restriction on the Plaintiff's account number.**
5. **Costs**
6. **Any other reliefs the Court may deem fit**

2.2. The Plaintiff claims that on 3rd August, 2017 the Defendant, declined to honor a cheque issued to the Plaintiff's landlord, Assurance Properties Limited for the sum of K7,200.00 notwithstanding that the Plaintiff had sufficient funds in the account held with the Defendant.

2.3. That the Defendant's action effected without notice nor justifiable cause was arbitrary and a breach of its duty to honor the Plaintiff's cheques when drawn on an account with sufficient funds to the Plaintiff's credit.

2.4. The Plaintiff further claimed that the Defendant's actions caused irreparable damage to the Plaintiff's credit, injured its

reputation and caused financial loss and major inconvenience.

3.0 **DEFENCE**

3.1. The Defendant filed its defence on 21st September, 2017, denying the Plaintiff's claims and alleged that by letters dated 19th May, 2017 and 12th June, 2017 sent to the Plaintiff by registered mail, the Defendant requested the Plaintiff to provide certain information necessary to assist the Defendant carry out a customer due diligence on the Plaintiff's bank account.

3.2. The letters advised that if the requested information was not received the Defendant would be unable to issue the Plaintiff with new cheque books and debit cards and would restrict the Plaintiff's deposits, cheques, cash withdrawals and transfers.

3.3. It was alleged that the Defendant's attempts to reach the Plaintiff by email and through his agent Mr. John Mumba for the purpose of obtaining the necessary information proved futile.

3.4. The Defendant denied breach of duty insisting that the Plaintiff's account was blocked because it failed to provide the requested information.

3.5. The Defendant concluded by saying that due process was followed and reasonable effort was made to update the Plaintiff's account as per Bank of Zambia regulations.

4.0. HIGH COURT PROCEEDINGS

4.1. At trial the Plaintiff called its Managing Director John Kelvin Mumba PW1, as its only witness. His witness statement dated 10th November, 2017 was admitted in evidence.

4.2. PW1 testified that the Plaintiff signed terms and conditions to guide the relationship between the Plaintiff and the Defendant. He confirmed that the Defendant conducted a due diligence in 2014 and another was being conducted in 2017.

4.3. He admitted that the Defendant was entitled to request information from time to time and failure to comply could lead to the Defendant bank blocking the account.

4.4. PW1 stated that the only communication he received from the Defendant with regard the customer due diligence was an e-mail on 2nd August, 2017 requesting various information.

4.5. The cheque that was returned was issued on 3rd August, 2017 and when PW1 asked the Defendant why the cheque had bounced he was informed that the account was restricted but was not provided with any reasons as to why.

4.6. The Plaintiff's lawyers wrote to the Defendant demanding that the restriction be lifted and for compensation. They received no reply and proceeded to issue the writ of summons herein.

4.7. That the Defendant only communicated the reasons for blocking the account in an e-mail dated 7th November, 2017 long after the commencement of these proceedings.

4.8. Under cross-examination (XXN) PW1 confirmed that in the email dated 7th November, 2017 the Plaintiff was informed that in order to complete a periodic review, the bank required a tax clearance or tax registration certificate, a complete company form 2, annual return form, 42 or PACRA print out, proof of operating address and proof of residential address from John, Abraham and Catherine.

4.9. The said email also informed the Plaintiff that its account had been restricted and the restriction would only be lifted after completion of the review. PW1 admitted that he did not provide the information even though it was clear.

5.0 DEFENDANT'S WITNESSES

5.1. The Defendant called two witnesses. DW1 was Mainala Phiri employed as a banker for the Defendant. Her witness statement was tendered in evidence on 20th November, 2017.

5.2. Under XXN DW1 testified that the Plaintiff was engaged before its account was blocked and she referred to letters written to the Plaintiff dated 19th May, 2017 and 12th June, 2017 in which the plaintiff was asked to provide specific information and warned that failure to do so would result in its account being blocked. (see p.175 to 178 ROA).

5.3. In further XXN, DW1 stated that the Plaintiff was given 60 days in which to provide information and the account was only closed after an extra 30 days on 31st July 2017.

5.4. She conceded that she had no evidence that the letters she referred to earlier had been delivered to the Plaintiff by hand but said that was why she sent follow up emails to the Plaintiff who did not respond.

5.5. In Re-examination DW1 told the Court that if the Plaintiff had provided the requested information, services to the account closed on 31st July, 2017 would have been restored but he had, to date, not provided any information.

5.6. The Defendants second witness DW2 was Charles Chimata, the Portfolio Manager who testified that the Plaintiff was asked to provide information as its account was due for additional due diligence but the information was not provided.

5.7. DW2 explained that clients had a maximum period of 150 days within which to provide requested information but the Bank's internal procedures allowed it to restrict an account after it had communicated with a client three times.

5.8. In XXN DW2 conceded that the Plaintiff's internal rules do not bind outsiders.

5.9. The Plaintiff filed written submissions, the thrust of which was that the Defendant could not point to any term in the General Terms and Conditions (GTC) by which it was authorized to block a customer's account. The case of **Chrismar Hotel Limited v Stanbic Bank Zambia Limited** [1] was relied on where the Supreme Court held that where a bank takes unilateral action with regard to a customer's account, when challenged to explain why, the bank must point to a legally sanctioned reason to do so.

5.10. The Plaintiff submitted that when the Defendant blocked its account before the expiration of 150 days, it contravened clause 15.2.2. of the Customer Due Diligence Procedures (CDDP) (p. 153 ROA) and had failed in its duty to honor the Plaintiffs cheque when the account had an adequate credit balance.

5.11. The Defendant likewise filed written submissions. It contended that its duty to undertake due diligence on its customer's account was prescribed by the **Financial Intelligence Center Act No. 46 of 2010 (FICA)** and reflected in the CDDP which set a minimum mandatory requirement when conducting customer due diligence.

5.12. That the Plaintiff having failed to comply with the request to complete the CDD, the Defendant was legally and contractually justified in placing restrictions on the Plaintiff's account in accordance with clause 13.3 of the General Terms and Conditions (GTC) executed between the Plaintiff and the Defendant exhibited at p.185 of the Record of Appeal (ROA) and which provide as follows:

"The bank may at any time without prior notice, suspend or close any account and the bank will not be liable to the

client or any other person for loss suffered or incurred by the client or such a person as a result of the bank acting pursuant to this clause. The bank will notify the client as soon as possible of any such suspension or closure."

5.13. That the 150-day period for conducting the due diligence was not binding on either the Defendant or the Plaintiff and the Plaintiff was advised that his account would be restricted if he failed to comply with request for information and the Plaintiff could therefore not be faulted.

6.0 LOWER COURT'S DECISION

6.1. After considering the evidence, the trial Judge observed that **section 24 FICA** mandated the Defendant to update the information and conduct, due diligence on its customers.

6.2. The lower Court held the view that clause 13.3 of the GTC empowered the Defendant to suspend or close any account without prior notice and without consequential liability for loss to the client or any person. According to the learned trial Judge, it therefore mattered not that the Defendant restricted the Plaintiff's account before the 150 days stipulated in the CDDP had elapsed.

6.3. The Court further observed that the Plaintiff failed to comply with clause 17.12 of the GTC which required the Plaintiff to promptly provide such information as the bank may reasonably request from time to time.

6.4. The learned trial judge found that under the FICA, GTC and CDDP, the Defendant, had both a contractual and legal basis upon which to restrict the Plaintiff's account and was therefore not liable for failing to honor the Plaintiff's cheque, despite their being sufficient funds, because the account was restricted.

7.0 THE APPEAL

7.1. The Plaintiff appealed against the Judgment of the lower Court, raising two grounds of appeal as follows:

1. **The Court below erred in law, and in fact by holding that the Respondent was in order to suspend or close the Appellant's account under clause 13.3 of the account general terms when the issue of suspension and closure was never pleaded nor raised during trial.**

2. **The Court below erred in law, and in fact by accepting parol evidence, which contradicted documentary evidence on record when it made a finding that the Appellant had prior warning from the Respondent that its account would be blocked.**

7.2. <u>Appellant's Arguments</u>

7.3. The Appellant's filed Heads of Argument on 7th April, 2021 and in ground one, argued that the issue of closure or suspension of the Appellant's account under the GST was not pleaded in the defence filed by the Respondent's in the lower court.

7.4. That the only thing pleaded was the restriction of the Appellant's account under the CDDP, and apart from PW1 confirming in cross examination that he signed the terms and conditions (p.249 of the ROA), the issue of closing or suspending the account under clause 13.3 of the GTC did not arise during trial and the Defendant's witnesses focused on the restriction of the Appellant's account under the CDDP.

7.5. The case of **Mwale v Mtonga and Another** [2] where the Supreme Court highlighted the importance of pleadings was cited. The case of **Mazoka and Others v Mwanawasa and Others** [3] was cited where it held that the parties thereto are bound by the pleadings, and the Court will have to take them as such.

7.6. The Appellant submitted that it went to trial to challenge the Respondent having blocked its account under the CDDP and therefore did not at any point challenge the Respondent's power to close or suspend the account under section 13.3 of the GTC on which the learned trial judge based her findings.

7.7. That clause 13.3 of the GTC was only introduced in the Defendant's submissions to justify blocking the Appellant's account despite not having been pleaded. The case of **Ram Sarup v Risnun Navain Inter College** [4] was cited where it explained that a party should plead all the material facts necessary to support the case it intended to set up and as such, no party should be permitted to travel beyond its pleadings.

7.8. The Appellant submitted that clause 15.2.2. of the CDDP clearly showed that the Respondent could only block or

restrict the Appellant's account after 150 days from the due date of the periodic review or due diligence. In keeping with that clause, the Appellant's account could only have been restricted after 20th November 2017.

7.9. For reasons that shall become clear, we find it unnecessary to recount the arguments advanced by the Appellant in support of ground 2.

8.0 RESPONDENT'S ARGUMENTS

8.1. In response to ground one, the Respondent submitted that the lower Court's finding that the Respondent was justified to suspend or close the Appellant's account was supported by the evidence on record as guided by the pleadings.

8.2. It was opined that the Respondent's argument was wholly based on semantics as it focused on the interpretation and understanding of the word *"suspend"* used in the GTC as opposed to the word "restrict"" used in the CDDP. The Respondent relied on the definitions of the two words provided by **Black's Law Dictionary, Eighth Edition** and concluded that the words "*suspend*" and "*restrict*" mean the same thing.

8.3. It was submitted that the central question for determination in the lower court was not whether the Respondent could suspend or restrict the Appellant's account, but whether the Respondent was justified in placing such restriction, or limitation by suspending the Appellant from enjoying certain services provided the Appellant.

8.4. It was argued that, on the basis of the evidence on record, the Appellant failed to submit documents requested by the Respondent to enable it conduct a due diligence. It was pointed out that the Respondent did not act in a vacuum but was guided by the contractual terms governing the relationship between the parties, and by its internal policies and legislative requirements and it initially suspended the Appellant's account and subsequently closed it.

8.5. The Respondent referred to clause 15.2.2 of the CDDP which provides that if the review cannot be completed within 150 days, after the due date, the relationship must be closed, exited or deactivated by restricting the account subject to the laws and regulations and the contractual terms with the client.

8.6. According the Respondent, the Appellant's breach of clause 15.2.2 alone provided a sufficient basis upon which this Court should uphold the lower Court's finding that the Respondent justifiably restricted the Appellant's account. We were urged to consider that clause 15.2.2 cannot be read in isolation as it makes reference to the terms of contract between the parties.

8.7. That clause 10.3 of the GTC read together with clause 15.2.2 of the CDDP establish the basis upon which the Respondent placed restrictions on the Appellants account by suspending certain rights that that the Appellant had.

8.8. That it was clear that the parties used the words, *blocking*, *restricting* and *suspending* interchangeably. By suspending the Appellant's account, he was temporality kept from exercising his rights and privileges. We were encouraged to adopt that interpretation as it is supported by the evidence and facts on record.

8.9. That this Court should not pay a blind eye to the relevant evidence on record merely because it was not specifically referred to in the pleadings. We were referred to the case of **Mazoka and Others v Mwanawasa and Others (supra)** in

which it was held that where a party does not immediately object to evidence adduced on an issue that was not pleaded, the court is not precluded from considering such evidence.

8.10. It was submitted that all the evidence led at trial arose from the pleadings and it would be a grave injustice for this Court to assert that the lower court's findings were not guided by the pleadings merely because the judgment and the documentation on record, refer to closure and suspension as opposed to restriction and blocking.

8.11. In relation to ground 2 as we did in respect of the Appellant, we shall not recount the arguments of the Respondent under ground 2 for reasons that shall become clear.

9.0 HEARING

9.1. **Appellant's Submissions**

9.2. At the hearing the Appellant stated that it would rely on its filed heads of argument.

9.3. **Respondent's Submissions**

9.4. Ms. Mukuka, on behalf of the Respondent equally relied on the filed heads of argument and in response to ground 1 emphasized that the Appellant had admitted that it was

bound by the GTC. She pointed out that clause 15.2.2 of the CDDP provided that customers would also be subjected to the terms of the CDDP.

9.5. She opined that there were circumstances where the bank could exercise discretion and terminate the account before the number of days provided in the CDDP. She noted that the Appellant was warned in writing that if it did not provide the requested information, its account would be restricted. Counsel submitted that the Respondent acted in accordance with the law, judiciously and in good faith.

9.6. **Appellant's Response**

9.7. Mr. Kamfwa on behalf of the Appellant submitted that the issue was not whether the Respondent had power to close the Appellant's account under the GTC. That the issue was about the procedure to be employed when the Bank was carrying out a due diligence on the Customer, and what was provided for under the latter procedure, was restriction and not closure.

9.8. That according to the CDDP an errant customer's account could only be restricted after 150 days elapsed without the customer complying with requests made under the CDDP.

10.0 DECISION

10.1. We have considered the record of appeal and the arguments advanced by both parties. We propose to address the two grounds separately.

10.2. Ground one is premised on the argument that the issue of suspension and closure of the Appellant's account under clause 13.3 of the Standard General Terms and Conditions (GTC) was neither pleaded nor raised during trial. The Appellant points out that what was pleaded was the fact that the Appellant's account was restricted or blocked under the Respondent's Customer Due Diligence Procedures (CDDP).

10.3. In our view, the argument with regard to semantics and the fact that the words *"suspend"*, *"restrict"* and *"blocking"* mean one and the same thing completely skirts and misses the issue at hand.

10.4. We understand the Appellant's discomfort to be that its account was closed on account of a specific alleged infraction in relation to a specific provision and they could only have been in a position to defend themselves against what was specifically disclosed to them. The Appellant's

claim does not suggest that the meaning of the words in the GTC and those in the CDD have different meanings.

10.5. The undisputed facts are as follows;

1. On 19th May, 2017 the Respondent wrote to the Appellant requesting information to enable it conduct a due diligence on the Appellant.
2. On 31st July, 2017, the Respondent restricted the Appellant's account because it had not provided the requested information.

10.6. According to the Respondent's its policy to request information from the Appellant from time to time, is provided for by;

1. *The standard General Terms and Conditions (GTC) by which every client resolves to be bound (see paragraph 3 of DW1's Witness Statement at p. 197 ROA);*
2. *The Bank of Zambia requirements and financial intelligence laws;*
3. *The policy on due diligence which is available to customers entitled Customer Due Diligence Procedures – Business Banking (CDDP) (see page 130 – 174 ROA).*

10.7. The Respondent justified restricting the account on the fact that several requests were made to the Respondent to provide the information but the Appellant did not comply with the request.

10.8. The defence settled by the Respondent made no reference at all to the GTC or any particular provision under which the Appellant's account was restricted. The defence only stated that the account was restricted because the Appellant failed to provide information to enable the Respondent conduct a due diligence on the Appellant's bank account as per Bank of Zambia regulatory requirements.

10.9. It is thus clear that according to the pleadings, the Respondent did not correlate the restricting of the account to the GTC but on account of customer due diligence which is regulated by the CDDP.

10.10. The law with regards to pleadings is well established that a court can only determine issues that were pleaded by the parties. The main reason is that parties are entitled to be sufficiently aware of what they shall have to defend themselves against. See the cases of **Mwale v Mtonga &**

Another (supra); **Mundia v Sentor Motors Limited** [5] and **Mazoka & Others v Mwanawasa & Others (supra)**

10.11. The Respondent did however argue that the GTC was specifically pleaded in the evidence where DW1 stated in her witness statement that the Appellant's policy to request for information from the Respondent's clients, from time to time is provided in the GTC. (see p. 197 ROA). The Respondent argued that because the Appellant did not object to this evidence, on the reasoning in the case of **Undi Phiri v Bank of Zambia** [6], the trial judge was at liberty to consider the GTC even though it was not specifically pleaded.

10.12. We bear in mind that this particular evidence was very general in nature as the Appellant did not refer to any specific clause in the GTC in relation to restricting accounts held by clients. We agree that the Judge was at liberty to consider the GTC in an equally general manner but obliged to exercise caution by confining herself to the evidence.

10.13. The learned trial judge considered clause 17.7 and 17.12 (a) of the GTC which oblige the client [Appellant] to promptly provide information as the Bank [Respondent]

may require from time to time. The lower Court concluded that the Appellant had breached this obligation and proceeded to consider clause 13.3 of the GTC and noted that the clause provided that the Respondent, *"may at any time without prior notice suspend or close any account and the Bank [Respondent] will not be liable to the Client [Appellant] or such other person as a result of the Bank acting pursuant to this clause."*

10.14. On this basis the learned trial Judge found that the Respondent was at liberty to suspend or restrict the Appellant's account at any time and without giving notice.

10.15. We however observe that the evidence shows that the Respondent did not notify the Appellant that its account was being suspended pursuant to Clause 13.3 of the GTC. The evidence on record by DW1 and DW2 indicates that the Respondent's account was restricted (not suspended) on account of failure to comply with the requirements of the CDDP.

10.16. The only reference by the Appellant to clause 13.3 of the GTC was in its submissions after it closed its case and submissions do not amount to evidence. The lower Court

threw caution to the wind and wrongly relied on a provision that had neither been pleaded nor proved in evidence to make a finding that the Respondent properly restricted the Appellant's account.

10.17. We have no hesitation in holding that the learned trial Judge's finding was perverse and we are duty bound to interfere with it as provided by the case of **Attorney General v. Marcus Achiume** [7].

10.18. We consequently find that the Respondent did not prove that it properly restricted the Appellant's account pursuant to Clause 13.3 of the GTC.

10.19. We note that in her reasoning, the learned trial judge hardly paid any attention to the CDDP despite the fact that the Respondent's case, in its entirety was in relation to the due diligence it was conducting on the Respondent's account as mandated under the CDDP.

10.20. In its submissions before the lower Court, the Respondent cited **section 24 of the FICA** which provides that a reporting entity [Respondent] shall exercise ongoing due diligence with respect to any business relationship with a customer and **section 23** provides as follows;

"23 (1) A reporting entity shall develop and implement programs for the prevention of money laundering, financing of terrorism and any other serious offence.

(2) The programmes referred to in subsection (1) shall include the following:

(a) internal policies, procedures and controls to fulfil obligations pursuant to this Act; ....."

10.21. Pursuant to its obligations under the cited law, the Respondent developed and started implementing the Customer Due Diligence Procedure (CDDP) exhibited at p.130 to p.174 ROA and whose Purpose is stated as follows; (see p. 5 CDDP /p. 135 ROA)

*"**PURPOSE***

*The Customer Due Diligence Procedures – Business Banking (CDD Procedures) sets the **minimum mandatory requirements** when conducting Customer Due Diligence (CDD) for anti-money laundering (AML) and Counter Terrorist Financing (CTF) purposes ....." (emphasis ours)*

10.22. The CDDP is therefore prescribed by law and the CDDP itself is clear that its provisions constitute the **minimum mandatory** requirements when the Respondent is conducting customer due diligence. Our understanding is that whilst perhaps the Respondent could resort to the GTC when undertaking customer due diligence, its primary instrument for reference in that regard is the CDDP which provides the minimum mandatory requirements for that purpose.

10.23. The evidence of both DW1 and DW2 spoke directly to the CDDP and the procedure it prescribes for undertaking due diligence of its clients and the power to restrict an errant clients' accounts after a prescribed period in relation to the request for information from the Appellant and the eventual restriction on its account.

10.24. Much has been said by both parties in relation to the circumstances that resulted in the Appellant's account being restricted. On the one hand, Appellant claims that some forms it was required to complete were complicated and was seeking clarity on how to go about it. On the other hand, the Respondent stated that it had made numerous

efforts to obtain the requested information from the Appellant but to no avail, and that, it had even sent a warning that non-compliance could lead to the account being restricted.

10.25. We have considered the provisions of the CDDP and note that the Respondent was perfectly entitled to review its earlier customer due diligence of the Appellant who was obliged to comply with the Respondent's request for information.

10.26. The problem arose when the Respondent observed that the review was overdue and it felt the Appellant was not making sufficient effort to provide the requested information. Clause 15.2 of the CDD provides how such a situation should be addressed;

"**15.2 Overdue Client Reviews**

15.2.1 CDD Overdue

All client reviews must be completed by the due date. Failure to do so would result in the Client becoming CDD overdue. Such overdue reviews must be tracked and mitigation measures put in place to mitigate risks.

Due date, at the latest, refers to the last day of the following month in which the review falls due. For example, if the review falls due on 15th June 2014 baed on the review cycle, the Due Date at the latest will be 31st July 2014.

15.2.2 Mitigation Controls

If the review cannot be completed within 150 days after trhe Due Date, the relationship must be closed/exited or deactivated by way of measures to restrict use of the account (e.g. "hard holds"), subject to laws and regulations and contractual terms agreed with the client.

10.27. When Clause 15.2 of the CDD is deciphered, the following is apparent;

1. The due date is the last day of the following month in which the review falls due. Where review is not concluded by the due date, the mitigatory controls must be enforced.
2. The mitigatory measures provide that after the due date, a period of 150 days is provided within which to

complete the review after which the use of an account can be restricted.

10.28. In cross examination, DW1 agreed that the CDD provides that 150 days are supposed to be observed before implementing drastic measures such as blocking the account.

10.29. The record shows that on 19th May, 2017 two letters were issued to the Appellant, respectively, one requesting information to update the Respondent's records. Surprisingly, the other letter issued on the same day was informing the Appellant that it had not provided information earlier requested in the Respondent's earlier contacts with the Appellant. The dates or references of the earlier requests for information were not stated in the letter. The letter further warned that if the information was not provided by 30th June, 2017, the Respondent's account would be restricted. (see p.175 and 176 ROA).

10.30. On 12th June, 2017 a similar letter was issued informing the Appellant that it had not provided the information requested in the Respondent's earlier contacts with the

Appellant. Again, the dates or references of the earlier requests for information were not stated in the letter. The letter further warned that if the information was not provided by 30th June, 2017, the Respondent's account would be restricted.

10.31. None of the exhibited letters were signed by the Appellant and none were acknowledged. The Appellant's Managing Director DW1 did however acknowledge that a 2nd due diligence was conducted in 2017. He however insisted that he only became aware that the Appellant's account was restricted when he enquired from the Respondent why a cheque issued by the Appellant had bounced.

10.32. Regardless of what was said by the parties, according to clause 15.2.1 of the CDD, the procedure for restricting an account kicks-in once information is not received by the due date. The process is referred to as *"mitigation measures put in place to mitigate relevant risks."*

10.33. As earlier noted the mitigation controls in 15.2.2 provide for accounts to be restricted where the review cannot be completed within 150 days after the due date.

10.34. According to the letter of 19th May, 2017, the 30th June, 2017 the due date for submitting the information was 30th June, 2017 and this complied with clause 15.2.1 because it was the last day of the following month in which the review falls due.

10.35. This means that the mitigation controls started running for a period of 150 days from 1st July 2017 but the Respondent contravened this mandatory requirement by restricting the Appellant's account only 31 days after the due date.

10.36. The trial Judge merely recounted the evidence of DW2 in which she tried to explain why the account was restricted before the expiry of 150 days but provided no analysis of the CDDP.

10.37. We have considered the evidence led by DW1 and note that she did not refer to any proviso that permitted restricting an account before 150 days had elapsed without the Respondent providing the requested information.

10.38. The Appellant restricted the Appellant's account prematurely and was therefore wrong in so doing. Ground 1 therefore succeeds.

10.39. Having found that the Respondent wrongly restricted the Appellant's account ground 2 becomes otiose.

10.40. We have proceeded to consider the Appellant's claims for breach of duty to honor its cheque number 801966 dated 3rd August, 2017 and for punitive and exemplary damages.

10.41. In the case of **Spider Machisa v Zambia National Commercial Bank** [8], the Supreme Court had this to say;

"In Paget's Law of Banking, 8th edition at Page 312 it is stated that the banker's primary function end duty is to honor his customer's cheques provided the state of account warrants his doing so and there is no legal reason or excuse to the contrary.

We accept that ***Gibbons v West Minister Bank Ltd (1939) 2 ALL ER 577*** *and the cases cited therein, lay down good law that a trader whose cheque has wrongly been dishonored by his banker is entitled to recover substantial damages without pleading and proving actual damages for the dishonor of his cheque.*

10.42. Further, in the case of **Kpohraror v Woolwich Building Society [1996] 4 AER 119** Evans LJ stated that

"..... It is not only a tradesman of whom it can be said that the refusal to meet his cheque is 'so obviously injurious to [his] credit' that he should 'recover, without allegation of special damage, reasonable compensation for the injury done to his credit' (see [1920] AC 102 at 112, [1918-19] All ER Rep 1035 at 1037 per Lord Birkenhead LC). The credit rating of individuals is as important for their personal transactions, including mortgages and hire-purchase as well as banking facilities, as it is for those who are engaged in trade, and it is notorious that central registers are now kept. I would have no hesitation in holding that what is in effect a presumption of some damage arises in every case, in so far as this is a 'presumption of fact.'"

10.43. In the premises, we order as follows;

1. **The Respondent is liable to the Appellant in general damages and special damages and the calculation of the quantum is referred to the Deputy Registrar for assessment,**
2. **The assessed sum shall attract interest at the short-term commercial bank lending rate from**

the date of the Writ until the date of Judgment and at the rate of 6.5% per annum from the date of Judgment until payment.

3. **Costs in this Court and the Court below are awarded to the Appellant.**

.....

M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE

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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE