SELECTED JUDGMENT NO.16 OF 2017

P.522

IN THE SUPREME COURT FOR ZAMBIA SCZ/8/125/2014

HOLDEN AT KABWE APPEAL NO.131/2014

(CIVIL JURISDICTION)

BETWEEN:

BARCLAYS BANK ZAMBIA PLC APPELLANT

AND

PATRICIA LEAH CHATTA CHIPEPA RESPONDENT

Coram : Mwanamwambwa DCJ, Kabuka and Mutuna, JJS

On 4th April 2017 and on 20th April 2017

For the Appellant : Mr. R. Mukuka of Messrs Robert and Partners

For the Respondent : N/A

J U D G M E N T

Mutuna JS, delivered the Judgment of the Court.

Cases referred to:

1) Foley v Hill (1848) 2 HLC 28, 9 ER 1002
2) Tai Hing Cocton Mill Ltd v Liu Chong Hing Bank Limited (1986) AC 80
3) London Joint Stock Bank Ltd v Macmillan (1918) AC 777
4) Greenwood v Martius Bank Ltd (1933) AC 51
5) Sithole v The State Lotteries Board (1975) ZR 140

6) **Sibongo v Shankanga (1969) ZR 149**
7) **Sichula & another v Chewe SCZ Judgment No.8 of 2000**
8) **Zambian National Commercial Bank Plc v Rosemary Bwalya T/A Lynette Guest House SCZ judgment No.25 of 2011**
9) **Georgina Mutale (T/A G.M. Manufacturers Limited v Zambia National Building Society (2000) ZR 19**
10) **Collet v Van Zyl Bros Ltd (1966) ZR 65**
11) **Barclays Bank Ltd v W.J. Simms Son and Cooke (Southern) Ltd and another (1980) 2 WLR 218**
12) **David Chiyengele and Others v Scaw Limited SCZ Judgment No.2 of 2017**

Other authorities referred to:

1) **Paget's law of Banking, 11th edition by Mark Hapgood QC, Butterworths, London**
2) **Halbury's Laws of England, volume 48, by Lord Mackay of Clashfern 5th Edition, Lexis Nexis**
3) **Judgment Act, Cap 81**

The concept of credit and debit card transactions is fairly new to the Zambian market. For a long time our economy was a cash economy with most transactions being concluded by cash. The few exceptions were those transactions involving cheques, bank drafts and money

orders, to mention but a few. Despite this, certain business entities such as hotels and airlines accepted credit and debit cards issued by foreign banks.

The issue that confronts us in this appeal arises from a debit card transaction effected by the Respondent through a local bank, the Appellant in this matter. It is, therefore, a novel issue involving Electronic Funds Transfer at Point of Sale known by the acronym, EFTPOS.

The background is that the Respondent opened a bank account with the Appellant and was availed a debit card. On 10th July 2010, she purchased an air ticket from Kenya Airways in the sum of K3,471.50, using the debit card and on 13th July 2010, her account held with the Appellant was debited with the amount of the transaction. Later, on 12th August 2010, a similar amount was debited

from the Respondent's account suggesting that the Respondent had purchased another air ticket from Kenya Airways. This prompted the Respondent to approach the Appellant to ascertain the basis upon which it had effected the second debit on her account. The Appellant's representatives assured the Respondent that they would investigate and report back to her.

Prior to the resolution of the anomaly, the Respondent left the country and the representatives of the Appellant continued to deal with her husband. They carried out investigations and were informed by a representative of Kenya Airways that the airline's debit card machine had a fault and had on occasions debited clients twice. As a consequence of this, Kenya Airways was willing to refund the Respondent the amount wrongly debited from her account as long as she presented to the airline a copy of

the original ticket purchased in July and her passport to show that she had travelled to Kenya. This information was communicated to the Respondent's husband.

Before the second debit on the Respondent's account was effected, her account was overdrawn and was, therefore, incurring interest charges agreed upon by the parties. These charges increased when the second debit was effected notwithstanding that her account continued to receive deposits by way of bank transfers. The Appellant was later prompted to close the account without prior notice to the Respondent. This appears to have aggrieved the Respondent. She took out an action in the High Court against the Appellant, claiming the following relief:

1) **A declaration that the purported debit to the Plaintiff's account of Kwacha three million four hundred and seventy one thousand and fifty (K3,471.50) on 10th August, 2010 was without authority and of no effect;**

2) **A declaration that interest charged to the Plaintiff's account on the sum of Kwacha three million four hundred and seventy one thousand and fifty (K3,471.50) to the tune of Kwacha six hundred and fifty one thousand eight hundred and seventy eight three ngwee (K651,878.03) was without basis and of no effect;**
3) **Damages;**
4) **Interest on the sums due under claims 1, 2 and 3 at the contractual rate applicable to the said account;**
5) **Any other relief that the court may deem fit;**
6) **Costs.**

The parties appeared before the High Court and presented their evidence and arguments. The Respondent's evidence recounted how she had purchased the air ticket at Kenya Airways using her debit card issued by the Appellant and how the amount paid for the ticket was debited from her account. Later she got a statement from the bank and discovered that a like amount had been debited once again from her account and that she had a debit balance. She called the Appellant to find out why the second debit had been done despite the fact that she had not purchased

another ticket and was not given a satisfactory explanation by the Appellant's officials.

The evidence concluded by revealing that when the Respondent used her debit card to purchase the air ticket she had entered her PIN on the pad of the debit card machine.

The Appellant's evidence recounted the events leading up to the purchase of the air ticket by the Respondent and the two debits effected to her account. It also explained the working of EFTPOS and the effect of a card holder entering a PIN on the pad of the debit card machine as granting authority to a bank to debit the card holder's account.

The evidence also revealed the investigations conducted by representatives of the Appellant with respect to the second debit which indicated that the debit card

machine at Kenya Airways was faulty and had been debiting clients twice. It concluded by revealing that the results of the investigations were communicated to the Respondent who was encouraged to call at Kenya Airways with a copy of the air ticket she had purchased and passport for purposes of getting a refund.

After the Learned High Court Judge heard the matter she acknowledged the evidence tendered by the Appellant's witness that the second debit from the Respondent's account arose from a malfunctioning of the debit card machine at Kenya Airways. She then identified the issue for determination as being, whether, in view of the banker customer relationship that existed between the Appellant and Respondent, the debits and the charging of interest and commissions effected on the Respondent's account leading to its eventual closure were justified. The Learned

High Court Judge went on to find that the relationship that existed between the Appellant and Respondent was the banker/customer relationship which was governed by the principles of the law of contract. This being the case, she opined that, the rights and obligations of the two parties arose out of the express and implied terms of their relationship. She found further that the nature of the relationship between a banker and customer is that of a debtor and creditor. As such, banks are allowed to treat moneys deposited with them as their own money and their only obligation is to pay to the customer an equivalent amount on demand. She relied on the case of ***Foley v Hill***[1] in making the foregoing finding.

Having identified the relationship between the parties and its effect, the Learned High Court Judge then went on a journey of analyzing the history of the Respondents'

account by looking at the bank statements. She found that the Appellant performed its obligations to the Respondent because it accepted deposits of money from the Respondent and also paid out whatever amounts the Respondent demanded. According to her, these transactions led to the account going into a negative balance because the Appellant allowed the Respondent to withdraw moneys on two occasions which were in excess of the balance held to her credit. She found that the Appellant allowed the overdraft situation, notwithstanding, the fact that there was no agreement between the parties to that effect. Further that since the Respondent derived a benefit from the overdrawn position of her account it was in order for the Appellant to levy an agreed monthly fee of K150.00.

The Learned High Court Judge went on to find that the problem on the Respondent's account arose on 12th

August 2010 when the Appellant allowed the second debit of K3,471.50 to be made to the account. She, in this regard, found that there was something seriously wrong in the Appellant's system which, if it had been corrected, would have made the litigation in the matter unnecessary. She found that the Appellant was negligent because it did not properly check the transactions on the Respondent's account to ensure that they were authorized. The Learned High Court Judge dismissed the Appellant's contention that there is a contractual duty on the part of the customer to exercise reasonable internal controls to prevent forged cheques being presented to a bank. This, she found is in line with the decision in the case of ***Tai Hing Cocton Mill Ltd v Liu Chong Hing Bank Limited***[2]. She found further that in accordance with the decisions in the cases of ***London Joint Stock Bank Ltd v Macmillan***[3] and

Greenwood v Martius Bank Ltd[4], a customer's implied duties are limited to exercising reasonable care in executing written orders, such as cheques, so as not to mislead the bank or facilitate forgery and to notify the bank of forgeries which the customer becomes aware of.

The Learned High Court Judge concluded that there was no evidence to show that the Respondent breached her duty to the Appellant. She further refused to accept the argument by the Appellant that once a customer had given his PIN or signature to a retailer, then he is at the mercy of retailer. Her finding was that banks, such as the Appellant, have a duty of care and skill to protect their customers from unwarranted and unauthorized withdrawals. She endorsed the opinion expressed by the learned authors ***J. Wadsley*** and ***G.A. Penn*** in ***The Law Relating to Domestic Banking*** that where the bank has paid without

the customer's mandate, it is not entitled to debit the customer's account.

In justifying her findings, the Learned High Court Judge took the position that the use of credit cards is governed by three contracts which are autonomous. These are between: the card issuer (usually a bank) and the card holder (debtor); the card holder and the retailer; and, the issuer and the retailer. Further that the relationship between the two parties was that of card issuer and card holder, that is to say, banker and customer.

The Learned High Court Judge also formed the opinion that there was another relationship falling under the second category of card holder and retailer pursuant to which there was one transaction authorized by the Respondent on 13th July 2010. That, following the debiting

frequently check her bank statements to ensure that there were no unauthorized debits and dismissed it. In doing so she relied on the ***Tai Hing*** case.

Having found in favour of the Respondent, the Learned High Court Judge ordered the Appellant to reopen the Respondent's bank account and adjust the amounts therein back to the position the account was in prior to the second debit. She also awarded the Respondent damages to be assessed by the Learned Deputy Registrar and costs, to be taxed in default of agreement.

Following delivery of the judgment by the court below the Appellant expressed its displeasure with the decision by launching this appeal on eight grounds as follows:

1) **The court below erred in making a declaratory order(s) under the circumstances of this case in light of the law that declaratory orders should not only be granted in certain circumstances (sic);**

2) The court below erred in fact and law in determining that the Appellant was negligent on the 12th August 2010 as a result of having paid the sum of ZMW3,471.50 without the mandate of the Respondent and such payment was of no effect and that the manner of working of the visa system was inconsequential, on the facts of this matter, after establishing that the said disputed transaction was done through EFTPOS (Electronic Funds Transfer At Point of Sale) at Kenya Airways;
3) The court below was wrong in fact and law in not having ordered that the Respondent pursues Kenya Airways for refund based on the relationship of card holder(Respondent) and Retailer (Kenya Airways) in the wake of incontrovertible evidence that Kenya Airways, the beneficiary of the debited sum of ZMW3,471.50, had not refunded the Respondent;
4) The court below erred in fact and in law in determining that duties of a bank customer such as the Respondent in cases of electronic transfer of funds through visa cards does not go beyond the duties laid out in the 1918 case of London Joint Stock Bank Limited v Macmillan (1918) AC 77 and 1833 case of Greenwood v Martius Bank Limited (1933) AC 51;
5) The finding of the court below that there was no overdraft arrangement touching the Respondent's account number 103455 flew in the teeth of evidence;
6) The court erred in fact and law in determining that the closure of the Respondent's account which had been established as dormant was wrong and illegal and should be opened;
7) The court below erred in law in determining interest payable in the manner it was done in the wake of the Judgment Act, Cap 81 of the Laws of Zambia;

8) The court below erred in fact and law in awarding costs to the Respondent on the facts of this case.

Prior to the hearing of the appeal the Appellant filed heads of arguments which it relied upon at the hearing of the appeal and augmented with viva voce arguments. The Respondent did not file heads of argument and did not attend the hearing. We, nonetheless proceeded with the hearing because there was sufficient evidence on the record to show that her counsel had been served with the record of appeal, heads of argument and indeed the cause list and notice of hearing.

In regard to ground 1 the Appellant's arguments were in relation to claims 1 and 2 in the statement of claim in which the Respondent sought declarations that the debiting of her account in the second sum of K3,471.50 and charging of interest of K651.87 were of no effect. Counsel for the Appellant, Mr. R. Mukuka took the position

that the Learned High Court Judge misdirected herself when she granted the declaratory orders because a declaratory order is discretionary and can only be granted where the person seeking it does not have soiled hands. He relied on the case of ***Sithole v The State Lotteries Board***[5] where we held that *"the High Court has power to give a declaratory judgment, but the power is a discretionary one. The discretion should be exercised with care and caution and judicially. In particular the court will not make a declaratory judgment where an adequate alternative remedy is available."* Counsel argued that there was an alternative and adequate remedy available to the Respondent being, pursuing Kenya Airways. As such, the Learned High Court Judge ought not to have granted the two declaratory orders.

Mr. Mukuka also contended that the refusal by the Respondent to pursue Kenya Airways amounted to soiling her hands thereby shutting the doors to a declaratory order further. Reliance was made on the High Court decision of ***Sibongo v Shankanga***[6].

Grounds 2 and 4 were argued together and in doing so Mr. Mukuka questioned the following findings of fact by the Learned High Court Judge: that the Appellant debited the Respondent's account without authority and that the Respondent's consent was required; the Appellant did not exercise reasonable care and skill when it effected the second debit; the Appellant should not have allowed the second transaction to go through; and that there was something seriously wrong in the operations of the Appellant. According to Mr. Mukuka these findings of fact were flawed because the Respondent did not allege

negligence on the part of the Appellant in her pleadings nor was evidence of negligence led. Further, the Respondent did not lead any evidence alleging breach of a particular duty of care and skill on the part of the Appellant. He also contended that the Learned High Court Judge treated the case as one of fraud when there was no fraud pleaded or evidence led, but he did, however, concede that there was an obligation on the part of the Appellant to act with care and skill in dealing with the Respondent's account.

The view taken by Mr. Mukuka was that the issue that the court below ought to have considered is what constitutes *"the customer's mandate"* in visa card transactions. He explained that the use of a card and insertion of a PIN in a credit card machine by a customer, in and of itself, constitutes a mandate to a bank to pay. This, it was contended, is the position because the use of a

card and PIN is synonymous to a customer using cash and as such, there is an obligation placed upon the customer to ensure proper use of the card. We were, at this point, invited to consider the evidence given by the Appellant's sole witness in the court below explaining the effect of, and procedure in EFTPOS transactions. Mr. Mukuka concluded that it was a misdirection on the part of the Learned High Court Judge to compare a bank's mandate arising from a credit card transaction to that arising from a cheque transaction. Consequently, the authorities she relied upon of ***London Joint Stock Bank v Macmillan and Arthur***[3] and ***Green v Martins Bank Limited***[4] are not relevant to the issue that was before her. Mr. Mukuka did, however, concede that each authority given to a bank by entry of a PIN and signature is unique to a particular transaction. He also confirmed that in effecting the second debit of the

Respondent's account, the Appellant used the authority or mandate given to it in relation to the first transaction.

The arguments in respect of ground 3 were simply that indeed there was a contract between the Respondent and Kenya Airways and as such, the Respondent should have pursued Kenya Airways for the refund and not the Appellant.

In relation to ground 5, the position taken by Mr. Mukuka was that the finding by the Learned High Court Judge that there was no overdraft facility on the Respondent's account was a misdirection in view of the evidence to the contrary. This, he explained, was reinforced by the admission made by the Respondent that her account had a negative balance prior to the debit that is in issue.

The arguments under ground 6 related to the order by the court below that the Appellant should re-open the Respondent's account. Mr. Mukuka contended that the Appellant was under no obligation to continue doing business with someone it did not consider appropriate; and that, there was no need for the Appellant to give notice to the Respondent prior to the closure of her account especially that the account had a negative balance.

Ground 7 attacked the award of interest on amounts that were in the Respondent's account at the time of closure, at the Appellant's ruling rate. The arguments here were twofold: that the award of interest was a misdirection and contrary to our decision in the case of ***Sichula and another v Chewe***[7], and that in any event, there was no money in the Respondent's account at the time of its closure to warrant the award of interest.

Lastly, ground 8 challenged the award of costs based on the contention that the Respondent did not need to institute the proceedings in the court below in view of the offer made by Kenya Airways to refund the money. Counsel sought solace in the cases of ***Zambia National Commercial Bank Plc v Rosemary Bwalya T/A Lynette Guest House***[8], ***Georgina Mutale (T/A G.M. Manufacturers Limited) v Zambia National Building Society***[9], and ***Collet v Van Zyl Bros Ltd***[10].

We were urged to allow the appeal.

We have considered the record of appeal, judgment appealed against and arguments advanced by the Appellant. This appeal raises a very novel question of the effect of a customer presenting a debit card to a retailer for purposes of paying for services rendered. Put differently,

what is the effect of a customer paying for services to a retailer by way of swiping with a debit card and entering a PIN and or appending his signature on the transactional voucher? In effect, the appeal will resolve the obligations of the key players in an EFTPOS transaction.

We must state from the outset that there is no case law in Zambia or legislation that addresses the question we have posed. We have, therefore, relied on the common law position on the principles of contract law, in particular the law relating to cheque transactions, as articulated by the authorities we have referred to in the latter parts of this judgment. The English authorities show that this is the position taken in England as well, where they also do not have legislation on the issue.

The court below in arriving at the decision it made observed that the use of debit cards, credit cards and other cards in general is governed by three contracts which are autonomous. These contracts are: between the card issuer (creditor/bank) and the card holder; the card holder and the retailer; and the issuer and the retailer. The court then went on to find that the transaction at Kenya Airways for the purchase of the air ticket created a relationship in the second category of the contracts, that is, between the card holder and the retailer. We agree with this particular finding by the court below and it begs the question which we have posed earlier of the effect of an EFTPOS transaction which has been aptly summed up by ***Paget's Law of Banking***, 11th edition by Mark Hapgood at page 281 to 282 as follows:

"EFTPOS allows payment to be made for goods and services by the electronic transfer of funds from the customers' account to the suppliers account. In the case of a retail payment, instead of a customer paying for goods or services by means of cash or a cheque, he presents the cashier with a plastic EFTPOS debit card, which has information relating to the customer's bank account (usually a current account) encoded on a magnetic stripe on the back. The cashier 'swipes' the card through a card reader installed at the retailer's point of sale terminal and enters the amount of the transaction ... Where the card has been accepted the terminal will produce a transactional voucher for the customer to sign. The cashier then compares the customer's signature with the signature on the back of the card to see if they correspond. Once verified, the signature acts as the customer's mandate to his bank to debit his account and credit the retailer's account, and a message to this effect is transmitted, via one of the independent EFTPOS networks, to the customer's bank and the retailer's bank".

In regard to the customer's authority or mandate, ***Halsbury's Laws of England***, volume 48, fifth edition states at paragraph 225 that a system known as *"chip and PIN"*, has been introduced, which enables the customer to enter his PIN onto a pad instead of signing a voucher, thereby giving his bank the authority or mandate to pay.

It is clear from the foregoing that in EFTPOS transactions the sale is negotiated and concluded at the point of sale by the card holder and the retailer. The bank, such as the Appellant, is merely an intermediary or facilitator of the transaction by effecting the transfer of the funds from its customer's account to that of the retailer's. This transfer is effected as a consequence of the authority or mandate given to the bank by the customer, by way of the signature on the transactional voucher and or PIN, as has been explained in the passages from **Paget's** and **Halsbury's.** Where no such authority or mandate has been given, the bank has no authority to debit the customer's account. Further, the view we take is that, in carrying out the customer's instructions, the bank does so with reasonable care and skill, as is the case when it is presented with a customer's cheque. The bank must,

therefore, be alert to ensure that prior to debiting its customer's account, the authority or mandate is in order or appears on its face to have been given by the customer.

The facts as presented before us, show that in July 2010, the Respondent purchased an air ticket from Kenya Airways in the sum of K3,471.50 using her debit card. In so doing, she gave the Appellant the authority or mandate to debit her account by entering her PIN on the pad of the debit card machine at Kenya Airways, being the point of sale where the transaction was consummated. The Appellant effected the debit to the Respondent's account for this transaction on 13th July 2010 and later, on 12th August 2010, the Appellant debited the Respondent's account in a like sum of K3,471.50 and transferred the funds to Kenya Airways' banker. This second transaction, as the evidence revealed, arose from a fault in the debit

card machine at Kenya Airways which was duplicating sales transaction. It is on this basis that the Appellant denies liability alleging that it had no part to play in the entry of the PIN at Kenya Airways. It has also been contended that it had the authority or mandate to debit the Respondent's account a second time because of the initial authority or mandate given.

Our review of the authorities reveals that each authority or mandate given to a bank by a customer when he or she enters the PIN on the pad of a debit card machine has its unique code and features. Mr. Mukuka was in agreement with us on this point. As such, in the case on hand, what is apparent is that the Appellant debited the Respondent's account a second time using the initial mandate given by the Respondent in July 2010. The, Appellant was in our view, obliged to scrutinize the second

request pursuant to which the second debit was effected on 12th August, 2010 to ensure that it had not already acted upon it. This is especially the case because the amount to be debited was similar to the amount debited earlier and in respect of the same retailer. The Respondent cannot, therefore, be said to have given authority or mandate for the second debit or that by giving the first mandate she left her card open to abuse. Consequently, the Appellant ought not to have debited the Respondent's account a second time. The position we have taken is supported by **Paget's** at pages 315 to 316 which states in part as follows:

> **"A bank may only debit its customer's account where it has his mandate to do so. In the case of a cheque the customer's mandate is his signature, and the same principle also applies where a customer signs a voucher when using an EFTPOS card. Where a customer uses an EFTPOS card to purchase goods and services over the telephone the customer's mandate will be given orally.**

Where the customer uses an ATM or EFTPOS card together with his personal identification number (PIN), the correct PIN entered by the customers is his mandate for debiting his account. But what if the PIN is typed in by an unauthorized person? A forged or unauthorized signature on a cheque does not represent the customer's mandate and the same rule probably applies by analogy in the case of the unauthorized use of a PIN. However, again by analogy with the law relating to cheques, the customer may be liable to have his account debited where he adopts or ratifies the unauthorized use of his PIN, or is estopped by his negligence or representation from denying that the use of the PIN was unauthorized.

The foregoing passage from **Paget's** clearly sets out the duty of the bank to take reasonable care and skill as we have explained in the earlier part of this judgment. This principal, as is evident from the first paragraph of the quotation above, is similar to that applicable in cheque transactions. Infact, the paragraph is derived from the decision in the English case of ***Barclays Bank Ltd v W.J. Simms Son and Cooke (Southern) Ltd and Other***[11], which involved the liability of a bank arising out of a cheque transaction. This reinforces the position we have

taken that the principles that govern cheque transactions are also applicable to EFTPOS transactions. Further, although the ***Barclays Bank Ltd*** case is a decision of the High Court in England, we find it persuasive and see no reason why we should not adopt it.

Paget's also sets out instances where a customer will be held liable when it talks about burden of proof and explains a situation similar to what happened in this case and states at page 316 as follows:

> **"The burden of proof becomes an important issue when a customer alleges that he did not use or authorize the use of his PIN (or card) to withdraw or transfer funds.... As it is the bank which wishes to debit the customer's account, the normal rule would be that burden of proof is on the bank to prove that it acted in accordance with the customer's mandate. In theory, the bank must prove that (1) the PIN was used, and (2) it was authorized by the customer."**

The facts surrounding this appeal are that subsequent investigations conducted by the Appellant revealed that it

later discovered that the second debit was on account of a faulty machine at the point of sale, being Kenya Airways. This shows that the Appellant did not satisfy the two tests, aforestated, on burden of proof because, not only was the second transaction not authorized by the Respondent, but she did not use her PIN. We are, therefore, of the firm view that, there was no misdirection on the part of the court below, when it held the Appellant liable. This effectively takes care of grounds 1 and 3 of the appeal which contend that the Respondent was obliged to pursue the payment with Kenya Airways. That having failed to do so her hands were soiled and she could, therefore, not be granted the equitable and discretionary relief of a declaration. Our view is that, the fact, in and of itself, that the Respondent opted to pursue the Appellant and not Kenya Airways does not in any way render her hands soiled. She was at liberty to

pursue either of the two because she was aggrieved by the acts of both of them. This is reinforced by our earlier finding that the Appellant owed her a duty which it breached. It is our considered view, that having been sued by the Respondent, the Appellant ought to have joined Kenya Airways to the suit to claim indemnity from it especially that it did not deny liability.

The finding also determines ground 2 of the appeal, in view of the position we have taken on the effect of an EFTPOS transaction and the duty of a bank. For the same reason, our findings also determines ground 4. We accordingly dismiss the said grounds, 1, 2, 3 and 4.

The other issue that falls for determination arises from grounds 5 and 6 on the overdrawing and closure of the Respondent's account. In regard to the overdrawn status of

the Respondent's account, the Appellant has contended that the court below made a finding of fact that there was no overdraft arrangement between the parties notwithstanding evidence to the contrary. We have had occasion to revisit the findings on the overdrawn account made by the Learned High Court Judge which are at pages 19 to 20 of the record of Appeal. They are as follows:

> **"It is quite clear from the ledger transcript in the defendant's bundle of documents that the defendant did perform his (sic) obligations to not only accept deposits of monies from the plaintiff but also to pay on demand whatever amounts the plaintiff demanded within the credit available up until 05th August 2010 when the plaintiff was allowed to withdraw an amount of K200,000 (K200) against a balance of only K46,158.29 and another withdrawal on 11th August, 2010 of K50,000 (K50.00) against a negative balance of K153,841.71. Invariably this led to the plaintiff's account having a negative balance of K203,841.71 as at 11th August, 2010. The plaintiff testified as aforesaid that there was no credit facility agreement between her and the defendant. The defendant did not through its witness DW1 dispute this. It is of course without question that by being allowed to withdraw the said amounts against negative**

balances, the plaintiff derived a benefit. It is also not in dispute that as DW1 testified that a monthly fee of K150.00 was by agreement charged as commission. And of course the plaintiff had no objection to this, there having been a mutual understanding between the parties in this respect.

The problem arose on 12th August, 2010 when according to the ledger transcript in the Defendant's bundle there was what purported to be a visa transaction by which it seemed that the Plaintiff had purchased via EFTPOS a ticket at the price of K3,471.50. The Plaintiff's account which at the time was already in negative was further debited with the said amount. From 15th August, 2010 through 06th June, 2011, the Defendant charged interest fees in addition to the agreed commission which unfortunately in spite of several deposits into the Plaintiff's account could not and were not offset as on divers dates several withdraws were allowed by the Defendant against negative balances resulting into a negative balance of K540.05 at 13th April 2011".

What is clear from the foregoing passage is that the Learned High Court Judge did not make a determination as to whether or not there was a formal overdraft agreement entered into by the two parties. She does, however, acknowledge the fact that the Appellant allowed the Respondent to overdraw her account arising from which

she derived a benefit. Further that, having derived such benefit, she was liable to pay the monthly fees of K150.00. She made no finding whatsoever that there was no overdraft agreement.

The Learned High Court Judge went on to express concern at the fact that after the second debit of K3,471.50 was effected on 12th August, 2010 the negative balance in the Respondent's account increased resulting in the Appellant imposing higher fees. We cannot fault the Learned High Court Judge for expressing the said concern and finding that since the second debit of K3,471.50 was unauthorized, the Appellant was not entitled to levy the higher charges. As a result of this, we find no merit in ground 5 and accordingly dismiss it.

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We now turn to consider ground 6 which alleges that it was wrong and illegal for the Appellant to close the Respondent's account without notice. In arriving at her decision on the issue, the Learned High Court Judge relied upon the case of ***Foley v Hill***[2] and quoted the following passage from the case:

> **"... and sometimes there is the additional term that the banker will pay interest on the balance due; and further, that the banker will not terminate the relation without giving the customer reasonable notice".**

The Appellant has contended that there is nothing to stop a bank terminating a relationship with a customer whose account is dormant.

We are of the considered view that the requirement of notice before closure of an account is only applicable where there is a term to that effect in the agreement governing the relationship between a banker and customer. This is in

accordance with the passage relied upon by the Learned High Court Judge from the case of ***Foley v Hill***. The Respondent did not lead any evidence in the court below to demonstrate that indeed there was such a term in the agreement relating to her bank account between herself and the Appellant. We, therefore, find that the Learned High Court Judge misdirected herself and consequently, ground 6 must succeed and we so order. However, we can understand why the Learned High Court Judge ordered the reopening of the Respondent's account. The reason is that the relief she awarded can only be attained by the Respondent if her account is open. For this reason we have not disturbed her order to reopen the Respondent's bank account for the reasons we have given in the latter part of this judgment.

Ground 7 questions the award of interest by the court below on the ground that: there was a negative balance in the Respondent's account which could not attract interest; and the award was against the ***Judgment Act***.

The award of interest by the court below was at the Appellant's ruling rate.

We have stated in a number of cases that interest shall be awarded at the short term bank deposit rate from date of writ to date of judgment, thereafter at the current lending rate as determined by Bank of Zambia from date of judgment to date of payment, unless the parties have agreed otherwise. The court will also award interest on money judgments such as the judgment of the court below in accordance with section 2 of the ***Judgments Act*** whose

purpose is to compensate a party for being kept out of his money.

To the extent that the Learned High Court Judge awarded interest at the Appellant's ruling rate and also on the Respondent's account that had a negative balance, she misdirected herself. Ground 7, therefore, succeeds.

Lastly, ground 8 attacks the award of costs to the Respondent on the ground that the proceedings in the court below were unnecessary.

We have already found that the court below was on firm ground by finding in favour of the Appellant. Having so found, the court below was entitled to exercise its discretion to award costs by applying the general principle that "*costs follow the event*". In view of this, the position we

take is that there is absolutely no merit in ground 8 and we accordingly dismiss it.

The net result is that the appeal substantially fails and we dismiss it. Further, although ground 6 has succeeded, we decline to overturn the Learned High Court Judge's order that the Appellant reopen the Respondent's account. The reason for this is that at the time the Respondent's account was debited in the sum of K3,471.50 a second time, it was already in a negative balance. What this means is that the second K3,471.50 remitted from her account to that of Kenya Airways was the Appellant's money availed to her as an overdraft. We, as a result, cannot award her what she did not own. The debit did, however, have an impact on her account because it increased the amount in negative balance in her account resulting in higher charges being levied. This needs to be redressed.

The negative balance remained thus notwithstanding the various deposits made into the Respondent's account subsequent to the second debit. Consequently, we order that the debit made to the Respondent's account on 12th August 2010 be reversed so that the status of her account as at 12th August 2010 be restored to what it was. We further order that the higher interest and commissions charged, other than the sum of K150.00, which the court below found as the agreed monthly interest charge, as a consequence of the unauthorized debit effected on 12th August 2010 be reversed. The Appellant will be at liberty to close the Respondent's account after the aforesaid reversals; and, payment to the Respondent of moneys (if any) that will be held to her credit arising from the reversals in view of the deposits made into her account.

The matter, however, does not end here because in the earlier part of this judgment we have found that the Appellant was wrong in debiting the Respondent's account a second time and charging higher interest and commissions. The position we have taken, in this regard, is that there has been an infraction of the Respondent's legal rights which entitles her to an award of nominal damages. Although, she did not lead any evidence in the court below which would have assisted the court to determine a monetary figure as damages for the infraction of her legal right by the Appellant, the fact, in and of itself, that there was such an infraction of her legal right entitles her to nominal damages. In taking this position we are reaffirming what we said in the case of ***David Chiyengele and Others v Scaw Limited***[12]. We, therefore, as we did in the said case, award the Respondent nominal damages in the sum

of K500.00. These damages are to attract interest at the short term bank deposit rate from date of writ to date of judgment and thereafter at the current lending rate as determined by Bank of Zambia till date of payment. We also award the Respondent costs of this appeal and in the court below, to be agreed, in default, taxed.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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J.K. KABUKA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE