IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 37/2017

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

SAVENDA MANAGEMENT SERVICES LIMITED APPLICANT

AND

STANBIC BANK ZAMBIA LIMITED RESPONDENT

CORAM : Wood, Kabuka and Mutuna, JJS

On 2nd November 2020 and 24th November 2020

For the Applicant : **Mr. S. Sikota, SC of Messrs Central Chambers;**

Mr. M. B. Mutemwa, SC of Messrs Mutemwa Chambers;

Mr. A. Wright of Messrs Wright Chambers;

Mr. A. Musukwa of Messrs Andrew Musukwa and Associates;

Mr. A. Kasolo of Messrs Mulilansolo Chambers;

Mr. K. Nchito of Messrs Kapungwe and Nchito Practitioners;

Mr. M. Sinyangwe of Messrs Willa Mutofwe and Associates; and

Mrs. Ponda of Messrs Bemvi Associates Legal Practitioners

For the Respondent: **Mr. E. S. Silwamba, SC and Mr. J. A. Jalasi of Messrs Eric Silwamba Jalasi snd Linyama Legal Practitioner; and Ms. A. D. Theotis of Mesdames Theotis and Mataka and Sampa Legal Practitioners**

R U L I N G

Mutuna JS, delivered the ruling of the Court.

Cases referred to:

1) **Hatten v Harris (1892) A.C. 560**
2) **Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited, SCZ judgment No. 7, of 1996**
3) **Finsbury Investments Limited and Three others v Antonio Ventriglia and another, SCZ judgment No.17 of 2013**
4) **Chibote Limited and others v Meridien BIAO Bank (Zambia) Limited (In Liquidation) (2003) ZR 76**
5) **Muyamwa Liuwa v Judicia; Complaints Authority v Attorney General SCZ judgment number 6 of 2011**
6) **In re Uddin (a child) (2005) EWCA Civ 52**
7) **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (suing as a firm) SCZ/8/52/2014.**
8) **Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company Limited (in Liquidation) and INDENI, Petroleum Refinery Company SCZ/8/199/2008**
9) **Mpongwe Farms Limited v DAR Farms and Transport Limited Appeal No. 208 of 2015**
10) **Zambia National Commercial Bank Plc v Gregory Muyamwa and 88 others SCZ judgment No. 37 of 2017**
11) **Leoanrd Kanyanda v Ital Terrazo Ltd, Appeal No. 125 of 2016**
12) **Trevor Limpic v Rachel Mawere and 2 others, SCZ judgment No. 35 of 2014**
13) **BP Zambia Limited v Lishomwa and others, Appeal No. 72 of 2007**
14) **The Attorney-General and Dvelopment Bank of Zambia v Gershom Moses Burton Mumba (2006) ZR page 77**

15) **R v Bow Street Metropolitan Stierdiary Magistrate and others, ex parte Pinochet (1999) 1 ALL ER 1936**
16) **Geofrey Miyanda v The Attorney General SCZ number 21 of 1985**
17) **Susan Mwale Harman v Bank of Zambia Appeal No. 185 of 2015**

Statute referred to:

1) **Supreme Court Act, Cap 25**
2) **Banking and Financial Services Act, Cap 387**
3) **High Court Act, Cap 27**
4) **Constitution, Cap 1**

Works referred to:

1) **Halsburys Laws of England by Lord Hailsham of St. Maryleborne, 3rd edition, volume 22, Sweet and Maxwell, London**
2) **Blacks Law Dictionary, by Bryan A. Garner, 7th edition, Thomson West, USA**

Introduction

1) On 28th October 2019 the Applicant filed a motion pursuant to rule 78 of the ***Supreme Court Rules***. The motion is a reincarnation of appeal number 37 of 2017 in which we delivered a judgment on 13th March 2018, at Ndola, numbered, SCZ judgment number 10 of 2018.

2) The motion seeks to resurrect matters in that judgment as follows:

2.1 to reopen appeal number 37 of 2017 and revisit the judgment of 13th March 2018 on the following grounds:

2.1.1 The Applicant through no fault of its own was subjected to injustice when this Honourable Court made an oversight and omitted to uphold an award of damages for negligence, after this Honourable Court having held that clause 2.3 of the Credit Data (Privacy) Code (hereinafter referred to as the Code) was a mandatory requirement in its judgment at pages J96 to J98 in paragraphs 133-135, and, as was held by the trial Court that the Respondent was negligent in breaching clause 2.3 of the Code, as was pleaded, and proved in the trial Court;

2.1.2 The Applicant through no fault of its own was subjected to injustice when this Honourable Court omitted and made an oversight as to the nature of the relief sought by the Applicant

being damages for negligence for being listed negligently on the Credit Reference Bureau by the Respondent and reversed the judgment of the trial Court on damages for negligence that were pleaded and proved;

2.1.3 This Honourable Court made an oversight and omission on a point of law when it held that the ***Banking and Financial Services Act*** (Provision of Credit Data and Utilization of Credit Reference Services) Directive 2008 (hereinafter referred to as the Directive of 2008) did away with the mandatory requirement of a written statement at the time of accessing credit to a customer in clause 2.1 of the Code by referring only to the Directive of 2008 and paragraph 4 of Guidance Note No. 1 of 2014, Utilization of the credit Reporting System (hereinafter referred to as the Guidance Note of 2014) in isolation and ignored other relevant provisions of Guidance

Note of 2014 which guide the application of both the Code and Directive of 2008;

2.1.4 The Applicant through no fault of its own was subjected to injustice when this Honorable Court awarded costs to the Respondent in all three Courts when the Applicant had proved its case on the balance of probabilities for negligence in that it was negligently listed on the Credit Reference Bureau by the Respondent.

3) We have deliberately set out the grounds in full for reasons that will become apparent later in this ruling.

4) The motion is supported by an affidavit sworn by one Clever Siame Mpoha. The Respondent has raised a preliminary objection to the motion.

Background

5) The background to the motion, which is relevant in the determination of the preliminary objection before us, is that the Applicant and Respondent enjoyed a relationship of customer and banker, respectively, for some time. As a

consequence of this relationship a facility was extended to the Applicant by the Respondent on agreed terms and secured by a lease of the Applicant's property.

6) Differences arose between the two parties regarding the facility. The Respondent contended that the Applicant was in default of its undertaking to service the facility prompting it to refer the Applicant's credit data to a credit reference agency (the agency) in 2008.

7) The Applicant was unhappy with the move taken by the Respondent and it escalated a complaint to Bank of Zambia as regulator of banks. In doing so it denied being in default and contended that the alleged default was as a result of an error in the Respondent's information technology system (IT system).

8) The Applicant's credit data as submitted to the agency remained with the agency for a while and a number of entities which had actual dealings and intended to have dealings with the Applicant had access to it. Despite this, the two parties continued to enjoy their relationship of customer and banker arising from which they agreed to

restructure all the facilities extended to the Applicant by the Respondent.

9) Later the parties referred their differences to arbitration and an award was rendered in favour of the Respondent. The award effectively confirmed the Applicant's default and its indebtedness to the Respondent.

10) Notwithstanding the award of the arbitrator, the Applicant took out an action against the Respondent in the High Court. It claimed: the sum of K192,500,000.00 as damages for loss of business arising from the Respondent's erroneous provision of its credit data to the agency; damages for loss of business profits; damages for negligence; damages for injury to business reputation; and, any other relief the Court may deem fit.

11) The Respondent denied the claim and attributed the default by the Applicant to its persistent failure to service the facility on a monthly basis. It therefore, contended that the listing of the Applicant's credit data with the agency was in order.

12) The High Court Judge found that the Respondent acted negligently in listing the Applicant on the agency, which resulted in the Applicant's business reputation being eroded and loss of funding opportunities. He found as a fact that the Applicant did not default but that the perceived default was actually an error in the Respondent's IT system which it admitted in a letter dated 23rd April, 2009.

13) As a consequence of these findings, the Judge held that at the time of supplying the Applicant's credit data to the agency, the Respondent had not conducted a diligent investigation into the true state of affairs of the Applicant's account. He found this to be in breach of clauses 2.6 and 2.7 of the Code. The Judge concluded that since the credit data provided was not accurate, the Respondent's actions were negligent. He found further that the Respondent ought to have obtained the Applicant's consent in terms of section 50(i)(a) of the ***Banking and Financial Services Act*** prior to providing

the data to the agency. This, he said amounted to breach of confidentiality by the Respondent.

14) The Judge held that the Applicant had proved its case on a balance of probabilities and awarded it all the reliefs claimed.

15) The Respondent was aggrieved by the decision of the Learned High Court Judge and launched an appeal to the Court of Appeal advancing seven grounds of appeal as follows:

15.1 The learned Trial Judge erred in fact and law when;

a) he made findings of fact that the Respondent had acted negligently when he determined that the [Applicant's] loan account was in default and proceeded to classify it as a delinquent account;

b) he made findings of fact that the [Applicant] should not have been listed on the Credit Reference Agency on the basis that the debt was fully secured by legal mortgages;

c) he made a finding of fact that the issue of default only arose in October 2008 notwithstanding evidence on record of the [Applicant's] default prior to that date;

d) he held that the [Applicant] was not indebted to the Respondent by misconstruing, the import of the letter dated 23rd April, 2009 from the Respondent to the [Applicant]; and

e) he held that the [Applicant] had suffered loss as a result being listed on the credit reference agency despite the [Applicant] having failed to prove any loss at trial.

15.2 The Learned Trial Judge erred in law when he fixed the date for hearing and thereafter commenced the trial before the parties had filed bundles of documents and thereafter permitted the parties to file bundles of documents *ex post facto* (after the fact) and consequently filed amended and supplementary witness statements;

15.3 The Learned Trial Judge erred in law and fact when he ordered that the [Applicant] be delisted from the Credit Reference Agency notwithstanding the [Applicant's] admissions contained in its statement of claim filed in the Court below confirming findings of indebtedness and/or default in the arbitration proceedings under cause number 2013/HP/ARB 14;

15.4 The Learned Trial Judge misdirected himself in law when he proceeded to determine *suo motu* (on his own motion) the issue of confidentiality under section 50 of the ***Banking and Financial Services Act***, Chapter 387, volume 21 of the Laws of Zambia which deals with the requirement of customer consent and prior notification under the Credit Data (Privacy) Code issued by Bank of Zambia when these were not pleaded and no evidence adduced;

15.5 The Learned Trial Judge erred in law and fact when he awarded the [Applicant] damages for loss of business and profits, damages for injury to

business reputation and damages for negligence when there was no evidence adduced by the [Applicant] at trial to support these claims, and after having acknowledged that the Applicant had not addressed the Court below on the requisite ingredients of negligence;

15.6 The Learned Trial Judge erred in law by admitting an expert report which was filed in the absence of the requisite notices *videlicet*; Hearsay Notices and Expert Report Notice;

15.7 The Learned Trial Judge erred in law and fact when he did not adjudicate on all issues in controversy.

16) We have deliberately reproduced the grounds of appeal in full because the grounds of appeal and indeed determination by the Court of Appeal, which is also detailed, like the claim endorsed on the writ (reproduced at page R8 hereof) and findings by the judge have a bearing on the fate of the application before us.

17) After hearing the parties, the Court of Appeal identified four issues falling for determination as follows: was the

Applicant in default in servicing the loan relating to the lease; was the Respondent entitled to refer the Applicant's credit data to the agency; was the reference of the Applicant's credit data to the agency in accordance with the law; and a side issue from the third issue, what is the effect of the Code, the Directive 2008 and Guidance Note; and, did the Applicant suffer as a consequence of the reference of its credit data to the agency?

18) The Court held that there was sufficient evidence in the correspondence passing between the parties which revealed that the Respondent notified the Applicant of its default and that the latter acknowledged the default. It also held that the default was from inception of the tenure of the lease. To this end, it held that the Learned High Court Judge misdirected himself when he failed to consider the evidence showing default on the part of the Applicant.

19) In relation to issue of consent for Applicant's credit data to be referred to the agency, the Court held that the provisions of the law required such consent to be

obtained from the customer by a bank. That such consent would normally be obtained at inception of the loan by way of a clause in the facility letter notifying the customer of the consequences of default being the referral of its credit data to the agency.

20) The Court examined the circumstances surrounding the facility and held that there was no such notification given to the Applicant by the Respondent. As such, no consent was given by the Applicant. Consequently, the Respondent breached the duty of confidentiality owed to the Applicant as its customer. In addition, it held that in view of the provisions of Section 13 of the ***High Court Act*** which enjoins Judges of that Court to determine all questions in dispute in the matter, whether or not presented by the parties, the Learned High Court Judge was on firm ground when he considered and made a determination on the provisions of Section 50 of the ***Banking and Financial Services Act***.

21) The Court clarified the position taken in the preceding paragraph that the need for consent or notification of the

consequences and consent thereto was pre the directive 2008. In 2008 when the Directive 2008 came into force the Respondent was compelled to submit its customers' credit data to the agency. For this reason, upon restructuring of the Applicant's facility in November 2008, the Respondent was obliged to provide the Applicant's data to the agency. It also held that clause 2.3 of the Code does not compel a credit provider to give notice to a customer of the consequences of default. That is was merely recommended practice.

22) Lastly, as regards the last issue, the question posed by the Court was whether the Applicant suffered damages as a consequence of the disclosure of its credit data. It held that although the credit data revealed was negative it was accurate. Consequently, though the Applicant's consent was not obtained in regard to its credit data for the period before the Directive 2008, there was no imaginable damage that could have been suffered by the Applicant. Further, there was no evidence led to show that it was denied funding as a result of the revelation of

its credit status. As for the period post 2008, the law had changed and the provision of credit data was mandatory. Therefore, the Respondent acted within the law.

23) The Court was compelled to award nominal damages of K5,000.00 only for the Respondent's acts prior to the Directive 2008 because the Applicant failed to prove the actual damages suffered. This was in relation to its holding that the Respondent breached the duty of confidentiality owed to the Applicant. It also declined the Applicant's requests to be delisted from the agency on account of the mandatory application of Directive 2008. It set aside the award of damages of K192,500,000.00 and all other reliefs granted by the High Court.

24) The Court also granted the Applicant leave to appeal to this Court. The Applicant accordingly appealed advancing four grounds as follows:

24.1 The Court below erred in law and fact and fell in grave error by failing to properly address and evaluate the application of the ***Banking and Financial Services Act***, Credit Data (Privacy) Code,

Banking and Financial Services Act (Provision of Credit Data and Utilization of Credit Reference Services) Directive 2008, and Guidance Note 1 of 2014 - Utilization of Credit Reporting System;

24.2 The Court below erred in law and in fact when it held that the Applicant subsequently consented to being listed on the Credit Reference Bureau when the finding is not supported by the evidence on record neither was it pleaded nor considered by the trial Court;

24.3(a)The Court below misdirected itself and failed to consider documentary evidence and witness testimony as a whole but instead chose to highlight certain pieces of the evidence in isolation and made findings of fact based entirely on the said isolated evidence without referring it to or contrasting it with other evidence on record by holding that the Applicant was in default when there was evidence to support the fact that the Applicant was not in default;

(b) The Court below erred in law and fact by interfering with the finding of fact made by the learned trial judge in the High Court;

(c) The Court below fell in grave error by holding that the reference to the Credit Reference Bureau was accurate and despite the evidence to the contrary;

24.4 The Court below erred in fact and law when it interfered with the award of damages by the learned trial judge.

25) After we considered the arguments by counsel for the parties we began our consideration of ground 1 of the appeal by stating the effect of clause 2.1 of the Code. In doing so we agreed with the meaning ascribed to it by the Court of Appeal that it compels a credit provider to inform the customer of the consequences of obtaining credit before or at the time of providing credit, that his or her data may be provided to a credit reference agency or a debt collection agency. In so doing, obtain the customer's consent.

26) We explained further that the clause compels a credit provider to reveal to the customer the contents of the credit data so provided and advise the consequences of default in respect of the period of retention of such data by the agency. In addition, we gave the rationale for such notice.

27) Further, we discussed the bankers' duty of confidentiality and the effect of Section 50 of the ***Banking and Financial Services Act***. We did not agree with the holding by the Court of Appeal that the Learned High Court Judge was on firm ground in considering and finding that the Respondent had breached this duty. The basis of our disagreement stemmed from the fact that the consideration of the issue by the High Court was notwithstanding the fact that it was not specifically pleaded nor evidence led. We, in this regard, reminded ourselves that the grievance presented by the Applicant in the High Court was that it was wrongly listed as a delinquent borrower on the credit reference agency and

not that it was listed without its consent. It did not plead breach of the duty of confidentiality.

28) Our discomfort with the holding by the Court of Appeal was further enhanced by the fact that, although the Learned High Court Judge discussed the duty of confidentiality, he did not make a decision on it. He instead granted the Applicant all the remedies claimed in the writ which did not include breach of duty of confidentiality. The Court of Appeal therefore, could not uphold a decision which had not been made by the High Court. We also disagreed with the Court's interpretation of the powers of a High Court Judge under section 13 of the ***High Court Act*** in light of the fact that ours is an adversarial and not inquisitorial system. For this reason, we proceeded to set aside the holding.

29) We also considered the effect of clause 2.3 of the Code in our consideration of ground 1 of the appeal. Our conclusion here was that it is a mandatory requirement for a credit provider to give written notice to a customer upon default and consequences of such default. We

disagreed with the holding by the Court of Appeal that the giving of notice was a recommended practice rather than mandatory.

30) We concluded our determination of ground 1 by considering the effect of the issuance of directive number 4 of Directive 2008. We said that it compelled credit providers to resort to and provide credit data to an agency. In the case of the former, prior to giving credit. We held that the Directive 2008 did away with the requirement of need for a written notice to be given to a customer before or at the time of providing credit.

31) In ground 2 of the appeal, the Applicant contested the holding by the Court of Appeal that by the facility letter dated 20th November 2009, it consented to its credit data being referred to the agency. The ground of the challenge was that there were no terms and conditions attached to the said letter which could be construed as a notice of the Respondent's intent to refer the Applicant's credit data to the agency which notice the Applicant consented to.

32) We agreed with the Applicant that indeed there was no consent given by it because the terms and conditions referred to in the letter were not attached to it as a schedule. However, we found this to be a moot point because, in any event, and as correctly held by the Court of Appeal, after the coming into effect of Directive 2008, it was mandatory for credit providers to resort to the agency and provide it with its customers credit data, whether the same was positive or negative.

33) Coming to ground 3 of the appeal in which the Applicant attacked the holding by the Court of Appeal that it was in default and that the Respondent's provision of its credit data to the credit reference agency was accurate, the Applicant contended that the holding was contrary to the evidence presented before the High Court. The emphasis here was the interpretation given by the Learned High Court Judge to the letter of 23rd April 2009 that the Respondent conceded that the perception of default on the part of the Applicant's account was brought about by an error in its IT system.

34) We dismissed the contention on the ground that there was overwhelming evidence before the High Court which revealed default on the part of the Applicant and admissions to this effect. The Court of Appeal correctly interpreted the said evidence to show default on the part of the Applicant.

35) We reiterated that the award of damages for breach of confidentiality by the Court of Appeal was a misdirection because, although the High Court Judge considered it, he did not award it. There was no basis, as a result, for the Court of Appeal to uphold it. In the case of damages awarded by the High Court for negligence for wrongful listing of the Applicant on the agency by the Respondent; we noted the basis upon which the claim was made by the Applicant that it was not in default, therefore, it was wrongly listed. This argument by the Applicant was accepted by the High Court Judge but set aside by the Court of Appeal which reviewed the evidence presented before the High Court Judge revealing default on the part of the Applicant.

36) We agreed with the decision of the Court of Appeal on the issue and upheld its reversal of the award of damages.

37) In the last ground of appeal, the Applicant attacked the decision by the Court of Appeal which reversed the award of damages in the sum of K192,500,000.00 and substituted it with an award of nominal damages in the sum of K5,000.00. Our decision on this ground was that its determination was rendered *otiose* in view of our decision under ground 1 of the appeal setting aside the holding and award of damages for breach of confidentiality by the Court of Appeal. Further, we clarified that the claim for damages for negligence as awarded by the High Court Judge could not be sustained because the basis upon which it was awarded was a wrong finding of fact by the judge that the Applicant had not defaulted.

38) We also expressed our misgivings about the manner in which the Learned High Court Judge awarded the K192,500,000.00 in the absence of evidence to support it or pleadings particularizing the claim. Our misgivings

extended to the fact that there was no proper assessment of damages conducted by the Learned High Court Judge prior to arriving at the sum of K192,500,000.00. We agreed with the misgivings expressed by counsel for the Respondent in regard to the financial report by one Merchant Bank which was the basis of the award of K192,500,000.00 damages by the High Court Judge. We dismissed the appeal on all four grounds.

39) It is against this background that the Applicant has launched this motion seeking to reopen this matter for purposes of the Court correcting what counsel termed omissions in its judgment. We are compelled to elaborate further on this point because it is the gist of the motion. The contention by the Applicant is that despite our determination that clauses 2.3 of the Code had mandatory application and as such, the Respondent had breached it, we omitted to award damages for negligence.

40) Prior to hearing of the motion, the Respondent filed a notice of intention to raise preliminary issues which

purported to move us by way of rule 78 of the ***Supreme Court Rules*** as read with Order 20 rule 11 of the ***Rules of the Supreme Court, 1965 (White Book), 1999 edition***. The preliminary objection was that the Applicant's motion to re-open this matter is grossly irregular and misconceived as it is erroneously anchored on the provisions of rule 78 of the ***Supreme Court Rules***.

Arguments by the parties in support and opposing the Preliminary objection raised by the Respondent

41) Both parties filed written heads of argument prior to the hearing which they augmented with *viva voce* arguments at the hearing.

42) In the written heads of argument, the Applicant argued that the motion as presented does not conform to the provisions of rule 78 but rather seeks to indirectly and substantially alter the judgment of this Court in order to reflect an outcome which would be desirable to the Applicant. Counsel set out the provisions of rule 78 and argued that in order to invoke the provisions of the rule,

a party is obliged to show to the Court that there is infact a clerical error or an error arising out of accidental slip in the judgment.

43) The Respondent argued further that the provisions of rule 78 mirror the provisions of Order 20 rule 11 of the ***White Book*** which enjoin this Court to consider a motion such as the one presented to us if it seeks to correct clerical mistakes or errors arising from any accidental slip or omission. It argued further that the Court has inherent jurisdiction, of its own motion, to vary its own orders so as to carry out its meaning and to make its meaning plain. To reinforce this argument we were referred to a number of English authorities and a passage from the case of ***Hatten v Harris***[1] as follows:

> **"Where an error of that kind has been committed it is always within the competence of the Court, if nothing has intervened which would order it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be made on motion, and is not a matter either for appeal or rehearing."**

44) According to the Respondent, the error or omission must be an error in expressing the manifest intention of the Court. The Court cannot correct a mistake in application of the law or precedent, even though apparent on the face of the order. Further, if the order as drawn correctly expresses the intention, it cannot be corrected under this rule or the inherent jurisdiction of the Court.

45) The Respondent advanced its arguments by quoting passages from the following decisions of this Court: ***Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited***[2]; ***Finsbury Investments Limited and Three others v Antonio Ventriglia and another***[3]***;*** and ***Chibote Limited, and others v Meridien BIAO Bank (Zambia) Limited in Liquidation***[4]. The argument here was that these decisions make it clear that this Court will not re-open a matter if the desire of the applicant is solely to get a favourable judgment. That the provisions of rule 78 are intended to afford this Court

an opportunity to correct any accidental slip or omission in expressing its manifest intention.

46) The Respondent rationalized the position taken in the preceding paragraph by contending that there is need for finality in litigation whether an applicant agrees with the Court's decision or not. Our attention was drawn to passages from our decision in ***Muyamwa Liuwa v Judicial Complaints Authority and Attorney General***[5].

47) The Respondent attacked the Applicant's motion by arguing further that even assuming this Court could re-open proceedings in this matter based on the principles we set out in the ***Finsbury Investments***[3] case, the Applicant has not surmounted the threshold set out in the case. In the ***Finsbury Investments***[3] case when explaining other instances where we can re-open a matter other than under the slip rule we said that we would entertain such an application where the applicant shows that: it is necessary to do so in order to avoid real

injustice; the circumstances are exceptional and make it appropriate to re-open the appeal; and, there is no alternative effective remedy. We adopted these principles from the English case of ***Re Uddin (a child)***[6].

48) The Respondent emphasized the arguments in the preceding paragraph by referring to our decisions in the cases of ***Access Bank (Zambia) Limited v Group Five/ ZCON Business Park Joint Venture (suing as a firm)***[7], ***Richard Nsofu Mandona v Total Aviation and Export Limited, Zambia National Commercial Bank Plc, Zambia National Oil Company Limited (in Liquidation) and Indeni Petroleum Refinery Company***[8] and ***Mpongwe Farms Ltd v Dar Farms and Transport Limited***[9]. In these three cases we restated what we said in the ***Finsbury Investments***[3] case and ***Chibote Limited***[4] case that we shall only re-open matters in deserving cases and the need for finality in litigation. In urging us to follow precedent set in these cases, the Respondent referred us to article 125 (3) of the

Constitution which states that this Court is bound by its previous decisions.

49) In the *viva voce* arguments, Mr. J. A. Jalasi, counsel for the Respondent, argued that although the Applicant had moved the Court by way of rule 78, the motion was actually presented by way of rule 48(5). This latter rule places a limit of fourteen days within which motions should be presented to this Court after delivery of the judgment in contest.

50) Counsel argued that the fourteen days deadline had elapsed prior to the lodging of the motion, therefore, this Court has no jurisdiction to entertain it. He drew our attention to our decision in the case of ***Leonard Kanyanda v Ital Terrazo Ltd***[11] where we said that applications made under 48(1) challenging the decision of a single judge should be made within 14 days of the decision. Further, the same limitation applies in respect to applications challenging a decision on appeal.

51) In the second limb of his argument, Mr. J. A. Jalasi restated the threshold set out in the ***Finsbury Investments***[3] case and argued that the grounds advanced in the motion by the Applicant have failed to meet the test because they reveal the true intent of the Applicant as being merely a need to revisit a decision it is dissatisfied with. He reviewed the grounds advanced in the motion as follows:

51.1 Ground 1 seeks to resurrect the judgment of the High Court and seeks the rehearing or re engineering of the appeal. He based this on the fact that what was at play in the appeal was the interpretation to be given to clause 2.3 of the Code.

51.2 Ground 2 seeks to have this Court re look and reverse its findings. It does not demonstrate the exceptional injustice suffered by the Applicant. To the contrary, if the ground is made to stand, it is the Respondent which would suffer injustice.

51.3 The third ground reveals an unhappy litigant and nothing more.

51.4 Ground 4, which is on costs, was not even argued in the heads of argument in support of the motion.

52) Mr. E. S. Silwamba SC restated the arguments by Mr. J. A. Jalasi and those in the written heads of argument.

53) Ms A. D. Theotis questioned the propriety of the motion in so far as it sought us to invoke our inherent jurisdiction. We were urged to allow the preliminary objection and dismiss the motion.

54) In the introductory part of the Applicant's response, the Applicant argued that the submissions by the Respondent were flawed because the purpose of the motion was not to re-litigate the matter in order to obtain a favourable outcome. It acknowledged the need for finality to litigation and agreed with our interpretation of clause 2.3 of the Code in our judgment which was the subject of the matter before us.

55) The Applicant explained that the motion seeks us to logically conclude our judgment arising from the interpretation given to clause 2.3 of the Code by awarding damages for negligence arising from breach of

clause 2.3, which claim was specifically pleaded, and proved by the Applicant.

56) In opening the substance of its arguments, the Applicant countered the arguments by the Respondent that the motion is misconceived in so far as it is presented by way of rule 78. It argued that in accordance with our decision in the ***Chibote Limited***[4] case, this Court has inherent jurisdiction to make an order as it deems fit in the interests of justice. To this end, the Applicant quoted a passage from that judgment at page 76 as follows: an appeal determined by the Supreme Court will only be re-opened where a party, through no fault of its own has been subjected to an unfair procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong. Here, the Applicant was contending that the motion is properly before us because it conforms with the principle in the ***Chibote Limited***[4] case.

57) The Applicant advanced its arguments by contending that since rule 78 empowers this Court to correct its judgments so as to give meaning to them, the motion is on firm ground. It supported the argument by reference to a passage from ***Halsbury's Laws of England***, 3rd edition, volume 22, at paragraph 1666 as follows:

> **"After the judgment or order has been entered or drawn up, there is power, both in the rules of the Supreme Court and inherent in the Judge, or master who gave or made the judgment or order, to correct any clerical mistake or some error arising from any accidental slip or omission or to vary the judgment or order so as to give effect to his meaning and intention."**

58) The Applicant also referred to our decision in the case of ***Trevor Limpic v Rachel Mawere and 2 others***[12] where we dismissed an application made under rule 78 because it was in effect an attempt by a dissatisfied applicant to obtain a favourable judgment.

59) The written submissions ended by setting out the omissions we allegedly made in the judgment by reference to each ground of the motion. The arguments

were in fact akin to prosecution of the main motion, and as such, premature. For that reason we have not seen it fit to summarize them.

60) In the *viva voce* arguments counsel for the Applicant, Mr. M. B. Mutemwa SC, responded to Mr. J. A. Jalasi's argument that the motion is time barred in view of the restriction placed by rule 48(1) of the ***Supreme Court Rules***. He argued that we made it clear in the case of ***BP Zambia Limited v Lishomwa and others***[13] that an application under rule 78 can be made at anytime and that the limitation placed for motions under rule 48(1) did not apply to it.

61) According to Mr. M. B. Mutemwa SC, the remedy under rule 78 is not subject to rule 48(5) as read with rule (48)(1) and that it can be sought or brought before us without reference to rule 48(5). In effect counsel was arguing that rule 78 is a standalone provision through which a party who is aggrieved by a judgment of this Court, which contains an omission, can launch an attack

against such judgment, outside the fourteen days limitation.

62) Mr. M. B. Mutemwa SC clarified further that the motion is intended to correct omissions made in our judgment in regard to the relief claimed in the High Court and award of damages for negligence made by the same Court.

63) Mr. A. Musukwa, complimented the argument by Mr. M. B. Mutemwa SC by referring us to our decision in the case of ***The Attorney-General and Development Bank of Zambia v Gershom Moses Burton Mumba***[14]. He said the case clearly sets out instances where the remedy under rule 78 will be invoked and that this motion is on all fours with the rule, therefore, properly before us.

64) Mr. S. Sikota SC in seeking to clarify the arguments by Mr. M. B. Mutemwa SC, argued that the Applicant was not approaching us as a dissatisfied litigant. To the contrary, it is satisfied with the judgment handed down by this Court and merely stating an omission arising

from the inescapable consequence of the findings by this Court.

65) Counsel argued that, since we found that non compliance with the provisions of the Code by the Respondent was negligent, which claim was specifically pleaded, we should have awarded the Applicant damages. By way of drawing an analogy, he argued that the position he was advancing was similar to a criminal appeal where an appellate Court upholds a conviction but fails to follow it up with a sentence. The sentence, he argued, is synonymous to the award of damages. He concluded that there was, therefore, an omission on our part.

66) In his submissions, Mr. A. Wright restricted himself to attacking the notice of intention to raise preliminary issue filed by the Respondent. He contended that the rule and order pursuant to which the application was brought do not provide for the raising of preliminary issues. Further, the correct rule is rule 19 of the ***Supreme Court***

Rules which requires an applicant to give reasonable notice. According to Mr. A. Wright, the preliminary objection is, therefore, misconceived.

67) Mr. A. Wright concluded by referring to the arguments advanced by Ms A. D. Theotis. Here, he said that in so far as they related to the inherent jurisdiction of this Court, they are misplaced because they are not expressed in the grounds advanced for the objection.

68) Mr. A. Kasolo agreed with Mr. A. Wright and did not advance the arguments.

69) Mr. M. Sinyangwa's arguments complimented the arguments by Mr. M. B. Mutemwa SC. He referred to the ***Lishomwa***[13] case and said that the motion in that case was anchored on rules 48(5) and 78 of the ***Supreme Court Rules***. That fact notwithstanding, we found that the motion was properly before us despite it having been brought well after the fourteen days deadline.

70) Counsel argued further that we pronounced ourselves very clearly in the ***Lishomwa***[13] case that there is no time limit for presenting a motion under rule 78. For this reason he urged us, as the apex Court, not to depart from our earlier decision as there is need for certainty and consistency in our decisions.

71) In addition, Mr. M. Sinyangwe set out what he felt were the omissions in our judgment. For obvious reasons we have not accepted the temptation to summarize these arguments as they relate to the main motion. This is the same fate which befalls the arguments by Mr. K. Nchito. We were urged to dismiss the preliminary objection and hear the motion.

72) In reply Mr. E. S. Silwamba SC, conceded that he had cited the wrong rule in the notice of intention to raise preliminary issue. The error he argued was, however, not fatal and no prejudice has been suffered by the Applicant as a consequence. This, he argued, was evident from the fact that the Applicant had responded to the preliminary

objection without difficulty. Counsel ended by reminding us that the matters that were before the Court related to the preliminary objection and not the motion. This fact notwithstanding, the Applicant had gone to great length in arguing the motion.

73) The reply by Mr. J. A. Jalasi re-emphasized his earlier argument that a motion under rule 78 can only be properly presented before us by way of rule 48(5). The two rules must, therefore, be read together.

74) As regards the ***Lishomwa***[13] case, counsel argued that the issue of the interplay between rules 48(5) and 78 was not raised in that case. He argued that indeed, an application under rule 78 can be brought at anytime but that it must be before the expiry of fourteen days.

75) Mr. J. A. Jalasi concluded by restating that the Applicant seeks a rehearing of the appeal and not to correct an omission or error. That it seeks to expand the meaning of omission beyond parameters of rule 78. Further, the interpretation sought by the Applicant goes beyond the

parameters set by Order 20 rule 11 of the ***White Book*** on the definition of slip or omission.

76) In addition, he agreed with Mr. A. Musukwa that we were correct in the interpretation we gave to rule 78 in the ***Development Bank of Zambia***[14] case which was an application under the slip rule for the award of interest. He said the omission of interest is a matter properly contemplated to be brought under rule 78.

77) In reply Ms A. D. Theotis clarified that the Court of Appeal not only set aside the award of K192,500,000.00 as damages but all the reliefs awarded by the High Court.

Determination of the preliminary objection and decision of the Court

78) In our determination of the preliminary objection raised by the Respondent we have considered arguments submitted by counsel for the parties and the record. We would like to begin by commending counsel for the industry deployed in the preparation and presentation of

arguments for and against the preliminary objection. Regrettably, such industry from the Bar is the shining exception rather than the shining example.

79) We would like first to address the objection raised by Mr. A. Wright on the rule and order cited by the Respondent in the notice of intention to raise preliminary issue. It is indeed an error on the part of counsel for the Respondent as Mr. E.S. Silwamba SC has magnanimously conceded. However, we agree that the omission is not fatal, therefore curable. Further, there appears to be no prejudice suffered by the Applicant because it ably responded to the notice.

80) From the arguments presented to us we have identified two issues falling for determination as follows:

80.1 Is rule 78 of the ***Supreme Court Rules*** a stand alone rule?

80.2 Whether or not the motion as presented is competent, regard being had to the scope of the

appeal which culminated into judgment number 37 of 2018 and our previous decisions on the scope of rule 78?

81) Three side issues from the first issue are: whether or not an aggrieved party can launch an application under rule 78 without having regard to rule 48(5) of the ***Supreme Court Rules***; and, if the answer to the first issue is in the negative, what is the effect of the fourteen day limitation prescribed by rule 48(1) of the ***Supreme Court Rules***; and, what is the extent of our inherent jurisdiction as explained in the ***Chibote Limited***[4] case?

82) As regards the first issue, the main arguments were advanced by Mr. J. A. Jalasi and Mr. M. B. Mutemwa SC. Mr. J. A. Jalasi argued passionately that a party aggrieved by a decision on appeal who seeks to resort to the slip rule under rule 78 must use the vehicle of rule 48(5). That is to say, a motion under rule 78 can only be presented to us pursuant to rule 48(5) and it should be

filed within fourteen days of the decision in accordance with rule 48(1).

83) To reinforce his arguments, Mr. J. A. Jalasi referred us to Order 20 rule 11 sub-rule 1 of the ***White Book*** which quotes the decision by Lord Watson in the case of ***Hatten v Harris***[1] that the correction in a judgment ought to be made by motion, and is not a matter either for appeal or rehearing.

84) Mr. J. A. Jalasi advanced his argument by contending that as a consequence of the proposition made in the preceding paragraph, the Applicant's motion is incompetent because it is presented out of time.

85) With equal fervence, Mr. M. B. Mutemwa SC, argued that rule 78 is a standalone rule and there is no interplay between it and rule 48(5) of the ***Supreme Court Rules***. In addition, a person seeking to challenge a decision based on rule 78 can launch a motion by virtue of the said rule without reference to rule 48(5) as long as there are sufficient grounds to launch such motion. According

to counsel, we adopted this approach in the ***Chibote Limited***[4] case where we heard a motion under rule 78 on the ground that the applicant through no fault of its own had suffered an injustice due to an unfair procedure by the Court.

86) Mr. M. B. Mutemwa SC argued further that as a result of the disconnect between rule 78 and 48(5) the time limitation prescribed in rule 48(1) does not apply to motions brought under rule 78 as they can be presented at any time after judgment. This he said is in line with our pronouncement in the case of ***BP Zambia Limited v Lishomwa and Others***[13].

87) The starting point in determining the first issue is an analysis of rule 48(5) and its effect. The rule states as follows:

48(5) **"An application involving the decision of an appeal shall be made to the Court in like manner as aforesaid, but the proceedings shall be filed in thirteen hard copies and an electronic copy and the application shall be heard in Court unless the Chief Justice or presiding judge shall otherwise direct."**

The " ... *like manner as aforesaid* ..." referred to in the order is a reference to among others, rules 48(1) which provides that such application will be by motion or summons and states that such motion or summons shall be filed within fourteen days of the decision complained of.

88) Our interpretation of the foregoing provisions is that: they prescribe the mode of moving this Court to be by way of summons or motion where a person seeks to challenge a decision of this Court; and, that such motion will be presented in the same manner as that made before a single Judge of our Court and, within fourteen days of the decision complained of. We, therefore, agree with Mr. J. A. Jalasi that all motions to this Court seeking to challenge a decision must be by way of rule 48(5) as read with rule 48(1) which prescribes the time limit.

89) We do not accept the arguments by Mr. M. B. Mutemwa SC that rule 78 is a standalone rule and prescribes the

mode of moving the Court because a reading of that rule reveals that what it actually provides for is the remedy of correction of a judgment rather than the manner of launching an application to achieve such remedy.

90) In addition, we do not agree with the argument by Mr. M. B. Mutemwa SC which suggests that a party can invoke the remedy of slip rule through the inherent jurisdiction of the Court on grounds of unfair procedure in accordance with the ***Chibote Limited***[4] case. His argument here was to the effect that such a motion can be launched under rule 78 and not 48(5) as long as the ground of unfair procedure is advanced. This tied in well with the Applicant's contentions in the grounds in support of the motion that and ,we quote, *"The Applicant through no fault of its own was subjected to an injustice ..."*

91) We have set out part of our holding in the ***Chibote Limited***[4] case which is relevant to the arguments advanced by Mr. M. B. Mutemwa SC earlier in this

ruling. It is important to explain the background and context in which we arrived at that decision. In deciding the ***Chibote Limited***[4] case we were persuaded by the decision of the House of Lords (now Supreme Court) in England in the case of ***R v Bow Street Metropolitan Stipendiary Magistrates and others ex parte Pinochet***[15]. The brief facts of that case were that the House of Lords on an appeal by the Government of Spain, in which by a majority of 3 to 2, found that the former President of Chile, Augustine Pinochet Ugarte (Pinochet) did not enjoy immunity in respect of acts committed while he was head of State. As such the Secretary of State could, if he wished, extradite him to Spain to face trial.

92) Pinochet later applied to the House of Lords to set aside that order on the ground that Lord Hoffman who had concurred with the majority opinion of the Court was closely linked to one of the parties that had intervened in the appeal, which interveners had sought his extradition

for trial in Spain. The linkage gave the appearance of bias against Lord Hoffman. The Court held that it had jurisdiction in appropriate cases to rescind or vary an earlier order of the Court. It also stated that the Court has power to correct an injustice caused by an earlier order, and that there is no relevant statutory limitation in this regard.

93) These facts and the holding are what informed our decision in the ***Chibote Limited***[4] case as expressed earlier in this ruling. It is important to note that the facts in the Pinochet case reveal that his discomfort with the decision of the Court arose, not from the reasoning thereof, nor was he attacking such reasoning, but events leading up to the decision. That is, the association or company which Lord Hoffman kept which led to a perception of bias. It was, therefore, a challenge against the procedure or road map leading up to the decision.

94) Our reasoning in the preceding paragraph is reinforced by our other holding in the ***Chibote Limited***[4] case

aforementioned, in which we said in part that we will reopen an appeal *"... where a party, through no fault of its own has been subjected to an unfair PROCEDURE ..."* (The underlining and capital letters are ours and deliberate to emphasize the point). There was thus no challenge to the reasoning in the judgment or the decision.

95) In contradistinction, the motion with which we are engaged contests and challenges our decision and not procedure or road map leading up to the decision. The allegation is that we omitted to award damages for negligence. We should now award damages for negligence. To this extent, the ***Chibote Limited***[4] and indeed Pinochet's cases are distinct from this case and are not helpful to the Applicant's cause.

96) In addition, our review of the relevant decisions of this Court on the slip rule spanning a period of over thirty years shows that we have consistently said that it can only be invoked for purposes of correcting a clerical error or omission. We have repeatedly said we will not revisit

our reasoning or decision in order to meet the wishes of a dissatisfied applicant by way of the slip-rule. The cases which speak to the foregoing are as follows: ***Geoffrey Miyanda v Attorney General (No.2)***[16] rendered in 1985, ***Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited***[2], rendered in 1996, ***the Attorney General and development Bank of Zambia v Mumba***[14], rendered in 2006, ***Finsbury Investments Limited and others v Ventriglia and another***[3], rendered in 2013, and ***Susan Mwale Harman v Bank of Zambia***[17], rendered in 2017.

97) Our decision in the preceding paragraph has also been informed by ***Blacks Law Dictionary***, by Bryan A. Garner which defines clerical error at page 563 as an error resulting from a minor mistake or inadvertence ... and not from judicial reasoning. Omission, on the other hand, is defined at page 1116 as a failure to do something or the act of leaving something out. The definitions clearly demonstrate that the slip rule does not

apply to judicial reasoning. We therefore, agree with Mr. J. A. Jalasi that the endorsement on the motion which we reproduced at pages R4 to R6 is beyond the scope of the slip rule which renders the motion misconceived.

98) Further, the House of Lord in Pinochet's case speaks to there being no statutory limitation for the exercise of such inherent jurisdiction i.e. to correct an injustice. We agreed with the House of Lords, in 2003 in the ***Chibote Limited***[14] case, before the statutory limitation in rule 48(1) was enacted. The firm view we have taken is that, in so far as, the only avenue open to a person in situations such as the Applicant finds itself in and indeed contesting an injustice, is by way of motion or summons pursuant to rule 48(5), the same should be filed within the time limit prescribed by rule 48(1). The intention of the legislature in enacting this time limit was the need to bring litigation to an end and therefore, prompt aggrieved parties to act swiftly.

99) Coming to the sub issue of whether the time line of fourteen days in rule 48(1) is applicable to this case, we are of the firm view that it is partially answered by our determination in the preceding paragraphs. In addition, the ***Lishomwa***[13] case does not aid the Applicant's case and can be distinguished from the facts in this case. We did indeed hold at page J13 in the ***Lishomwa***[13] case that rule 78 does not provide any time limit within which a party can apply under the said rule. But our holding must be looked at in its proper context.

100) The holding arose from a submission by counsel for the Respondent on the need for an end to litigation because he felt that the motion was prompted not because there was an error or omission in the judgment but by new precedent which the Applicant sought to use to alter the earlier judgment of the Court. It was not based on and neither was the issue considered, that applications under rule 78 are subject to the time limit as prescribed in rule 48(1). This argument has been presented to us in that

case, and will be determined as opposed to the ***Lishomwa***[13] case where it was not presented (though the motion, as Mr. Sinyangwe argued, was presented to us by way of both rules 78 and 48(5)) and as such, not determined.

101) To the extent that we have held that rule 48(5) is the vehicle through which the remedy under rule 78 is achievable, the time limit prescribed under rule 48(1) is applicable. We, as a consequence, hold that the motion is hopelessly out of time and we lack jurisdiction to determine it in accordance with the objection raised by the Respondent.

102) The determination we have made in the preceding paragraph to a large extent renders the need for determining the second issue otiose. We are, however, compelled to determine it because of the force with which it was argued by the parties in the hope that it will bring closure to the Applicant. Further, the determination of the issue, enables us to ascertain the real intention of the

Applicant in launching the motion. This is important because the common thread that resonates through most of the authorities cited by counsel is that we will not reopen an appeal if the sole purpose of an applicant is to get a favorable judgment. Counsel from both sides are in agreement with this. A motion anchored solely on that purpose would thus be misconceived. In addition, the effect of rule 48(5) as read with 48(1) is that in re-opening an appeal, the Court will only deal with matters that are contained in the decision or were the subject of the appeal.

103) The history we have given in the earlier part of this ruling of this case is relevant to the issue on hand. It reveals that the claim which the Applicant launched in the High Court was, among others, damages for being wrongly listed. The High Court Judge in his wisdom granted this claim among other claims. The Respondent contested it in the Court of Appeal and was successful. The relevant portion of the judgment of the Court of Appeal which

reflects this was referred to us by Ms A. D. Theotis and it is at page 172 of the record of appeal and is as follows: *"... we therefore set aside the award of K192,500,000.00 as well as all the relief granted to the Respondent ..."* The Applicant contested this in the appeal launched before us as revealed by the grounds of appeal at pages R17 to R19 of this ruling. It also sought an interpretation of the provisions of the Code, Directive 2008 and Guidance Note 2014 which we did and explained why damages were not awardable.

104) Our reasoning was based on the following facts: negligence was not proved as pleaded because the evidence revealed default on the part of the Applicant, therefore it was properly listed on the agency; award of damages for breach of confidentiality could not stand because it was not pleaded and although pronounced upon by the Court of Appeal, was not awarded by the High Court; despite the breach of Code no imaginable damages could be proved as the credit data submitted

though negative was correct and neither were any proved.; and, as a consequence of the two preceding holdings, the interpretation of the mandatory nature of the clause 2.3 was academic. This is contained in our judgment in dealing with ground 1, 3 and 4 of the appeal.

105) It is also important to note that the Court of Appeal in setting aside the award of damages for negligence *"... in its place ...[awarded] ... the sum of K5,000.00 as nominal damages ..."* for breach of confidentiality. We set aside this award on appeal because, although the High Court Judge considered it, he did not award it but awarded all the reliefs claimed as pleaded.

106 To the extent, therefore, that the Applicant seeks of us, by the motion, to correct what it terms an omission and award damages for negligence, arising out of breach of clause 2.3 of the Code, it is misconceived because the claim as presented in the High Court and evidence led, sought damages for negligence for wrongful listing, based on the contention that it was not in default. This was the position taken on appeal to this Court as well as reflected by ground 3 of the appeal. The Applicant at all material

times alleged negligence for wrongful listing based on its claim that it was not in default. At no time did it contend negligence for breach of clause 2.3 of the Code. The claim as presented and as Mr. J. A. Jalasi argued, is an attempt to re-engineer the appeal. It is, and using the words we have often used in such matters, an attempt by a dissatisfied party to re-open the appeal for the sole purpose of getting a favorable decision.

Conclusion

107) To the extent we have explained in the preceding paragraphs, the preliminary objection has merit and we uphold it. In doing so we hold the motion to be misconceived and dismiss it with costs. These will be taxed in default of agreement.

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A. M. WOOD
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE