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IN THE HIGH COURT FOR ZAMBIA 2023/HPC/A0883

AT THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

AFRICAN BANKING CORPORATION ZAMBIA LIMITED

T/A ATLAS MARA APPELLANT

AND

THE COMPETITION AND CONSUMER PROTECTION

COMMISSION (Re Allan Moosho) RESPONDENT

Coram: Honourable Mr. Justice L. Mwanabo on the 25th November, 2024

For the Appellant: Mrs. M. B. Mutuna, Messrs. Mweshi Banda & Associates and Mrs T. Banda, In-House Counsel

For the Respondent: Ms. T. Chola, In-House Counsel

JUDGMENT

Cases Referred to:

1. Development Bank of Zambia v Stalwart Investment Limited and Others2015/HPC/481
2. Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR 13
3. Trustees of Maximum Miracle Centre v Equity Bank (Kenya) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)
4. Stanbic Bank Zambia Limited v A. S. & C Enterprises Limited, Yula Enterprises Limited and Another (2008) ZR Vo. 1 P. 259

5. Mopani Copper Mines Plc v Ndumo Miti (Suing in his capacity as Administrator of the Estate of the late Geoffrey Elliam Miti) and Two Others Appeal No. 154 of 2016
6. Plevin v Paragon Personal Finance Limited (2014) UKSC 61
7. Savenda Management Services v Stanbic Bank Zambia Limited Selected Judgment No. 10 of 2018
8. Tiger Chicks (T/A Progressive Poultry Limited) v Tembo and 4 Others SCZ Appeal No. 06/2020
9. John Mugala and Kenneth Kabenga v the Attorney General (1988-1989) ZR 171
10. Citi Bank Zambia Limited v Suhayl Dudhia, Appeal No. 6 of 2022
11. Fenin v Commission Case-205/03 P (2006) ECR 1-6295
12. Pangea v CCPC Appeal No. 2017/CCPT/005/COM
13. Andries v Attorney General Appeal No. 23 of 2015 [2017] ZMSC 87
14. Bolam v Friern Hospital Management Committee [1957] 1WLR 582
15. Baldwin and Francis Limited v Patent Appeal Tribunal [1959] AC 663
16. McQuaker v Goddard (1940) 1 KB 687
17. Stanbic Bank Zambia Limted v A.S & C Enterprises Limited, Yula Enterprises Limited and Another (2008) ZR Vol 1 259
18. Mopani Copper Mines Plc v Ndumo Miti & Two Others Appeal No. 154 of 2016
19. The People v Shamwana and Others (1982) Z.R. 122
20. Zinka vs Attorney-General (1990-92) ZR 73
21. Hukum Chand Mill vs State of Madhya Pradesh (1964) AIR S.C. 1329

Legislation Referred to:

1. The Competition and Consumer Protection Act, No. 24 of 2010
2. The Banking and Financial Services Act, 2017.

3. **The Banking and Financial Services (Cost of Borrowing) Regulations, 1995**

Other Materials Referred to:

1. **Black's Law Dictionary, 8th Edition, 2004**
2. **Bank of Zambia CB Circular No. 5 of 2012**
3. **Bank of Zambia CB Circular No. 19 of 2015**
4. **Bank of Zambia CB Circular No. 12 of 2012**
5. **Cross and Tapper on Evidence, 13th Edition**
6. **Bank of Zambia CB Circular No. 25 of 2012**
7. **Black's Law Dictionary, 11th Edition, 2019**
8. **Barbara Billingsley, Law Now, Relating Law to Life In Canada, The Rule of Law: What Is It? Why Should We Care? Dated April 1, 2002**

1.0 INTRODUCTION

1.1 The Appellant's Appeal is against the decision of the **Competition and Consumer Protection Tribunal (the Tribunal)** which upheld the decision by the Board of the Respondent that found the Appellant to have breached **Section 49(5) of the Competition and Consumer Protection Act[1] (the Act)**. The Appellant was fined under **Section 49(6) of the Act[1]** as read with the Respondent's Guide for Administration of Fines.

1.2 The Tribunal, after hearing the matter, upheld the Respondent's decision that the Appellant failed to exercise reasonable care and skill in dealing with the Complainant's loan. The Tribunal established that there was no increase in Monetary Policy Rate (MPR) in 2016 and further that there were reductions in MPR during the tenor for second Loan (Loan 2) advanced to Mr. Allan Moosho (the Complainant). The Tribunal upheld the Respondent's directive to the Appellant to reconstruct the loan and furnish the Respondent

and the Complainant a detailed and independently verified statement of account of the loan within 30 days from the date of delivery of its judgment. The statement of account was to show all debits and credits and applicable interest rates from the inception of the loan.

2.0 BACKGROUND

2.1 This appeal is, once again, about the usually ugly contest between a borrower and lending institution that arises mostly when the lender pursues the borrower to recover a loan deemed to be under default. The Respondent received a complaint from the Complainant against the Appellant concerning the handling of his loans following which the Appellant which was held to be in breach of **Section 49(5) of the Act[1].** The Complainant alleged that between 2012 and 2013, he acquired a loan facility (loan 1) in the sum of ZMW15,000.00 from BancABC (the Appellant herein as it was then called). In 2014 the Complainant stated that he obtained another loan (loan 2) of about ZMW30,000.00. The loan was to run for a period of 60 months. According to the Complainant, he settled the loan in issue in 2019. In 2021, the Complainant said that he acquired another loan facility (loan 3) from the Appellant in the sum of ZMW75,000.00. When the money was disbursed into his account and after using ZMW60,000.00 of that amount, the Complainant discovered that his account had been blocked by the Appellant: he could not access the ZMW15,000.00 that was in the account. When the Complainant called the Appellant over the issue he was informed that he was still owing the Appellant ZMW23, 000.00 for the loan he earlier acquired from BancABC i.e. loan 2. The Appellant agreed to unblock the Complainant's account and gave him access to ZMW5,000.00 while ZMW10,000.00 was channeled towards settlement of the

ZMW23,000.00 outstanding on loan 2 thereby reducing the loan balance to ZMW13,000.00.

2.2 The Complainant later visited the Appellant's Mumbwa Branch and produced all his pay slips as proof of having settled loan 2. He was informed by the Appellant that the ZMW23,000.00 was as a result of the upward adjustments in interest rates that took place between 2016 and 2017 and that communication to that effect was made to clients. The Complainant disputed receiving the said communication. He expressed displeasure with the Appellant's position and indicated to the Appellant that he would seek legal intervention.

2.3 In April, 2022, about a year later from the last communication between the Complainant and the Appellant, the Complainant discovered from his April, 2022 pay slip that the Appellant had initiated deductions of ZMW500.00 for an intended period of 40 months and that there was an indication of a loan balance in the sum of ZMW20,000.00. The Complainant's demanded was for the Appellant to stop making deductions and to refund him the amount that was collected from him after he settled his loan.

2.4 The Appellant contended on its part that the Complainant obtained a loan (loan 1) in the sum of ZMW15,000.00 which he fully settled when he refinanced it by getting loan 2 in the sum of ZMW28,000.00 in January 2014 contrary to his assertion that loan 2 was in the sum of ZMW30,000.00. The Appellant confirmed though that loan 2 was scheduled to run for a period of 60 months starting from 31st January 2015 up to 31st December 2019 with a monthly installment of ZMW1,094.25.

2.5 According to the Appellant, it revised its annual effective interest rate in the loan book for loan 2 following the adjustment in MPR in the year 2016 by the Bank of Zambia (BOZ). The Appellant indicated that the Complainant's loan was rescheduled in order to maintain

affordability which resulted in an increased loan tenor from 60 months to 68 months and that this aspect of the loan was signed for and covered in the complainant's loan agreement.

2.6 The Appellant further stated that the loan was not serviced in accordance with the loan agreement as the complainant overpaid in the first five (5) months of the loan by remitting ZMW1,792.41 instead of the agreed ZMW1, 094.25 thereby resulting in an overpayment of ZMW3, 490 which was refunded to the Complainant in two installments. The Appellant added that the Complainant did not remit the installments for June 2015 and for March, April and May 2016 thereby missing a total of four (4) installments from the initial 60 months. According to the Appellant, the missed payments attracted interest which increased the loan amount to ZMW21, 562.13 as at 31st December, 2020. In January 2021, the Complainant is said to have obtained a loan 3 in the sum of ZMW75,000.OO in order to refinance the ZMW21,562.13 balance on loan 2 and to settle loans with three non-bank financial institutions.

2.7 According to the Appellant, the Complainant withdrew much of the money meant to settle the outstanding balance on loan 2 leaving the Appellant to collect only ZMW5,000.00 which was credited to the loan 2 account. The loan balance was reduced to ZMW16,562.13 as at 12th January 2021. The Appellant denied having any record of keeping the ZMW10,000.00 stated by the Complainant in his letter of complaint to the Respondent.

3.0 MATTER BEFORE THE BOARD AND THE DECISION

3.1 The Board of Commissioners ("the Board") after receiving evidence summarized in the introduction considered the issue of whether the Appellant contravened the provisions of **Section 49(5) of the Act**[1]. The following assessment tests were used by the Board to arrive at its decision:

i. ***Whether the Appellant as an "enterprise" or "person" supplied a service to the consumer; and***

ii. ***Whether the Appellant supplied a particular service to the Complainant with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.***

3.2 The Board found that in view of the definition of consumer in **Section 2 of the Act**[1], the Complainant qualified to be a consumer as envisaged under **the Act**[1] because he obtained loan facilities from the Appellant for his personal use as evidenced by the Complainant's account statement for the period 1st January, 2014 to 16th May, 2022.

3.3 The Board also found that the Appellant was African Banking Corporation Zambia Limited trading as Atlas Mara (now the Appellant herein) whose core business was the supply of banking and financial services and was registered with the Patents and Companies Registration Agency (PACRA) with registration number 119990042541. According to the Board, the Appellant fell under the definition of Enterprise as provided by **Section 2 of the Act**[1].

3.4 The Board also considered the submissions of the Appellant, reviewed the Complainant's account statement and MPR by BOZ from 2014 to 2019. A preliminary Report was prepared after receipt of the complaint and served on the Appellant and the Complainant on 9th June, 2022 for them to make submissions.

3.5 The Board in its findings established that in January, 2014, the Complainant acquired facility loan 2 in the sum of ZMW28,000.00 from the Appellant to be repaid over a period of 60 months at a monthly repayment amount of ZMW1,094.25.

3.6 The Board also established that at the time the Complainant was making his last payment on his loan, he had missed instalments for

the months of June, 2015, March, 2016, April, 2016 and May, 2016, thereby pushing the date of the last instalment from December, 2019 to April, 2020 in line with the initial loan tenor of 60 months.

3.7 The Board established also that during the Complainant's loan 2 tenor, the Bank of Zambia had adjusted MPR upwards from 9.75% in 2014 to 15.5% in 2015; and thereafter reduced it to 12.5% in 2017 and to 11.50% in 2019.

3.8 On MPR, the Board established that at the time the Complainant was making the final instalment on his loan in April, 2021, the Appellant had not effected the interest rate adjustments on the Complainant's loan after MPR changes.

3.9 The Board also established that due to the adjustments in MPR by BOZ and the missed instalments by the Complainant, the loan went into arrears thereby accruing interest leading to an accumulated loan balance of ZMW17,929.92 as at 18th April, 2020 and rising to ZMW21,562.13 as at December, 2020.

3.10 The Board further established that in January, 2021, the Complainant acquired another loan facility from the Appellant in order to refinance his loan 2 and to pay loans the Complainant owed Bayport, Tottengram and IZWE but the Appellant was only able to recover ZMW5,000.00 because the Complainant had withdrawn the rest of the funds.

3.11 In relation to previous cases involving the Appellant, the review of the Appellant case file revealed that there was no previous case against the Appellant in which it was found to have violated **Section 49(5) of the Act[1].**

3.12 On the issue of whether the Appellant was a "Person" or an "Enterprise" that supplied a service to the consumer, reference was made to paragraph 10 of the report. The Board also referred to the **Act[1]** for the definition of the term 'supply' which provides as follows: ***"in relation to goods, the supply, including resupply, by way***

of sale, exchange, lease, hire or hire purchase of the goods; and services, the provision by way of sale, grant or conferment of the services." The Board held the view that the Appellant supplied the Complainant with loan facilities.

3.13 On whether the Appellant supplied a particular service to the Complainant with reasonable care and skill or within a reasonable time, the Board referred to **Black's Law Dictionary**[1] where reasonable care is defined as, ***"a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances".*** And reasonable skill is defined by the same dictionary as: ***"the skill ordinarily possessed and used by persons engaged in a particular business".*** According to the Board, reasonable care and skill would translate to whether the Appellant informed the Complainant that he was still owning on loan 2 due to missed instalments and adjustments in MPR before ceasing to make deductions on his loan April, 2020.

3.14 The Board established that from 8th April, 2020 to December, 2020, the Appellant did not inform the Complainant that he was still owing on his loan due to factors highlighted above. The Board's position was that silence from the Appellant meant that the Complainant's balance kept on accruing interest as can be noted from the Appellant's representations. It was opined that the Appellant should have effected the adjustments in MPR on the Complainant's loan during its initial loan tenure of 60 months and should have informed the Complainant that he was still owning them funds due to the above mentioned factors. The Appellant was found to have only communicated to the Complainant in January, 2021, nine (9) months after the loan amount increased to ZMW21,562.13 as of December, 2020 thereby placing a financial burden on the Complainant. The Board's position was that the Appellant's failure

to effect interest adjustments due to MPR changes on the Complainant's loan during its initial loan tenure and to only communicate to the Complainant when he was making his last instalment in April, 2020 translates into lack of care and skill by the Appellant. The Board's conclusion was that the Appellant did not exercise reasonable care and skill when supplying its service to the Complainant and found the Appellant to have violated **Section 49(5) of the Act**[1].

3.15 The Board further decided that according to the facts and evidence of the case the Appellant was deemed to have engaged in unfair trading practices thereby breaching **Section 49(5) of the Act**[1].

3.16 To that end, the Board directed as follows:

i. The Appellant is fined 0.5% of its annual turnover for breach of **Section 49(5) of the Act**[1] in accordance with **Section 49(6) of the Act**[1] and imposed the applicable cap in line with the Commission's Guidelines for Administration of Fines, 2019.

ii. The Appellant was directed to restructure the Complainant's loan balances as at end of the initial loan tenures and only recover the loan balances outstanding as at the date when the initial loan tenures elapsed and exclude the interest accrued as at the date of resumption of loan recoveries. The Appellant was to submit the restructured loans to the Commission within ten (10) days of receipt of the Board Decision in accordance with **Section 5(d) of the Act**[1];

iii. The Appellant was to submit its latest annual books of account to the Commission for calculation of the actual fine within thirty (30) days of receipt of the Board Decision according to **Section 5(d) of the Act**[1]; and

iv. The Research and Education Unit of the Respondent was to conduct a market survey regarding commercial banks' adjustments of customers' loan tenures based on MPR

changes, as there is no indication of downward adjustments on customers' loan tenures when the MPR is adjusted downwards, yet there are notable upward adjustments when MPR is adjusted upwards.

3.17 The Appellant was given the liberty to appeal against any part of the Board directives within thirty (30) days of receipt of the Decision.

4.0 MATTER BEFORE THE TRIBUNAL AND DECISION

4.1 The Appellant appealed, against the decision of the Board to the Tribunal on 19th September, 2022. Seven (7) grounds of appeal were advanced as follows:

1. ***The Respondent erred both in law and fact, when it found the Appellant liable for breaching Section 49(5) of the Act contrary to banking custom, laws and regulation, which prescribe the standard of care and skill for banks;***
2. ***The Respondent erred both in law and fact, when it found the Appellant guilty of engaging in unfair trading practices in the absence of evidence supporting such a finding;***
3. ***The Respondent arrived at its decision due to a manifest error in assessment of the facts and error of principle that the Appellant was responsible for informing the Complainant that he still owed the Appellant due to missed instalments and adjustments in the monetary policy rate before ceasing to make deductions on his loans;***
4. ***The Respondent erred both in fact and at law, when it failed to acknowledge that the Complainant was accountable for breaching his obligations under the loan agreement;***

5. ***The Respondent misdirected itself when it found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the Monetary Policy Rate in 2016;***
6. ***The Respondent erred both in law and fact when it directed the Appellant to "restructure the Complainant's loans to the balances outstanding as at the end of the initial loan tenures and only recover the loan balances outstanding as at the date, when the initial loan tenures elapsed" excluding interest when it is not empowered to do so and contrary to evidence submitted to show that: the Complainant were notified of the increase in the MPR in 2016; would not remit the loan instalments in full on time or at all; and had given their prior permission to the Appellant to increase their loan tenors in the event of a restructure; and***
7. ***The Respondent erred in law, when it abrogated its Guidelines for Administration of Fines, 2019 published in a daily newspaper of general circulation in Zambia, when it purported to fine the Appellant in accordance with the revised Appendix 1 to its decision which is different from fines in the published guidelines.***

4.2 The Appellant sought the following reliefs:

1. ***That the Respondent's decision that the Appellant breached Section 49(5) of the Act and the directives issued on 19 August 2022 be quashed;***
2. ***That the decision to fine the Appellant be overturned;***
3. ***Cost; and***
4. ***Any other relief the Tribunal may deem necessary.***

4.3 In opposition to the grounds of appeal filed by the Appellant, the Respondent on 25th October, 2022 filed the following responses:

1. ***The Respondent did not err in law and in fact when it found the Appellant liable for breaching Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 (the Act) as the record will show that the Appellant did breach the aforesaid provision;***
2. ***The Respondent was on firm ground when it found the Appellant liable for unfair trading practices and there is evidence to support this finding;***
3. ***Contrary to the Appellant's assertion in ground three, the Respondent did not err in fact and in law as the communication in question would have prevented the loan balance from accruing interest as the Complainant would have met his obligation upon receipt of the communiqué;***
4. ***The record will show, it did acknowledge that the Complainant had not paid four (4) instalments on his loan, hereby pushing the date of the last instalment from December, 2019 to April, 2020;***
5. ***It found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the monetary policy rate in 2016;***
6. ***The Respondent is mandated under the Act to impose such sanctions as it may deem necessary; and***
7. ***That contrary to the Appellant's assertion in ground seven, Appendix 1 of the decision is the conversation [sic] of the fee units appearing in the Administration of Fines Guidelines, 2019 to the nearest round figure in Kwacha.***

4.4 The Respondent sought the following reliefs:

1. ***That the Honourable Tribunal upholds the decision of the Board dated 9th August 2022***

2. ***The appeal herein be dismissed forthwith with costs, as it lacks merit.***
3. ***Any other relief the Tribunal deems fit.***

4.5 The Tribunal considered the evidence adduced and submissions by both parties in the matter and noted that the Appellant had opposed the Decision of the Board by raising seven (7) Grounds of Appeal. Based on the seven grounds of Appeal, the Tribunal opined that there were three key questions to be determined set out as follows:

1. Whether the Appellant exercised reasonable skill and care in the management of the Complainant's Loan 2 in the Appellant's books. The question is phrased as such for it was on basis of the allegation of the Respondent, that its Board examined and found the Appellant to have breached section 49(5) of the Act.
2. Whether the Board was right to direct that the Appellant restructures the Complainant's loan in accordance with the Board's directives.
3. Whether in finding that the Appellant violated section 49(5) of the Act, the Respondent applied the correct fines in line with published guidelines of the Respondent as regards application of fines.

The Tribunal, however, still elected to consider the grounds of appeal separately in order to answer the above questions.

4.6 On the first ground, the Tribunal was of the considered view that the Appellant had a statutory duty to exercise reasonable care and skill in the manner in which the Complainant's loan was managed. According to the Tribunal, the Appellant ought to have informed the Complainant of the duration by which the loan tenor had been extended and that based on the prior notification of the extension, the Complainant would not have been surprised when the Appellant began to deduct extra loan repayments close to two (2) years after

the initial agreed period of sixty (60) months. Thus, the Tribunal found no merit in Ground One and upheld the finding that the Appellant did not exercise reasonable care and skill when offering its service to the Complainant and, therefore, was in breach of **Section 49(5) of the Act**[1].

4.7 In considering Ground Two of the Grounds of Appeal, the Tribunal referred to the case of **Development Bank of Zambia v Stalwart Investment Limited and Others**[1] where it was observed as follows: ***"...the pricing for the facility was dependent on the BOZ policy rate and accordingly the interest rate applicable to the loans was adjusted with each change to the BOZ Policy rate."***

4.8 On the basis of the **Development Bank of Zambia**[1] case, the Tribunal was of the view that the Appellant's actions disadvantaged the Complainant. In addition, it was observed that the Appellant's conduct during the life of loan 2 were a clear affront to BOZ guidelines, which required local currency loans to be priced off MPR. The Tribunal went on to state that, this level of injustice towards the Complainant cannot by any measure be considered as an act of fair trading in the management of the Complainant's loan. The Tribunal held that such conduct flies in the teeth of good banking practice on loans priced at variable interest rates. Therefore, no merit was found in the second ground of appeal. The Tribunal upheld the decision of the Board that the Appellant engaged in unfair business practice.

4.9 On the third ground of appeal, the Tribunal found that the Appellant's failure to communicate the new interest rates and ramifications thereof to the Complainant was in itself an act of negligence and as such the Complainant failed to exhibit reasonable care and skill in the management of the Complainant's loan. Ground three failed on account that the duty to communicate the interest rate adjustment and loan tenor extension was on the Appellant.

4.10 As regards ground four, it was contended that the Respondent failed to acknowledge that the Complainant was accountable for breaching his obligation under the loan agreement. However, the Tribunal did not find any merit in this ground as the Appellant did not adduce a copy of the loan agreement in order for the Tribunal to appreciate the terms and conditions and also to deduce the Complainant's responsibilities as assigned therein. Furthermore, the Tribunal found that the Respondent had acknowledged that the Complainant was accountable for breaching his obligation under the loan agreement when the Complainant missed four (4) payments during the first sixty (60) months of the loan.

4.11 In considering ground five of the appeal, the Tribunal referred to, *inter alia,* **CB Circular No. 5 of 2012**[2] and **No. 19 of 2015**[3] and agreed with the Respondent's finding that the Appellant effected only one interest rate adjustment which was upward adjustment on 30th June, 2016. The Tribunal found no merit in Ground Five and concluded that the Respondent did not misdirect itself when it found that the Appellant implemented only one interest rate adjustment on loan 2.

4.12 The Tribunal summarized Ground Six of the appeal into three (3) arguments raised by the Appellant, which were that:

i. The Respondent had no legal power to direct it to restructure loan 2 and this point hinged on the assertions that: ***"the Complainant were [sic] notified of the increase in the Monetary Policy Rate in 2016; would not remit loan instalments in full on time or at all; and had given their prior permission to the Appellant to increase their loan in their event of a restructure."***

ii. The Appellant notified the Complainant of the purported increase in MPR in 2016.

iii. The Complainant had given the Appellant prior permission to increase the loan tenor in the event of a restructure.

The Tribunal concluded that the Respondent did not err in law or fact, when it directed the Appellant to restructure loan 2. Therefore, Ground Six of the appeal failed.

4.13 Lastly, the Tribunal considered ground seven of the appeal where the Appellant challenged the Respondent's application of the 2019 Guidelines for Administration of Fines. In this regard, the Appellant argued that the Respondent erred in law when it abrogated its Guidelines for Administration of Fines, 2019 published in a daily newspaper of general circulation in Zambia when it purported to fine the Appellant in accordance with the revised Appendix 1 to its decision which is different from the fines in the published guidelines.

4.14 On account of the typographical errors in the Guidelines, the Tribunal did not find merit in ground seven of the appeal and found that the Respondent applied the correct fine in relation to the Board's directive to the effect that the Appellant be fined 0.5% of the Appellant's turnover pursuant to **Section 49(6) of the Act**[1].

4.15 All the seven (7) grounds of appeal failed and according to the Tribunal, the Tribunal upheld the Respondent's finding that the Appellant failed to exercise reasonable care and skill and that by so doing the Appellant breached **Section 49(5) of the Act**[1] on the balance of the law and evidence produced in the matter.

4.16 In view of the Tribunal's finding that there was no increase in MPR in 2016 and that there were reductions in MPR during the tenor of loan 2, the Tribunal maintained the Respondent's directive to the Appellant to reconstruct the loan and to furnish the Respondent and the Complainant a detailed and independently verified statement of account of the said loan within thirty (30) days from the date of delivery of the Judgment. The statement of account was to show all

debits and credits and applicable interest rates from inception of the loan. Costs were awarded to the Respondent.

5.0 THE APPEAL BEFORE THIS COURT

Dissatisfied with the decision of the Tribunal, the Appellant launched an appeal before the High Court on nine grounds as follows:

Ground One

The tribunal erred in law and fact when it held that the Appellant had breached its statutory duty by failing to communicate price adjustments following the increase in the Monitory Policy Rate (MPR) to the Complainant, Allan Moosho, without pointing to the provision in the Banking and Financial Services Act No. 7 of 2017 that gave rise to the purported duty.

Ground Two

The Tribunal misdirected itself when it relied on the Kenyan case of Margret Njeri Muiriri v Bank of Borada (Kenya) Limited [2014] eKLR 13 which refers to a foreign statute not applicable to Zambia for its findings that general banking practice requires a lender to inform the borrower of an adjustment in pricing and the effects thereof on any existing loan.

Ground Three

The Tribunal misapprehended the evidence on record and the case of Development Bank of Zambia v Stalwart Investments Limited and Others cited in paragraph 16.4 of its judgment to support the findings that the Appellant had engaged in unfair business practice.

Ground Four

The Tribunal erred both in law and fact when it disregarded the uncontroverted evidence that the Complainant had consented to adjustments being made to the interest by the Appellant in the loan agreement between the parties and proceeded to find that the Appellant ought to have sought the Complainant's prior approval in fulfilling its alleged duty to communicate the interest rate adjustment and loan tenor extension.

Ground Five

The Tribunal erred in law and fact when it found that the Respondent had held the Complainant accountable by acknowledging that the Complainant had breached his duty under the loan agreement contrary to the evidence on record that it is the Appellant who has been held accountable for the consequences of the Complainant default.

Ground Six

The Tribunal erred in fact and at law when it premised its decision on the Bank of Zambia Circular Nos. 5 and 25 of 2012 when neither the Appellant nor the Respondent had referred to them nor been given an opportunity to address their implications on the dispute.

Ground seven

The Tribunal misdirected itself when it volunteered rulings in (i) the interest rate adjustments applied by the Appellant on the loan, (ii) the MPR adjustment in 2016, (iii) the loan management fee recovered by the Appellant and (iv) the question of penal interest.

Ground eight

The Tribunal erred in fact and at law when it held that section 5(b) and (f) of the Competition and Consumer Protection Act, No. 24 of 2010 (the "Act") empowers the Respondent to impose any sanctions contrary to sections 46, 49 (4) and 82 of the Act.

Ground nine

The Tribunal misdirected itself when it accepted that there was an error in the fee unit published in the Respondent's Guidelines for Administration of Fines, 2019 on the one hand while proceeding to uphold the Respondent's application of an unpublished fee unit on the other hand.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In arguing the appeal, Mrs. Mutuna relied on the Appellant's heads of arguments which she orally augmented. On ground one, the Appellant contended that the Tribunal misdirected itself in its assessment of the duty of reasonable care and skill expected of the Appellant as a financial institution thereby erring in law and fact when it made the comments that are at pages 30 to 32 of its Judgment appearing at pages 39 to 41 of the Record of Appeal. According to Mrs. Mutuna, the Tribunal was influenced by the comments it made at page 39 paragraph 15.7 lines 2 to 6 as follows: ***"The alleged increase in the MPR, raises the question of what the responsibilities of the respective parties to Loan 2 were. In general banking practice, a lender is expected to inform the borrower of an adjustment in pricing and the effects thereof, on any existing loan. Therefore, it would be considered an act of negligence if the lender did not communicate pricing adjustments to its borrowers."***

6.2 The Appellant contended that the Tribunal in making the above comments did not point at any section of the **Banking and**

Financial Services Act (BFSA)[2] despite the appeal being a challenge to the Respondent finding the Appellant to have breached **section 49(5) of the Act**[1] contrary to the banking customs, laws and regulations which prescribe the standard of care and skill for banks. According to the Appellant, there is no duty on the banks set out by the **BFSA**[2] to communicate to the borrower pricing adjustments and their effect. The Appellant expressed dissatisfaction with the Tribunal's reliance on the Kenyan cases of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited**[2] **and Trustees of Maximum Miracle Centre v Equity Bank (Kenya) Limited**[3] in arriving at its decision as indicated on page 40 lines 18 to 24 of the Record of Appeal in the absence of any reference to the **BFSA**[2].

6.3 The Appellant cited the case of **Stanbic Bank Zambia Limited v A. S. & C Enterprises Limited, Yula Enterprises Limited and Another**[4] and the case of **Mopani Copper Mines Plc v Ndumo Miti (Suing in his capacity as Administrator of the Estate of the late Geoffrey Elliam Miti) and Two Others**[5] to fortify its argument that, whenever an allegation is made that there has been a breach of a statutory duty, the statute and specific provision breached must be identified and that in the two cases cited above the breached statutory provisions were specifically identified which is not the case with the decision of the Tribunal. It was argued further that the Tribunal should have seriously considered the Appellant's arguments that adjudicative bodies should not resort to visceral instincts but to standards imposed by the statute. Reference was made to the English case of **Plevin v Paragon Personal Finance Limited**[6] to buttress the argument.

6.4 Mrs. Mutuna further argued that the Tribunal glossed over the Appellant's argument that the services it provided were of advancing loans and that the reasonable standard of care and skill to have

been applied is the one applicable to that kind of service. My attention was drawn to the definition of reasonable care and skill as defined by **Black's Law Dictionary[1].**

6.5 Grounds two and three were argued together. The gist of Mrs. Mutuna's argument is that the case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited[2]** the Tribunal relied on to find the Appellant liable is not applicable to the case at hand because in the Muiruri case, the Kenyan Court was interpreting **Section 44 of the Kenyan Banking Act** which is not provided for by any statute in Zambia. The same argument was extended by Counsel to the Tribunal's reliance on the case of **Maximum Miracle Centre[3]** and contended that the Tribunal should have exercised caution in relying on that case because it was not a final decision but ruling arising from an interlocutory application.

6.6 Counsel drew my attention to the testimony of the Appellant's witness, Steven Kabungo (AW), at page 195 lines 7 to 17 of the Record of Appeal (ROA) where the witness explained the meaning of MPR and stated that the Appellant would only adjust interest in line with changes to MPR made by BOZ. According to Mrs. Mutuna, this is a very crucial distinguishing factor that the Tribunal overlooked when it relied on the Kenyan authorities and that the Tribunal accordingly misapprehended the case of **Development Bank of Zambia v Stalwart Investments Ltd & Others[1]** as it failed to be guided by the very submission it quoted with approval that:

"... the pricing for the facility was dependent on the BOZ policy rate and accordingly the interest rate applicable to the loans was adjusted with each change to the policy rate."

6.7 It was argued that the Tribunal could not on one hand accept the argument that pricing of facilities is dependent on BOZ policy rate which is the same as MPR while on the other hand find that the Appellant's actions, in the Tribunal's considered view,

disadvantaged the Complainant. It was further argued that the Tribunal misapprehended the impact of MPR fluctuations on loans because of its statement on page 43 lines 9 to 11 of the ROA that:

"In addition, the Appellant's conduct during the life of Loan 2 were a clear affront to the BOZ Guidelines, which required the local currency to be priced off the MPR"

6.8 Mrs. Mutuna referred to portions of the evidence of AW where he indicated the method of communication used in communicating the changes to the Complainant as being through the employer because the loan in issue was a scheme loan. It was also pointed out that, when AW was asked by the Vice-Chairperson of the Tribunal as to what measures were put in place by the Appellant to advise the Complainant of the loan amount and interest, his answer was that the Complainant was already aware of the outstanding loan balance by the time he obtained loan 3 in the sum of ZMW80,000.00 from which the Appellant recovered ZMW5,000.00 before resuming deductions of ZMW500.00 in 2022. Mrs. Mutuna repeated the argument that the Tribunal failed to refer to any provision of the **BFSA**[2] which requires notification and the period within which such notification ought to be sent to the borrower.

6.9 On ground four, Mrs. Mutuna submitted that, the evidence on record revealed that there was no dispute between the Complainant and the Appellant concerning the fact that the Complainant had consented to the Appellant adjusting the repayment period in the event of fluctuations in MPR and, therefore, it was not open to the Tribunal to adopt the reasoning in the Kenyan authorities to arrive at its findings on general banking practices. Counsel referred me to the case of **Savenda Management Services v Stanbic Bank Zambia Limited**[7] as restated in the case of **Tiger Chicks (T/A Progressive Poultry Limited) v Tembo and 4 Others SCZ**[8] which is to the effect that our adversarial system shackles the Judge to the

pleadings by the parties and should do nothing more outside the pleadings. That the issue before the Tribunal was whether the Respondent was correct to find that the Appellant had breached **Section 49 of the Act**[1] by not informing the Complainant that he still owed the Appellant money after lapse of the loan tenor and that the Appellant could not adjust interest rates without consulting the Complainant.

6.10 As regards ground five, Mrs. Mutuna drew my attention to the meaning of accountable as defined by **Black's Law Dictionary**[1] and contended that the Tribunal did not correctly apply its mind to the ground of appeal that challenged the Respondent's failure to acknowledge that the Complainant was accountable for breaching his obligations under the loan agreement. The gist of the Appellant's argument on this ground is that, the Complainant is the one who was in breach of repayment terms due to missed payments and increase in MPR but it's the Appellant who was punished for that by the Tribunal. According to the Appellant, the finding of the Tribunal in that regard is perverse because it is akin to punishing the victim for the actions of the wrongdoer.

6.11 Grounds 6 and 7 were argued together. Mrs. Mutuna criticized the Tribunal for basing its decision on **BOZ Circulars No. 5**[2] and **No. 12 of 2012**[4] when none of the parties referred to the same and further that the Tribunal was wrong in volunteering rulings on interest rate adjustments by the Appellant and MPR adjustment in 2016. According to Mrs. Mutuna, the Tribunal set up a new case against the Appellant without warning or inviting the Appellant to submit on the specific portions of the circulars it believed were pertinent to determination of the appeal.

6.12 The main contention concerning grounds six and seven is how the Tribunal went about deciding the issue of the MPR and interest adjustment outside the issues raised by the parties. The case of

Savenda Management Services[7] and the case of **John Mugala and Kenneth Kabenga v the Attorney General**[9] were cited which are to the effect that the Court should not volunteer a ruling without affording the parties chance to address their minds on the issue and that the Court is bound to decide matters according to the pleadings of the parties.

6.13 On ground eight, Mrs. Mutuna's argument is that the Respondent's powers to mete out sanctions is limited to those stated in **Sections 46 and 49 of the Act**[1] and that **Section 5 of the Act**[1] only gives general functions to the Tribunal hence the inclusion of **Section 46 and 49 of the Act**[1] so as to provide specific sanctions for unfair trading practices. That those that are not specifically provided for are taken care of by **Section 82 of the Act**[1].

6.14 As regards ground nine, Mrs. Mutuna condemned the Tribunal's decision to uphold the Respondent's reliance on the unpublished correction of the obvious error in the published guidelines as bad law. The case of **Citi Bank Zambia Limited v Suhayl Dudhia**[10] where the Supreme Court overturned the decision of the Court of Appeal on account of being decided on a narrower view of the consequences of failure to comply with **section 85 (3) (b) (ii) of the Industrial and Labour Relations Act** as badly decided. It was argued that an administrative body is supposed to exercise its statutory functions in accordance with the enabling legislation if its decisions are to be intra vires.

6.15 Mrs. Mutuna concluded that the Appellant demonstrated that this is an appropriate case in which this Court should exercise its powers to reverse findings of fact made on a misapprehension of the evidence before the Tribunal as its findings of fact resulted in perverse decisions which should not be allowed to stand.

7.0 RESPONDENT'S ARGUMENTS

7.1 The Respondent in arguing ground one contended that its mandate, as spelt out under the Act[1], is to protect consumers against unfair trade practices and that the mandate under **Section 5 of the Act[1]** includes the following: reviewing the trading practices pursued by enterprises doing business in Zambia, investigating unfair trading practices and unfair contract terms and imposing such sanctions as may be necessary. It was further argued that **Section 3 (1) of the Act[1]** expressly states that the Act applies to all economic activities within, or having an effect within Zambia. My attention was drawn to the definition of economic activity as stated in the case of **Fenin v Commission[11] Case**, at **Paragraph 25** as follows:

"...the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity."

7.2 According to the Respondent, it is an established fact that the Appellant offered a loan service to the Complainant as evidenced by the loan statements and submissions made by the Appellant and the Complainant. During investigations the Respondent concluded that the Act applies to the Appellant, particularly **Section 49(5) of the Act[1]** which mandates an enterprise in the Appellant's position to supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed on, within a reasonable period around the agreed time. It was the Respondent's further contention that where an erring enterprise is in a sector regulated by another statute, the provisions of the Act still apply as the Respondent has overarching mandate on all economic activities and conduct relating to competition and consumer protection in Zambia. The case of **Pangea v CCPC[12]** was cited to fortify the argument where the Tribunal held as follows:

"The object of the Competition Act as seen in the long title, which states in part, 'An Act to protect consumers against unfair trade practices ...' that was the intention of the legislature that the Competition Act should have overriding application above all other legislation having a bearing on competition (including consumer protection) in the country... in particular, we emphasize that economic activities of enterprises in sectors falling under statutory regulators are subject to the reign of part Ill of the Competition Act... As the law stands, the legal context of s 8 and 9 of Competition Act is first and foremost the Competition Act itself, subject only to the Constitution. Any provision of any other law, such as the Insurance Act, the Pensions Scheme Regulation Act or other related law in the case under consideration, is secondary and may be taken into account only to the extent not inconsistent with the Competition Act".

7.3 I was further referred to **Section 119 of the BFSA[2]** relating to the provisions on consumer protection which provides as follows:

"The provisions of this part (Part IX- Anti-competitive activities and consumer protection) are without prejudice to any other law in force on the promotion of competition, consumer protection and fair trade. " (added and underlined by the Respondent for emphasis).

7.3 The Respondent contended also that in the appeal before the Tribunal, the Appellant disputed the finding of the Board of Commissioners that the Appellant had not acted with reasonable care and skill in the management of the Complainant's loan and thus had breached **Section 49(5) of the Act[1]**. In considering the appeal, the Tribunal refered to **Section 49(5) of the Act[1]** and stated in its judgment at **page 40 of the ROA**, Paragraph 15.14; line 18

as regards its reference to **Section 49(5) of the Act** and not the **BFSA[2]** that:

> ***"The Appellant had a statutory duty to exercise reasonable care and skill in the manner in which the Complaint's loan was managed".***

7.4 The Respondent submitted that going by the explanation above, the Respondent's mandate emanates from **the Act[1]** and that this is the statute that the Tribunal is empowered to administer. The Respondent indicated that the Tribunal did not refer to the **BFSA[2]** as the breach of duty was contrary to **the Act[1]**, being the statute under which the conduct was investigated. It was further submitted that paragraph 14 of the Judgment at **page 28 of the ROA** shows that the Tribunal blatantly spelt out the position that what was being considered which was exercise of reasonable care and skill or lack thereof in the management of loan 2 in the Appellant's books, contrary to **Section 49(5) of the Act[1]** as was determined by the Respondent.

7.5 My attention was drawn to the evidence of AW in examination in chief, at **page 201 of the ROA**; line 18 where he stated that the Appellant had an obligation to notify the Complainant that there was an amount still outstanding on his loan after April of 2020. (Underlining my own). According to the Respondent, of important note is the **Bank of Zambia Directive dated 30th April 2019**, and issued to all commercial banks directing that:

> ***"whenever a bank increases the lending rate, implications of the increase should be explained to the customer and the customer should be accorded an opportunity to decide how they wish to manage the increased repayment, either to extend the tenure or to enhance the monthly repayment."***

It was further submitted that AW confirmed in cross-examination that the Appellant was aware of this directive as appearing on **page 219 line 7 of the ROA** and AW confirmed that the Complainant was not communicated to directly by the Appellant to discuss the implications of MPR changes on his loan as per record on **Page 212 of the ROA, line 18**. According to the Respondent, the Complainant was not aware of the restructuring of the loan and only discovered that he had a balance of K23,000 on his loan when he went to apply for another loan in 2021. I was referred to **page 120 of the ROA, line 29** where it was indicated that the Complainant disputed having received any communication about interest rate adjustment and the fact that there was still an outstanding balance on his loan.

7.6 The Respondent concluded its argument by stating that it is the above conduct of the Appellant that the Tribunal found to have been without reasonable care and skill thereby violating **Section 49(5) of the Act**[1] and that it was immaterial for the Tribunal to refer to the **BFSA**[2] as that was not the anchor legislation of the investigation. It was further contended that the Respondent in carrying out its mandate it administered the Act[1] effectively. According to the Respondent, the Tribunal was on firm ground in upholding the Board's Decision and contended that there is no merit in ground one and that it should be dismissed.

7.7 The Respondent opted to argue grounds two and three together. My attention was drawn to paragraph 15.9 of the Tribunal's Judgment at **page 39 line 13 of the ROA** where the Tribunal made reference to the **Muiruri**[2] case as follows:

> ***"the court's position in the Muiruri case, was based on the fact that the bank had arbitrarily increased interest rates on the loan arguing that the terms and conditions of the loan gave it the discretion to apply interest without reverting to the borrower."***

7.8 According to the Respondent, the issues in that case were similar to the facts in issue between the Appellant and the Complainant, whose issues for the Court's determination in that matter were: whether the provisions of Section 44 of the Banking Act were followed, whether the interest rate charges were reasonable and in good faith, whether the bank supplied statements of accounts to the Appellant, whether the contract between the parties was conscionable, whether the variation of interest discharged the appellant from liability and what was the appropriate order for costs. The Respondent contended that where the issues for consideration are similar, Courts are permitted to be persuaded by authorities of foreign jurisdictions. I was referred to the case of **Andries V Attorney General**[13] to buttress the point where the Supreme Court stated at pages 37 and 40 that:

> ***"I find these cases to be significantly persuasive and in the absence of any direct local authority on the issue, they should be instructive in providing judicial guidance in the determination of the crisp issue before us... The question raised before us in the present appeal closely mirrors that which fell to be decided by the privy council in the case of Gomes V the State. I think that this case is almost on all fours with the case before us."***

7.9 It was the Respondent's further contention that the Tribunal was in order when it relied on the Kenyan authority as the same was persuasive to deal with the facts in issue. It was argued that the Appellant acted in a similar manner in the case in *casu* as was the case in the Kenyan case when it increased the interest rate on the loan, extended the loan tenure of the Complainant without informing him and unjustly stalled the deductions on his loan for a period of almost two years thereby increasing the interest payable

on the loan whilst stating that the loan agreement provided for loan restructuring.

7.9 As regards the Tribunal's reference to the case of Development **Bank of Zambia v Stalwart Investments Limited**[1] and the Respondent's contention that the case explains the application of BOZ MPR and that the Court stated at page 17 as follows:

> ***"what is in dispute in this matter is whether the interest on the principal debt was properly calculated".***

The Respondent submitted that the same was true for the case in *casu* because similar to the **Development Bank of Zambia**[1] case, the interest rate for the loan between the Appellant and the Complainant was also dependent on BOZ Policy Rate and that the position was acknowledged by AW's testimony at **page 195, line 5 of the ROA** where he testified that:

> ***"...the monetary policy rate is an instrument used by the Bank of Zambia that will stipulate how much each bank in fact all commercial banks will charge and, on that basis, the bank will also price its own...".***

7.10 According to the Respondent, in the present case, the loan statement at **page 127 of the ROA** only shows the effect of MPR increases on the Complainant's loan statement and nothing on the effect of MPR reductions on the said loan. The Respondent cited as an example that, the only interest adjustment on the loan was an adjustment of the interest rate to 32.5 on 30th June, 2016 as recorded at page 127, line 23 of the ROA and that this was the conduct which the Tribunal found to be an unfair trading practice.

7.11 The Respondent contended that much like the **Muiruri**[2] case, where the interest rate was not determined by the bank, but could only be adjusted with the approval of the Minister, in the present case and

as per **AW's** testimony on page **195 of the ROA line 5**, the adjustments in interest rate are determined by BOZ through its adjustments to MPR. To buttress the point the Respondent referred me to the testimony of **AW** when he was asked the following question:

> ***"You alluded to the fact that when the MPR increases there is a cost for the loan, in which case the customer has option either to increase on the repayment or having the tenure increased. Would I be right to assume that when the MPR reduces then it has the effect of reducing the cost, reducing the tenure?"***

To which **AW** responded, ***"that will be correct."***

7.12 The Respondent argued further that although the Appellant accused the Tribunal that it relied on foreign authority for its finding that general banking practice requires the lender to inform a borrower of pricing adjustments to an existing loan, the Practice of informing the borrower of variation to interest rate is generally accepted in Zambia and that **AW** testified multiple times to the effect that the Complainant (or borrower) had been notified of the increase in MPR in 2016 as appearing on **Pages 195, line 5; 212, lines 10 to 18; and 221, line 5 of the ROA** where **AW** testified that the borrowers had been informed through print media and a letter sent through the line ministry. The evidence is at **page 201, line 18 of the ROA** and further that, the **Banking and Financial Services (Cost of Borrowing) Regulations, 1995**[3], provide in **Regulation 7(4)** that:

> ***"Where the cost of borrowing in respect of a loan is subject to variation, the bank or financial institution shall, by means of written statement or by notice displayed in each branch of the bank or financial***

institution, and within a reasonable time, disclose to the borrower any variation that affects the amount of any periodic payments to be made by the borrower."

The Respondent contended that although the requirement is now to inform the borrower directly and explaining the implications of MPR revision and obtaining the option to either extend the loan tenure or increase the instalment, banks have always been required to inform the borrower of any adjustments to the interest rate, and that The Tribunal was therefore on firm ground when it made a finding that it was general banking practice for a borrower to be informed of adjustments in the interest rate.

7.13 As regards ground four, the Respondent contended that in as much as the loan agreement permitted restructuring, the Appellant was supposed to communicate the variation in interest rate directly to the borrower and explain implications of such variation to the loan, and obtain the option of the borrower to either increase the periodic payment or extend the loan tenure. According to the Respondent, this is what is expected of the Appellant when offering banking services to their consumers and that the Appellant ought to conduct themselves with reasonable care and skill and ensure that all consumers, not only the complainant, are communicated to efficiently and effectively of any matter regarding their loan. My attention was drawn to the case of **Bolam Vs Friern Hospital Management Committee**[14] where **McNair J.** stated that;

"the required standard of care and skill is that of the ordinary skilled person of the same discipline, and which members of the relevant profession ought to achieve."

7.14 It was argued that any enterprise offering banking services is expected to communicate to its consumers and that the Tribunal

was, therefore, on firm ground when it found that the Appellant's action or lack thereof was against general banking practice.

7.15 The gist of the Respondent's argument on ground five is that, the Respondent whilst acknowledging that the Complainant was accountable for missed instalments on the loan, went on to direct the Appellant to restructure the loan, and that the Appellant only recovers loan balances outstanding at the end of the initial loan tenure as appearing at **page 179, line 4 of the ROA**. The Respondent contended that it was worth noting that the Tribunal found that there was no MPR adjustment in 2016. Therefore, the restructuring of the subsequent loan should exclude the 8 months added after the lapse of the initial 60 months period and the 4 alleged missed instalments. It was submitted that the Tribunal was on firm ground when it found that the Respondent did acknowledge that the Complainant was accountable for missed instalments on his loan.

7.16 The Respondent argued grounds 6 and 7 together and contended that according to the Record of Appeal, the Tribunal made rulings on matters that were before it as can be seen from the scope of the Appellant's ground 5 of appeal before the Tribunal at **page 239 of the ROA** which states that: ***"the Respondent misdirected itself when it found that the Appellant did not effect adjustments to the loan following the adjustment of the MPR in 2016".*** The Respondent pointed out that as a consequence of the Appellant's ground of appeal, the Tribunal looked at **BOZ Circulars 5 and 25 of 2012, 19 of 2015 and 2016 BOZ Annual Report of 2016** which said documents are public documents. According to the Respondent the Tribunal took judicial notice of information that was contained in public documents and was also in public domain. Reference was made to the book **Cross and Tapper on Evidence[5],** at **Page 78** where it is stated that:

"Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. " (underlined for emphasis by Respondent)

7.17 I was further referred to the case of **Baldwin and Francis Limited v Patent Appeal Tribunal**[15] where **Lord Denning** espoused that:

"The Court must possess itself of necessary information. Some judges may have it already because of their experience. Others may have to acquire it for the first time, but in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross examined, and no one ever called the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly."

The Respondent further referred to the case of **McQuaker v Goddard**[16] to buttress the point that when hearing witnesses, the Judge takes evidence and the witnesses simply assist the judge in forming a view on a matter.

7.18 The Respondent submitted that the setting of interest on the Complainant's loan was dependent on the BOZ MPR and that the ground of appeal sought the Tribunal to make a determination on when the interest adjustment of 2016 was effected on the Complainant's loan. It was averred that there were pieces of information missing before the Tribunal, namely the interest rate on the loan at the time of executing the loan and the loan agreement

in respect of the Appellant and the Complainant. Reference was made to the testimony of **AW** who stated that the interest rate adjustments on loans followed adjustments in MPR, such that when BOZ adjusted MPR upwards, the interest rate increased and vice versa.

7.19 It was the Respondent's submission that to make a determination on that ground of appeal, the Tribunal consulted the originator of MPR that is BOZ, to get a clear picture of the operations of MPR and how it was applied to the Complainant's loan. Hence, the Tribunal's reference to circulars, the Annual Report of 2016 and the loan statement adduced in evidence by the Appellant. In the process of such consultation, the Tribunal discovered that there was in fact no MPR adjustment in 2016 by BOZ.

7.20 The Respondent further argued that the upward adjustment of the Complainant's loan was, therefore, not based on BOZ MPR and was illegal. Furthermore, the Tribunal took judicial notice by way of consulting BOZ circulars to possess itself of the necessary information to arrive at a just conclusion. Referring to **Cross and Tapper**[5], the Respondent contended that statements in public documents were admissible as truth of their content. Therefore, there was no need for the parties to make submissions on the contents of BOZ circulars. It was argued that the ground of appeal lacked merit and should be dismissed.

7.21 On ground eight, the Respondent argued that **Section 5 of the Act**[1] clothes the Respondent with power to impose sanctions as it deems necessary upon investigating unfair trading practices and unfair contract terms. According to the Respondent **Section 5 of the Act**[1] is intended to arm the Respondent with necessary tools to achieve its mandate to ensure fair trade and consumer protection and that it is imperative for the Respondent to do so in order to correct any misconduct on the market. The Respondent referred to several

decisions of the Tribunal to fortify the argument. It was further contended that **Section 5 of the Act**[1] does not in any way restrict the sanctions that the Respondent could impose.

7.22 It was the Respondent's contention that following the Board Decision, BOZ issued a circular dated 30th April 2019 to all commercial banks concerning the increased number of complaints from customers of commercial banks regarding the extension of loan tenures.

7.23 It was submitted that the Respondent clearly has power to impose sanctions as it deemed necessary to ensure fair trade and consumer protection. According to the Respondent, the Tribunal was on firm ground to find that the Respondent did not err in law and fact when it directed the Appellant to restructure loan 2.

7.24 The Respondent's contention to ground Nine is that the Guidelines for Administration of Fines, 2019 ("Fines Guidelines) formulated by the Respondent give guidance regarding imposition of fines and that of particular relevance is Annex 1, Table 3 with the heading **Determination of Fines for Offences under Part VII of the Act** appearing on page 11 of the Guidelines: that the third column has a heading Maximum Fine in Fee Units. The Respondent contended further that the Fines Guidelines contain a typographical error in their stipulation of the applicable cap of 1666,66.67 fee units for turnovers amounting to more than 16,666,666.67 which when converted to Kwacha as per the Fees and Fines (Fee and Penalty Unit Value) (Amendment) Regulations 2015, is K50,000 for turnovers of more than 5, 000,000.00 (underlined by the Respondent for emphasis)

7.25 According to the Respondent, this cap is less than the maximum cap payable for less turnovers in lower bands of the caps. The

following portion from the decision of the Tribunal appearing at page 54 of the Record of Appeal was reproduced:

> ***"it is our considered view that in its current form, the published fine creates an absurdity that needs to be urgently cured."***

The Respondent stood by the Tribunal's decision appearing at **page 55 of the ROA** as follows:

> ***"The Respondent applied the correct fine in relation to the Board's directive to the effect that the Appellant be fined 0.5% of the Appellant's turnover pursuant to section 49(6) of the Act."***

7.26 The Respondent contended that its Board Decision at **pages 178 and 179 of the ROA** directed that the Appellant be fined as follows: (1) 0.5% of their annual turnover for breach of Section 49(5) of the Act in accordance with Section 49(6) of the Act and (2) the applicable cap in line with the Commission's Guidelines for Administration of Fines, 2019 and that the Tribunal in its Judgment found that the application of Section 49(6) in fining the Appellant was proper, and not the application of the cap on the fine as the Guidelines contained typographical errors.

8.0 ANALYSIS AND DECISION OF THIS COURT

8.1 I have considered the ROA, the written and oral arguments by both parties. The Appellant has raised 9 grounds of appeal but they can be collapsed into three parts because grounds 1 to 7 relate to the same grievance as they are all simply on whether the Tribunal erred in law and fact in the manner it arrived at its decision upholding the Respondent's position that the Appellant breached **Section 49(5) of the Act**[1]**.** Grounds 8 and 9 will be considered as they are *seriatim.*

8.2 The genesis of the matter is that the Respondent received a complaint from Mr. Moosho, the Complainant, against the Appellant relating to conduct which was deemed to be in breach of **Section 49 (5) of the Act**[1]. The facts of the Complaint were as follows:

> **"The Complainant alleged that between 2012 and 2013, he acquired a loan facility in the sum of ZMW15,000.00 from BancABC (the Appellant herein). In 2014 he got an additional amount of about ZMW30,000.00 towards the same loan facility. The loan was to run for a period of 60 months. According to the Complainant, he settled the loan in issue in 2019. In 2021, the Complaint acquired another loan facility from the Appellant in the sum of ZMW75,000.00. When the money was disbursed into his account and after using K60,000.00, the Complainant discovered that his account had been blocked by the Appellant: he could not access the ZMW15,000.00 that was in the account. The Complainant called the Appellant over the issue and he was informed that he was owing the Appellant ZMW23, 000.00 for the loan he had acquired from BancABC. The Appellant agreed to unblock his account and gave the Complainant access to ZMW5,000.00 while ZMW 10,000.00 was channeled towards settlement of the ZMW23,000.00 thereby reducing the loan balance to ZMW13,000.00.**
>
> **The Complainant later visited the Appellant's Mumbwa Branch and produced all his pay slips as proof of having settled the previous loan. He was informed by the Appellant that the ZMW23,000.00 was as a result of the upward adjustments in interest rates that took place between 2016 and 2017 and that communication to**

that effect was made to clients. The Complainant disputed receiving the said communication and disagreed with the Appellant's position. He further indicated to the Appellant that he would seek legal intervention.

In April, 2022, about a year letter from the last communication between the Complainant and the Appellant, the Complainant discovered from his April, 2022 pay slip that the Appellant had initiated deductions of ZMW500.00 for an intended period of 40 months and that there was an indication of a loan balance in the sum of ZMW20,000.00. The Complainant demanded that the Appellant should stop making deductions and refund him the amount that was collected from him after he settled his loan."

8.3 It appears that the resumption of deductions in the sum of ZMW500.00 for payment towards loan 2 for a projected period of 40 months after a period of inactivity of about one year is the last nail that propelled the Complainant to seek legal redress as earlier threatened and proceeded to lodge a complaint with the Respondent against the Appellant.

8.4 The Appellant's response was as follows:

"The Appellant contended on its part that the Complainant obtained a loan (loan 1) in the sum of ZMW15,000.00 which he fully settled when he refinanced it by getting a loan of K28,000.00 in January 2014 contrary to his assertion that he obtained a loan (loan 2) in the sum of K30,000.00: the loan was scheduled to run for a period of 60 months starting 31st January 2015 till 31st December 2019 with a monthly installment of K1,094.25.

According to the Appellant, it revised its annual effective interest rate in the loan book following the adjustment in the MPR in the year 2016 by the Bank of Zambia. The Appellant indicated that the complainant's loan was rescheduled to maintain affordability which resulted in an increased loan tenor from 60 months to 68 months and that this aspect of the loan was signed for and covered in the complainant's loan agreement.

The Appellant further stated that the loan was not serviced in accordance with the loan agreement as the complainant overpaid in the first five (5) months of the loan by remitting ZMW1,792.41 instead of the agreed ZMW1, 094.25 resulting in an overpayment of K3, 490 which was refunded to the complainant in two installments. The Appellant added that the complainant did not remit the installments for June 2015 and for March, April and June 2016 thereby missing a total of four (4) installments from the initial 60 months and that this attracted interest which amounted of ZMW21, 562.13 as at 31st December, 2020.

In January 2021, the complainant is said to have obtained a loan (Loan 3) in the sum of ZMW75,000.OO in order to refinance the ZMW21,562.13 balance on loan 2 and to settle loans with three non-bank financial institutions.

According to the Appellant, the complainant withdrew much of the money meant to settle the outstanding balance with the Appellant, leaving the Appellant to collect only ZMW5,000.00 which was credited to the loan account thereby reducing the balance to ZMW16,562.13 as at 12th January 2021. The Appellant

denied having any record of keeping the ZMW10,000.00 stated in the complaint letter and alleged by the Complainant to have been deducted from his account to reduce the loan balance to ZMWl3,000.00."

8.5 The Respondent's Board head the complaint and after hearing the parties, it rendered its decision which was appealed against to the Tribunal using the following assessment tests appearing at **pages 91 and 92 of the ROA**:

8.5.1 Whether the Appellant herein, supplied a service to the customer (Complainant)? The Board looked at the definition of supply in the Act[1] and the Board concluded that the Appellant supplied the Complainant with loan facilities and held that the Act[1] applied to the Appellant.

8.5.2 The 2nd assessment test was whether Appellant herein supplied a particular service to the Complainant with reasonable care and skill or within a reasonable time? The Board looked at the definition of reasonable care as defined by **Black's Law Dictionary**[1] as:

> ***"a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances."***

The Board further looked at the definition of reasonable skill also as defined by **Black's Law Dictionary**[1] as:

> ***"the skill ordinarily possessed and used by persons engaged in a particular business."***

8.5.3 According to the Board, in the case at hand, reasonable care and skill translated to whether the Appellant informed the Complainant that he was still owing them due to missed instalments and adjustments in MPR

before ceasing to make deductions on his loan in April, 2020. The Board reviewed the history of the loan and established that loan 2 was in the sum of ZMW28,000.00 to be paid back over a period of 60 months in monthly instalments of ZMW1,094.25. It also took note of the four missed payments. The Board went on to establish that during the course of the loan tenor, BOZ adjusted MPR upwards from 9.75% in 2014 to 15.5% in 2015 and thereafter reduced to 12.5% in 2017 and to 11.50 in 2019. According to the Board, the Appellant had not effected the adjustments in MPR on the Complainant's loan at the time he was making his final instalment in April, 2020. However, the Board found that due to adjustments in MPR and the missed instalments the loan went into arrears thereby accruing interest leading to an accumulated loan balance of ZMW17,929.92 as at 18th April, 2020 and ZMW21,562.13 as at December, 2020.

8.5.4 The Board established also that from 8th April, 2020 to December, 2020, the Appellant did not inform the Complainant that he was still owing them funds due to the factors highlighted above and that it only did so in January, 2021 when it should have effected the adjustments within the 60 months of the initial loan tenor and further that the Complainant should have been informed of the loan balance within that time. The Board went on to state that silence from the Appellant meant that the Complainant's balance kept on accruing interest as was noted from the Appellant's submissions. The Board held that the Appellant's failure to do the above translated into lack of care and skill as such the

Appellant did not exercise reasonable care and still when supplying its service to their consumer: thereby violated **Section 49 (5) of the Act[1].** The Board's determination was that the Appellant engaged in unfair trading practices, hence breached **Section 49 (5) of the Act[1].** The penalties complained of were meted out against the Appellant by the Board.

8.6 On appeal to the Tribunal, the Tribunal upheld the Board's decision. The Tribunal's holding was that the Appellant did not exercise reasonable care and skill when offering its service to the Complainant thereby breaching **Section 49(5) of the Act[1]**. The Tribunal adopted the Board's definitions of reasonable care and reasonable skill as defined by **Black's Law Dictionary**[1]. At **page 40 of the ROA** the Tribunal stated the following:

> ***"Our considered view is that the Appellant had statutory duty to exercise reasonable care and skill in the manner in which the Complainant's loan was managed. This duty entailed inter alia that the Appellant informs the Complainant of any adjustments in the terms and conditions of the loan. Further, in the Miracle Centre case, supra, the court held that while the loan agreement gave the bank authority to vary interest rates, variations should have been done in an open and transparent manner."***

8.6 Before arriving at the above position, the Tribunal looked at the evidence of **AW** which it quoted as follows at page 40 of the ROA:

> ***"According to AW, the Appellant informed the Complainant of the upward adjustment in MPR and the resultant decision taken to increase the loan tenor by way of letters sent through the line ministries."***

8.7 The Tribunal went further to state the following:

"In the same vein, AW had earlier testified that he was not sure if that communication was directly to the Complainant or not. However, the Tribunal notes that no evidence was adduced to prove that the Appellant communicated the alleged adjustment of MPR in 2016 and that the Complainant received such communication."

8.8 The evidence of **AW** quoted by the Tribunal is on **pages 196 and 212 of the ROA**. The full paragraph of **AW**'s evidence on this issue was as follows:

"So, the notices were done by letters to customers and these letters were channeled through the line Ministries to consider the fact that the Ministry will be a better position to know the rotation or changes in terms of the location of their employees. The other part was the bank and advertised we put it in newscript indicating of our position"

8.9 According to the decisions of the Board and the Tribunal, what was at the centre of the complaint was the issue of extension of the Complainant's loan tenor and interest adjustment in circumstances that appeared to show that the Complainant was not appraised on those issues within the 60 months of the loan tenor. The Appellant indicated that the extension of the loan tenure was caused by the four missed instalments and the upward adjustment in MPR by BOZ in 2016. The consequential issues were whether the Appellant effected MPR adjustments on the interest computation for the Complainant's loan and whether the Complainant was informed of the effect thereof on his loan as a result of MPR adjustment including the issue of extension of the repayment period.

8.10 From the record it is clear that there was and there still is no dispute that an upward adjustment in MPR increases the cost of the loan and that the borrower has an option to either increase the

repayment amount or the repayment period after discussing the issue with the lender. What is being contested is whether the lender was duty bound to advise the borrower of the effect of MPR adjustment. The issue of whether the Appellant was duty bound to inform the Complainant about MPR adjustment is very cardinal. In this case the Appellant stated, while denying the responsibility to do so, that communication was done through line Ministries and newscripts.

8.11 The Board and the Tribunal were both of the view that the Appellant had a duty to inform the Complainant of the adjustment in MPR and the effect thereof. The Appellant's contention is that the Tribunal erred in law and fact when it held that the Appellant had breached its statutory duty by failing to communicate price adjustments following the increase in MPR to the Complainant without pointing at any provision in the **BFSA[2]** that gave rise to the purported duty. Married to the above contention was the contention that the Tribunal misdirected itself when it relied on the Kenyan case of **Margret Njeri Muiriri v Bank of Borada[2]** which refers to a foreign statute not applicable to Zambia for its finding that general banking practice requires a lender to inform the borrower of an adjustment in pricing and the effects thereof on any existing loan.

8.12 On the issue of the duty by the Appellant to inform the Complainant about the adjustments in MPR, AW was asked several times on this aspect while testifying before the Tribunal. **At page 195 of the ROA, AW** explained what MPR is and how it impacted loans. On **page 196** he explained the modes of communication used by the Appellant. On **page 201** of the **ROA, AW** was asked this question by Mrs. Mutuna: **So, what is your response to the Commission's finding that the bank had an obligation to notify Mr. Moosho that there is an amount still outstanding on his loan after April, 2020? AW's** answer was: **Yes, the bank had the obligation and we**

executed through the notification that I mentioned through the newsprint as well as the letters that were sent to the line Ministries. At **page 211 of the ROA** the issue was raised by Counsel for the Respondent as follows:

> ***"Chair, in his statement he (AW) mentioned that they have a way in which they communicate with the complainant in terms of when the loan tenure or MPR has increased. So in this case he talked about two things, he said that usually in this particular case with Allan Moosho he state that they wrote to the line Ministries concerning the issue of MPR being increased, and the loan tenure going up. He also mentioned that they also advertised through print media and letters, those are the two things. But in this case, he had contact details for this complainant, don't you think that you going to PMEC was wrong? Because you have contacts of Mr Allan Moosho, specifically you could have contacted him directly unlike going to the line Ministries?"***

AW's response was:

> ***"Responding to that question I guess we do have contact numbers however, along the way we noticed that we had changes. People change numbers and so forth."***

The Tribunal chipped in and said, "***So witness the question was specific for Mr Moosho?***"

AW's answer was: ***"Okay, so with regards to Mr. Moosho we thought that it will be ideal for us to communicate through the line Ministries as well as putting in print media."***

8.13 On **page 214 of the ROA** the following are the questions put by Counsel for the Respondent to **AW** and his responses:

"Respondent: So in this case you affected the adjustment minus informing PMEC and the complainant?

Witness: PMEC was informed

Respondent: PMEC was informed but the complainant was not informed? You said you were not certain whether client was informed?

Witness: The channels that I mentioned earlier were deemed as sufficient communication to the customers.

Respondent: Did you follow up just to find out if the complainant was aware?"

Tribunal chipped in as follows: Vice Chair, ***"Have you displayed a copy of the letter to PEMIC and a copy of the advert for your notification?"***

Witness: The advert should be there and the letter too."

At this point Counsel for the Appellant clarified that in this particular case, the document was not there but in the other case that was to come later before the Tribunal the document was there and that it also applied to this case. However, the Tribunal guided that this matter which they were dealing with was independent from the other matter.

8.14 On **page 219 of the ROA**, **AW** was asked the following question by Counsel for the Respondent:

"Are you aware of the Bank of Zambia's directive in relation to what should happen when the Bank adjusts their rates with regard to how they ought to communicate to customers; are you aware of that directive?

Witness: I am aware"

8.15 On **page 229 of the ROA**, **AW** responded to the questions put to him as follows:

"So, with regards to the first question which you asked about notification, I am not too sure whether the

customer was notified in terms of the agreement with PEMIC. However, in terms of adjustment after the initial investment we had actually done some more offer communication some time in 2020 just to notify customers on the outstanding balances. There were SMS's that were sent to just indicate to them that there were outstanding balances and they needed to come forward to look at the outstanding balances."

8.16 From the portions of evidence of **AW** highlighted above, it is abundantly clear that the Appellant had a duty to communicate and inform the Complainant about any changes in MPR and how it affected the cost of his loan. The Appellant was clearly aware of this duty going by the evidence of AW. Therefore, I don't agree with the Appellant's contention that the Tribunal misdirected itself by making the statement that in general banking practice, a lender is expected to inform the borrower of an adjustment in pricing and effects thereof on existing loan. The submissions by the Respondent on this issue are on point. The statement by the Tribunal is in fact strengthened by the **Banking and Financial Services (Cost of Borrowing) Regulations**[3] cited by the Respondent providing that:

"Where the cost of borrowing in respect of a loan is subject to variation, the bank or financial institution shall, by means of written statement or by notice displayed in each branch of the bank or financial institution, and within a reasonable time, disclose to the borrower any variation that affects the amount of any periodic payments to be made by the borrower."

8.17 The foregoing position was further strengthened by BOZ directive dated 30th April, 2019 issued to all banks directing that:

"whenever a bank increases the lending rate, implications of the increase should be explained to the customer and the customer should be accorded an opportunity to decide how they wish to manage the increased repayment, either to extend the tenure or to enhance the monthly repayment."

8.18 Although the above directive was issued after the loan in issue was already advanced to the Complaint, it came into existing and force during the tenor of the loan.

8.19 From what I have demonstrated above, it is crystal clear that communication to the borrower was required of the Appellant whenever events causing adjustment to the cost of the Complainant's loan arose. What is not clear though is the required mode of communication because the materials referred to above do not prescribe the mode of communication. The Appellant's evidence was that it communicated by letters which were sent to clients through the line Ministries, by newscript and that in 2020 it sent SMSs to the clients informing them of the outstanding balances. However, as noted by the Tribunal, the Appellant did not adduce any evidence of the loan agreements and of actual communications to the Complainant using the said modes of communication. At **pages 43 to 44 of the ROA**, the Tribunal observed as follows:

"AW submitted that whenever the MPR was adjusted by BOZ, the Appellant placed in a newspaper of wide circulation, notices of impending adjustments of the applicable borrowing rates on loans. AW further testified that borrowers were informed by letters sent through the line Ministries. However, in both cases, AW did not adduce any evidence to back his testimony."

8.20 Furthermore, one of the members of the Tribunal, Mr. Mulima, at **page 229 of the ROA** lamented about the unavailability of the

contracts. The unavailability of such evidence was confirmed by Counsel for the Appellant at **page 214 of the ROA**. The Appellant clearly did itself a disservice by not availing such evidence. This position was pointed out by the Tribunal at **page 40 of the ROA.** The Tribunal held the position that the Appellant had a statutory duty to exercise reasonable care and skill in the manner in which the Complainant's loan was managed. Contrary to what is stated in ground 1 of appeal, the Tribunal did not state that the Appellant breached its statutory duty by failing to communicate price adjustments following the increase in MPR to the Complainant. What the Tribunal stated was that the Appellant's failure to communicate to the Complainant amounted to failure to use reasonable care and skill and that failure to do so amounted to breach of **Section 49 (5) of the Act**[1] which provides that:

> ***"A person or an enterprise shall supply a service to a customer with reasonable care and skill or within a reasonable time or, if a specific time is agreed, within a reasonable period around the agreed time."***

8.21 According to the findings of the Board and the Tribunal, the Appellant did not notify the Complainant of MPR adjustment and the effect thereof on the cost of his loan within the tenor of the loan. It was further found that the extension of the loan was only brought to the Complainant's attention about a year after the expiry of the 60 months for loan 2. In short, both the Tribunal and the Board found that the Appellant did not use reasonable care and skill thereby breaching its statutory duty to do so as required by **Section 49 (5) of the Act**[1]**.** Therefore, the Appellant's contention that the Tribunal should have pointed at a provision in **the BFSA**[2] to premise the breach of the duty to exercise reasonable care and skill is a misconception. I am of the view that the cases of **Stanbic Bank Zambia Limted v A.S & C Enterprises Limited, Yula Enterprises**

Limited and Another[17] and that of **Mopani Copper Mines Plc v Ndumo Miti & Two Others**[18] cited by the Appellant on how a statutory duty arises were not departed from. I agree with the Respondent's submission that the applicable statute in this matter is **the Competition and Consumer Protection Act**[1] particularly, **Section 49 (5)** thereof. I find no merit in ground one and it has failed.

8.22 In Ground two, it is contended that the Tribunal misdirected itself when it relied on the Kenyani case of Margaret Njeri Muiriri v Bank of Baroda (Kenya) Limited on the requirement to inform the borrower of adjustment in pricing and the effect thereof on any existing loan because the cases were in relation to a foreign statute not applicable in Zambia. Before citing the **Muiruri**[2] case the Tribunal made the following statement:

> ***".... Therefore, it would be considered an act of negligence if the lender did not communicate pricing adjustments to its borrowers."***

8.23 The tribunal also quoted the following portion from the Muiruri[2] case:

> ***"Even (sic) we were to say that the respondent bank was within its rights to increase the rate of interest, we think that a failure to give notice of the same was a material alteration in the terms of the contract."***

8.24 After quoting the above portions, the Tribunal made the following statement:

> ***"The court's position in the Muiruri case, supra, was based on the fact that the bank had arbitrarily increased interest rates on the loan arguing that the terms and conditions of the loan gave it the discretion to apply interest without reverting to the borrower. In disputing the extent of the debt, the borrower had requested the bank***

for a proper statement of account on the loan showing all the interest rate changes."

8.25 Although the Tribunal referred to the **Muiruri[2]** and the **Miracle Centre[3]** cases, the issue which was being addressed is the requirement to notify the borrower of adjustments to the loan which issue was discussed in the cited cases. The Appellant's contention that the Complainant had given prior consent to adjust the repayment period and to increase interest based on MPR adjustment was in a way related to some of the issues raised in the Muiruri[2] case. Therefore, as argued by the Respondent there are some similarities between the two cases. However, even though Courts and indeed Tribunals are entitled to take persuasive leaf from foreign judgments as was as pointed out by the Respondent, the Tribunal's reference to the said cases does not appear to be the basis for its holding that the Appellant was required to notify the Complainant of adjustments to the loan. The Tribunal of course cited portions in those cases relating to how the issue of failure to give notice was deemed to be material alteration to the contract. However, as already demonstrated in ground one, the issue of the Appellant's duty to inform the Complainant of the effect of the upward adjustment of MPR to the loan was confirmed by the Appellant's own witness and the directives or circulars by BOZ. Therefore, reference to the Kenyan cases whose facts are not very different from the facts of this case as they relate to the requirement to notify a customer of adjustments to a loan and how the Courts dealt with the issue in that country was not a misdirection. The ground has no merit and is dismissed.

8.26 As regards the contention that the Tribunal misapprehended the evidence on record and the case of **Development Bank of Zambia v Stalwart Investments Limited and Others[1]** to support the

finding that the Appellant had engaged in unfair business practice, the Tribunal quoted from the said case as follows:

> ***"... the pricing for the facility was dependent on the BOZ policy rate and accordingly the interest rate applicable to the loans was adjusted with each change to the BOZ policy rate."***

8.27 After citing and quoting from the said case, Tribunal made the following statement:

> ***"On the basis of the Development Bank of Zambia case, supra, the Appellant's actions were in the Tribunal's considered view disadvantaged the Complainant. In addition, the Appellant's conduct during the life of Loan 2 were a clear affront to the BOZ guidelines, which required local currency loans to be priced off the MPR. This level of injustice towards the Complainant, cannot by any measure be considered as an act of fair trading in the management of the Complainant's loan. Lastly, such conduct flies in the teeth of good banking practice on loans priced at variable interest rates."***

8.28 The full context in which the Tribunal made the above statement should be understood from the tribunal's observations at **page 42 paragraphs 16.3 and 16.4 of the ROA**. What I gather is that the tribunal was addressing the issue of selective application of MPR adjustment and observed that, while the Appellant stated that the repayment period was increased due to MPR adjustment in 2016, the Complainant's loan did not receive the same treatment when MPR was reduced during the tenor of loan 2. The Tribunal was not disputing the increase in the cost of the loan due to the impact of the upward adjustment of MPR on the loan but that when there was downward adjustment of MPR the Complainant was supposed to

receive the benefit of its effect on his loan. In **paragraph 16.3** the Tribunal stated that:

> ***"According to AW, the loan tenor was extended in order to maintain affordability of the loan by keeping repayments unchanged. If we consider that argument, it follows that, when the MPR reduced, the cost of borrowing to the Complainant would have reduced...."***

8.29 Therefore, ground three is based on the Appellant's misapprehension of the context in which the Tribunal applied the DBZ case. At page 38 paragraph 15.6, the Tribunal agreed with the Appellant's contention on this ground. The Tribunal well understood the effect of MPR upward and downward adjustment on the loan and found that the Appellant applied the adjustments in a manner that disadvantaged the Complainant. I find no merit in ground three.

8.30 As regards ground four, the Appellant did not cite the portion of the Judgment where the Tribunal stated that the Appellant was supposed to seek the Complainant's prior approval in fulfilling the Appellant's alleged duty to communicate the interest rate adjustment and loan tenor extension. I have looked at the Judgment of the Tribunal and found nothing to that effect. Some of the observations of the tribunal around the issue of communication or notification are on **page 41 of the ROA** stated as follows:

> ***"15.15 .... Our considered view is that a borrower will not always fully understand the mechanisms by which loans operate. As such, the lender has a duty to inform the borrower of the implications of any material changes to either the terms and conditions or the structure of a loan. 15.16 In view of the foregoing, it is our considered view that the Appellant ought to have informed the Complainant of the duration by which the loan tenor had been extended. Based on the prior notification of***

extension, the Complainant would not have been surprised, when the Appellant began to deduct extra loan repayments close to two (2) years after the initial agreed period of sixty (60) months."

I have not seen any introduction of new issues on that aspect by the Tribunal as argued by the Appellant. The Tribunal was not against the Appellant's right to make adjustments to the loan but to its failure to notify the Complainant of the adjustments which would have allowed the Complainant to choose whether to increase the repayment amount or period. Ground four has no merit.

8.31 On ground five, the Appellant's ground of appeal from the decision of the Board on the issue on this ground was that *the Respondent erred both in fact and at law when it failed to acknowledge that the Complainant was accountable for breaching his obligation under the loan agreement.* In addressing this ground, the Tribunal stated the following:

"in evaluating the merits of the fourth ground, the Tribunal had recourse to the Board Decision where in paragraph 27 it was stated as follows:

"The Commission established that due to the adjustments in the monetary policy by the Bank of Zambia and the missed instalments by the Complainant, the loan went into arrears thereby accruing interest leading to an accumulated loan balance of K17,929.92 as of 18th April,2020 to ..."

In addition, the Appellant did not adduce a copy of the loon agreement for us to appreciate the terms and conditions as well as to deduce the Complainant's responsibilities as assigned therein"

8.32 It is clear that the issue of the Complainant's default was acknowledged by the Tribunal and the Board but what the Board

was dealing with was whether the default was properly communicated to the Complainant. The Board was not dealing with enforcement of the Complainant's obligation. What was before the Board was a complaint from Mr. Moosho. In dealing with the complaint and after hearing the parties, the Board stated that for the purposes of **Section 49 (5) of the Act**[1], the following assessment tests were used:

a. *Whether the Respondent as an "enterprise" or a "person" supplied a service to the consumer.*

b. *Whether the Respondent supplied a particular service to the Complainant with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.*

8.33 The Board found the Appellant wanting on the 2nd test. The Tribunal in dealing with the ground of appeal relating to the contention that the Respondent failed to acknowledge that the Complainant was in breach of his obligation under the loan, it could do no more than to confirm whether the Respondent addressed the issue and the Tribunal did make that confirmation. The Tribunal then indicated that it could not deal with the issue further than that because the Appellant did not provide evidence of the contract to show the Complainant's obligations. In light of the issue before the Board, the Complainant's accountability to pay the missed instalments and the adjustments to the loan interest was not the solution to the issue of whether the Appellant acted with reasonable care and skill in handling the Complainant's loan. I find no merit in ground five.

8.34 In ground six the Appellant contended that the Tribunal was wrong in premising its decision on BOZ **Circulars Nos. 5[2] and 25 of 2012**[6] when neither parties referred to them. I have looked at the decision of the Tribunal on this issue as appearing on pages 46 to 49 of the ROA and find that the Tribunal referred to the Circulars in issue for

the sake of context. The ground of appeal before the Tribunal on this issue was that: *The Respondent misdirected itself when it found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the monetary policy rate in 2016.*

8.35 In referring to BOZ circulars of 2012, the Tribunal was tracing the genesis of MPR and how commercial banks were to apply it to loans issued to customers. The question is, was it wrong for the Tribunal to do so? I don't think so. The Court's recourse to judicial notice was considered in the case of **The People v Shamwana and Others**[19] where the case of **Commonwealth Shipping v Peninsular Brand Services**[20] was quoted. Furthermore, the case of **Baldwin and Francis Limited**[15] cited by the Respondent is also persuasive enough on the need a Court to equip itself with knowledge for its task even by taking Judicial notice of all things as it ought to know. Ground six, therefore, has no merit.

8.36 Ground seven raises four issues as having been volunteered by the Tribunal, namely: (i) the interest rate adjustments applied by the Appellant on the loan, (ii) MPR adjustment in 2016, (iii) the loan management fee recovered by the Appellant and (iv) the question of penal interest. As regards the first two issues, the Appellant's contention that those issues were not raised by the parties is incorrect. This is so because as earlier indicated, one of the issues before the Board was whether the Appellant herein supplied a particular service to the Complainant with reasonable care and skill, or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.

8.37 The ground of appeal the Tribunal was invited to consider when it made the above pronouncements was that The Respondent misdirected itself when it found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to

MPR in 2016. In addressing the ground, the Tribunal at **page 47 of the ROA** stated the following:

> ***"19.6 In assessing the merits of Ground Five, the Tribunal examined the loan account statement produced by the Appellant. The Tribunal found that the only interest adjustment on the loan was applied on 30th June, 2016, and showed the rate to be 32.5%.***
>
> ***19.7 In relation to the Respondent's evidence on interest rate adjustment, the Tribunal considered the 2016 Bank of Zambia Annual Report ....***

8.38 After looking at the said report the Tribunal discovered that BOZ maintained the MPR throughout the year 2016 at 15.5% contrary to the Appellant's numerous submissions to the effect that the interest rate adjustment in 2016 was necessitated by increase in MPR in that year. The tribunal went further to reprimand the Appellant for giving false information. Moreover, at **page 227 to 228** of the ROA there is testament that the issue of MPR adjustment and the rate thereof in 2016 was raised by the Tribunal but AW failed to give an answer outrightly. Furthermore, the issue of MPR adjustment during the tenor of the Complainant's loan was also considered by the Board as evidenced on **pages 88 and 90 of the ROA**.

8.39 I am of the view that, having looked at the evidence on record and the issues before the Board and Tribunal, the Tribunal was entitled to address the issue of interest adjustment based on the Appellant's contention that the loan tenor was increased due to MPR adjustment in 2016 without the Appellant mentioning the rate. As was indicated in the **Shmwana case** (*supra*), the Tribunal was entitled to take judicial notice of MPR adjustments in the period in issue as it was a notorious fact that required no further evidence to prove.

8.40 As regards the issue of loan management fee recovered and the question of penal interest, I agree with the Appellant that the issue

never arose before the Board and during the proceedings before the Tribunal. The case of **John Mugala and Kenneth Kabenga v The Attorney General (1988-1989) ZR 171 (SC)** cited by the Appellant is indeed very instructive on the contention raised by the Appellant. It was a misdirection on the part of the Tribunal to have devolved into those issues when the parties were not given chance to address the issue of management fee and penal interest. Ground seven, therefore, has partially succeeded: However, the success does not exonerate the Appellant from the core issues of the complaint.

8.41 Ground 8 relates to the issue of the penalty and whether the Respondent is at liberty to impose any sanctions by virtue of **Section 5 (b) and (f) of the Act**. The Appellant herein was found to have breached **Section 49 (5) of the Act**. The penalty for that offence is provided by **Section 49 (6) of the Act**. **Section 49 (5), (6)** and **(7)** provides as follows:

> ***"(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.***
>
> ***(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.***
>
> ***(7) In addition to the penalty stipulated under subsection (6), the person or the enterprise shall—***
>
> ***(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or***
>
> ***(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard.***

8.42 I agree with the Appellant that penalty for the offence the Appellant was found liable is specifically provided for but I must add that this includes the applicable remedial measures to be taken to make good the breach in issue. **Section 5 (b) and (i) of the Act** cited by the Respondent to support the penalty imposed cannot be used to impose sanctions that are not specified in addition to the applicable offence. The section relates to administrative functions of the Respondent. Therefore, the powers under **section 5 of the Act**[1] cannot be extended to adjudicative jurisdiction and sanctions to be imposed by the Board or Tribunal. The cases cited by the Respondent to support the Respondent's further sanctions are not binding on me as they are all decisions of the Tribunal. I do not agree with the reasoning in those cases. However, as regards the Tribunal's directive to the Appellant to restructure the Complainant's loan, I am of the view that the Respondent has those powers based on **Section 49 (7) of the Act**[1] already reproduced above. The fact that the Respondent referred to **Section 5 (d)** instead of **Section 49 (7) of the Act**[1] does not make the directive void. The case of **Zinka vs Attorney-General**[20] fortifies my position. In that case, the President purportedly exercised a power under the Emergency Powers Act which could validly be exercised under the Preservation of Public Security Act. The Supreme Court upheld that exercise of power because it was traceable to a legitimate source. The Supreme Court referred to the case of **Hukum Chand Mill vs State of Madhya Pradesh**[21] among other cases, in which the Court stated inter alia that:

> ***"It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would not per se vitiate the actions done if it can be justified under some other power under which the Government could lawfully do these acts."***

8.43 Therefore, although ground eight has partially succeeded the directive to the Appellant remains valid for the reasons given above.

8.44 Ground nine relates to the use of unpublished fee unit due to a noticeable error in the fee unit published in the Respondent's guidelines. I agree with the Appellant's contention that it was wrong for the Board and the Tribunal to have relied on unpublished fee unit due the noticeable error. The Tribunal at **page 54 of the ROA** made the following observation:

> ***"... it is our considered view that in its current form, the published fines creates an absurdity that needs to be urgently cured"***

8.45 Having made the above observation, the Tribunal should not have proceeded to uphold the decision of the Respondent to prematurely implement the unpublished fee unit as doing so defeats the need to publish the fines. The threshold and fines that should have applied to the Appellant in the circumstances should have been the published ones and as was at the time and not as it should have been. I find the following words in an article, **The Rule of Law: What Is It? Why Should We Care8** to be useful in cementing my reasoning:

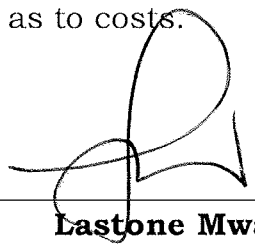
> ***"In essence, the Supreme Court's descriptions of the Rule of Law say that this principle requires society to be governed by discernible laws, rather than by personal whims and preferences. Instead of society being ruled by the desires or interests of a particular person or group, which desires and interests may fluctuate daily, society should be ruled by law. Among other things, a society that is ruled by law must have procedures in place for ensuring that people in positions of power are not able to arbitrarily manipulate social order. So, laws must be created only in accordance with established and agreed upon procedures;***

laws cannot be created arbitrarily and without warning to the public. Laws must be equally applied to both the law-makers and ordinary citizens.

Laws must be applied in predictable and established fashions, rather than depending solely on the whims of the law-makers or law-enforcers. In other words, the Rule of Law calls for the application of objective standards in the creation and application of a society's laws."

8.46 The penalty of the Board upheld by the Tribunal is varied to the extent that the applicable cap on the penalty is the one prevailing under the published Guidelines. Ground 9, therefore, succeeds.

8.47 In conclusion, grounds 1 to 6 have failed while grounds 7 and 8 have partially succeeded and ground 9 has fully succeeded. Therefore, I make no order as to costs.



Lastone Mwanabo
HIGH COURT JUDGE