CASE FILE NUMBER: CONS/13/04/2022/00674/NM

IN THE MATTER BEFORE THE BOARD OF THE COMPETITION AND CONSUMER PROTECTION COMMISSION

BETWEEN

Mr. Naphitali Banda	**COMPLAINANT**
AND	
African Banking Corporation Zambia Limited T/A Atlas Mara	**RESPONDENT**

BEFORE:

Commissioner Angela Kafunda	**- Chairperson**
Commissioner Stanford Mtamira	**- Member**
Commissioner Emmanuel M. Mwanakatwe	**- Member**
Commissioner Sikambala M. Musune	**- Member**
Commissioner Derrick Sikombe	**- Member**

DECISION

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1. Below is a summary of the facts and findings presented by the Commission to the Board of the Commission following investigations carried out in the above case:

Introduction and Relevant Background

It was submitted that:

2. On 13th April 2022, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Mr. Naphitali Banda ("the Complainant") against African Banking Corporation Zambia Limited T/A Atlas Mara ("the Respondent"). Specifically, Mr. Naphitali Banda ("the Complainant") alleged that in March 2022, the Respondent reactivated deductions of K350.00 per month from his salary for a loan he fully repaid in 2019 without notifying him. The Complainant further alleged that the deductions were scheduled to run for a period of 27 months. The Complainant alleged that he made efforts to contact the Respondent to explain to him why they were causing deductions from his salary, but the Respondent did not furnish him with any response. The Complainant demanded that the

Respondent stops the deductions and refunds him the money they had deducted.

Legal Contravention & Assessment Tests

Legal Contravention

It was submitted that:

3. The alleged conduct appeared to be in contravention of Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 ("the Act").

4. Section 49(5) of the Act states that: *"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."*

5. Section 49(6) of the Act states that: *"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' annual turnover."*

6. Section 49(7) of the Act states that: *"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 if practicable and if the consumer so chooses, perform the service again to a reasonable standard."*

Assessment Tests

The following assessment tests will be used to consider Section 49(5) of the Act.

It was submitted that:

7. Whether Atlas Mara is a "person" or an "enterprise";

8. Whether Atlas Mara provided a service to a consumer; and

9. Whether Atlas Mara supplied a particular service to the Complainant as 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.

Investigations Conducted

It was submitted that:

10. Initially the Commission instituted investigations in the matter under Section 46(1) as read together with Section 45(b); and Section 47(a)(iv) of the Act. As such, the Notice of Investigation and accompanying letter were served on the Respondent. However, during the investigations, the Commission found that the matter bordered on Section 49(5) of the Act. Hence, this case was analyzed under Section 49(5) of the Act.

Findings

The Parties

The Complainant[1]

It was submitted that:

11. The Complainant is Mr. Naphitali Banda of Chipata, Eastern Province. The Complainant's phone numbers are 097XXXXX35 and 096XXXXX43. Section 2 of the Act defines a consumer as, "*any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration*".[2] Therefore, the Complainant is a consumer because he obtained a loan facility from the Respondent for his personal benefit as evidenced by his loan agreement with the Respondent dated 3rd February 2014.[3]

The Respondent

It was submitted that:

12. The Respondent is Atlas Mara. The Respondent's registered office is situated at Atlas Mara House, corner of Church and Nasser Roads, Ridgeway, Lusaka. The Respondent is registered with the Patents and Companies Registration Agency and with company registration number 119990042541. Section 2 of the Act defines an enterprise as, "*a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial*

[1] CCPC form IV
[2] Competition and Consumer Protection Act No. 24 of 2010.
[3] Complainant's account statement held with the Respondent dated 3rd February 2014.

activities, and includes their branches, subsidiaries, affiliates of other entities, directly or indirectly, controlled by them". Therefore, the Respondent is an enterprise as envisaged under the Act as they are a company which engages in commercial activities of supplying banking and financial services such as loans to its clients[4].

Submissions from the Respondent[5]

It was submitted that:

13. In a letter dated 23rd May 2022 the Respondent through their Acting Managing Director then, Mr. Bobbline Cheembela, submitted that on 3rd February 2014, the Complainant obtained a K15,000.00 loan from the Respondent. The Respondent submitted that the loan was to run for a period of 60 months and the Complainant was to repay the loan in monthly instalments of K537.05, which would result in him paying back a total sum of K32,176.28.

14. The Respondent submitted that following the adjustment of the Monetary Policy Rate ("MPR") in 2016, they revised their annual effective interest rate in their loan book, which resulted in the Complainant's loan tenor being increased from 60 months to 68 months. The Respondent submitted that this was done to maintain the Complainant's loan affordability as was signed for in the Complainant's loan agreement.

15. The Respondent further submitted that in the first 8 months of the loan tenor, the loan was not being serviced in accordance with the loan agreement as the Complainant underpaid the monthly instalments. The Respondent submitted that in the first 8 months the Complainant remitted monthly instalments of K233.60 instead of the agreed K537.05.

16. The Respondent submitted that these underpayments resulted in total arears of K2,427.50 as of 29th October 2014, when he started remitting the correct instalments.

17. The Respondent submitted that in June 2019, the loan deductions dropped off the Complainant's payslip leaving a balance of K5,863.57 as at 28th August, 2019. The Respondent submitted that this balance was as a result of the underpayments in the first 8 months and the loan rescheduling of 2016.

[4] Complainant's Loan Agreement form dated 3rd February 2014
[5] Letter from the Respondent dated 23rd May 2022

18. The Respondent submitted that the balance that remained continued to accrue interest culminating to the current balance of K9,372.26 as at 20th April 2022.

19. The Respondent submitted that on several occasions they made efforts to engage the Complainant through Short Message Service ("SMS") on his mobile number 0979-383535 but the Complainant did not heed to their request to visit the branch and advise how the balance would be settled. The Respondent submitted that in order to have the loan fully settled, they resumed deductions of K350.00 through the Complainant's employer.

20. The Respondent submitted that they had attached supporting documents relating to the investigation, that is, the loan statement which reflected how the loan was being paid and marked "Account ID 20XXXXXXXXX5"; and loan settlement account which reflected all payments received from the Complainant to service loan payments and marked "Account ID 10XXXXXXXXX1.

Further submissions from the Respondent[6]

It was submitted that:

21. On 13th June 2022, in an email to the Commission, the Respondent submitted that on 12th November 2019 they sent a SMS communication to the Complainant's last known mobile number +260979383535. The Respondent submitted that if the Complainant had changed the mobile number, he had the obligation to inform them about such changes.

22. The Respondent submitted that on 11th March 2020, they sent another text to all their customers with balances including the Complainant whose outstanding balance stood at K6,418.58 as at end of January 2020. The Respondent submitted that in the text message they were offering the Complainant a discount of K541.86 so that the Complainant could pay K5,876.72.

Further submissions from the Complainant[7]

It was submitted that:

23. On 13th June 2022, in a telephone conversation with the Commission, the Complainant submitted that from the time the Respondent ceased deductions

[6] Respondent's email to the Commission dated 16/06/2022
[7] Tele-record between the Complainant and the Commission dated 16/06/2022

in June 2019, he had never received any communication from the Respondent that he was owing them any money or that the loan tenor had been adjusted from the 60 months to 68 months.

Review of the Complainant's Loan Agreement[8]

It was submitted that:

24. A review of the Complainant's loan agreement revealed that he obtained a loan of K15,000.00 at an interest rate of 18.75% for a tenor of 60 months to be settled in monthly instalments of K537.05. The loan agreement was signed on 3rd February 2014 and the loan amount was disbursed to the Complainant the same month. The loan was therefore expected to run till January 2019. The review of the loan agreement also revealed the expected repayment amount was K32,176.28.

Review of the Complainants Account Statements[9]

It was submitted that:

25. A review of the Complainant's account statements revealed that from February 2014 to October 2014, the Complainant made monthly instalment payments which were less than the agreed K535.05. A further review showed that as of August 2019, the Complainant had remitted a total of K32,436.27[10]

Review of the Monetary Policy Rate by the Bank of Zambia from 2014 to 2019

It was submitted that:

26. A review of the monetary policy rate by the Bank of Zambia revealed that the monetary policy rate in the year 2014 had increased from 9.75%[11] to 15.5% in the year 2015[12]. It was also revealed that in 2016 the Bank of Zambia maintained a tight monetary policy stance and kept the monetary policy rate at 15.5% throughout the year[13]. It was also revealed that the Bank of Zambia reduced the monetary policy rate from 15.55% to 10.25% in the year 2017[14]. It was revealed that the monetary policy rate was lowered to 9.75% in February 2018 from 10.25%, and was maintained at 9.75% for the rest of the

[8] Review of the Complainant's Loan Agreement dated 3rd February 2014
[9] Review of the Complainants Account Statement from 3rd February 2014 to 20th Aoril 2023
[10] Complainant's Account Statement submitted by the Respondent
[11] https://www.boz.zm/BOZGOVERNORMONETERYPOLICYJan-Jun2014.pdf accessed on 21st December 2023
[12] https://www.boz.zm/BOZANNUALREPORT2015.pdf accessed on 21st December 2023
[13] https://www.boz.zm/BOZANNUALREPORT2016.pdf accessed on 21st December 2023
[14] https://www.boz.zm/BOZANNUALREPORT2017.pdf accessed on 21st December 2023

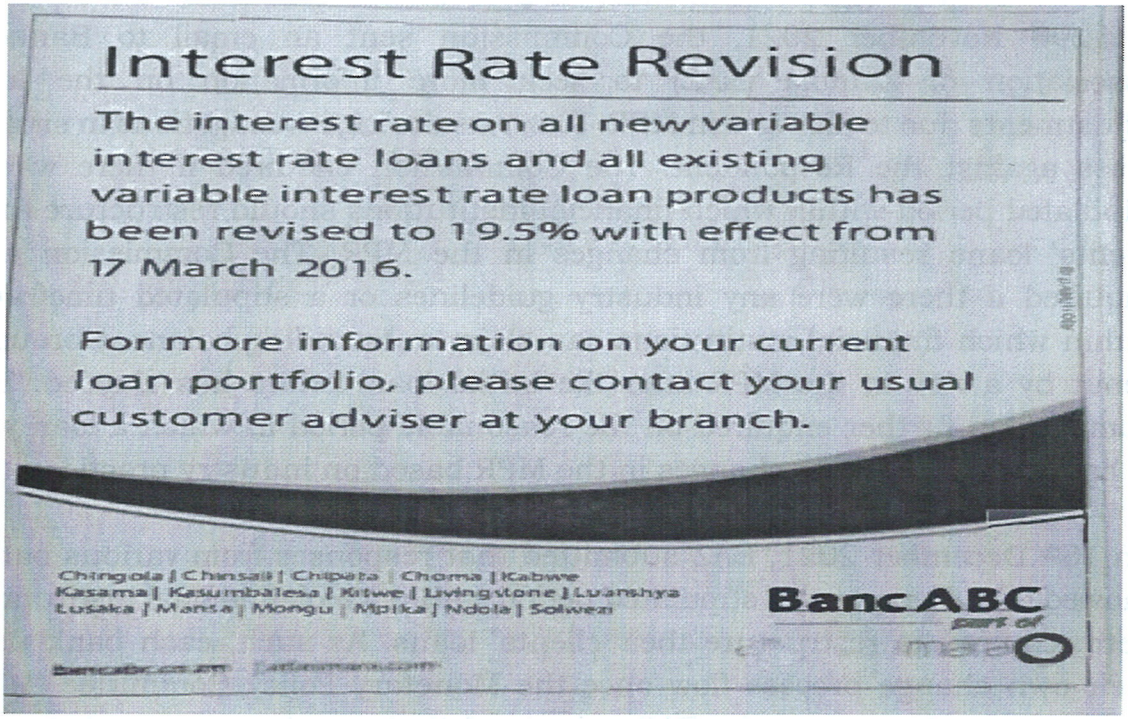
year[15]. It was further revealed that the Bank of Zambia raised the monetary policy rate in May, 2019 from 9.75% to 10.25% and that in November, 2019 it further raised the monetary policy rate from 10.25% to 11.50%[16].

Review of Respondent's Newspaper Statement[17]

It was submitted that:

27. A review of the Respondent's Newspaper notice, revealed that on 17th February 2016, the Respondent published an article in the Zambia Daily Mail informing the public and all their customers that they had upwardly adjusted the interest rates on all their loan products to 19.5%.[18]

Picture 1: Interest Rate Revision Notice



Review of the Respondent's Internal Communication on SMSs[19]

It was submitted that:

28. A review of the Respondent's text to the Complainant revealed that on 12th November 2019, the Respondent sent an internal email to themselves which stated "*See below approved SMS to be sent out to customers on the attached*

[15] https://boz.zm/BOZ-ANNUAL-REPORT-2018.pdf accessed on 21st December 2023
[16] https://www.boz.zm/AnnualReport2019.pdf accessed on 21st December 2023
[17] Review of Respondent's Newspaper Statement dated 17th February 2016
[18] Respondent's statement published in the Zambia Daily Mail Newspaper on 17th February 2016
[19] Review of the Short Message Services (SMS) sent by the Respondent dated 12th November 2019 and 11th March 2020

list. Let's aim to shoot this one today." It was revealed that the message read as*; "Refinance your loan with a top up of up to K320,000 and get a discount on your existing Loan. Call 202 or visit your nearest Branch for details. TCs & Cs apply (158 characters)"*[20].

29. It was further revealed that on 11th March 2020, the Respondent through their internal processes sent an email to themselves which read "*Good Morning Stephen, kindly see attached as requested. Please refer all clients on the Collections list to us to advise the discount offered. Regards Mutinta.*"

Submissions from the Bankers Association of Zambia[21]

It was submitted that:

30. On 29th November 2021, the Commission sent an email to Bankers Association of Zambia (BAZ) to seek more information on the loan adjustments due to changes in MPR. This was during investigations in similar cases against the Respondent. The Commission enquired if there was a stipulated period within which financial institutions should restructure their clients' loans resulting from changes in the MPR. The Commission also enquired if there were any industry guidelines or a stipulated timeframe within which financial institutions can claim outstanding balances brought about by a rise in the MPR after the initial loan tenure has elapsed. The Commission further enquired on the reasonable period in which a loan was to be restructured after changes in the MPR based on industry practice.

31. On 15th December 2021, BAZ submitted that responses from various banks showed that there was no stipulated period within which financial institutions were required to restructure their clients' loans. As such, each bank used their own change process flow once the Monetary Policy Committee (MPC) announcements were made. BAZ submitted that members reported that no restructures were done retrospectively and that clients were usually notified on the MPR change using different channels such as SMSs, print and social media notifications, bank branch notices and emails. BAZ further submitted that clients were advised to contact the bank to choose between adjusting the tenure or the repayment amount and the grace period was provided. BAZ submitted that other banks advised that they did not change the interest rates in line with the changes in the MPR as they maintained the rate, as contractually agreed with the client at onset.

[20] Respondent's SMS to the Complainant on 12th November 2019
[21] BAZ document to the Commission dated 15th December 2021

32. BAZ submitted that outside of the position of the law in Section 110 of the Banking and Financial Services Act (BFSA) and the fact at common law, no change in law/directive or guideline including MPR was applicable retrospectively, there was no industry guideline on the timeframe within which financial institutions could claim outstanding balances. However, the timeframe could vary from one client to the other. BAZ submitted that if the client opted for the adjustment of the repayment amount, the loan tenure remained unchanged, and the customer paid off the loan within the original tenure. BAZ submitted that in the event that the client opted for the tenure adjustment the increase on the loan would depend on the balance, instalment remaining, number of the basis point increased etc. Some banks set parameters which were followed as such loans were not supposed to go beyond 72 months, Debt Service Ratio was maintained.

33. BAZ submitted that varied responses were received towards the reasonable period in which a loan could be restructured after changes in the MPR based on industry practice which included the following:

a. Two (2) to three (3) weeks
b. As soon as it was practicable for the financial institution
c. Within a year after the adjustment of the MPR by Bank of Zambia
d. MPR changes were implemented within 24hrs with value of Bank of Zambia Value date

Analysis of the Submissions from BAZ

It was submitted that:

34. From submissions made by the Bankers Association of Zambia, the Commission observed that most banking institutions generally worked with a time-period of 24 hours to utmost a year (from the date of change in MPR) to restructure loans and commence recovery of excess interest brought about because of an increase in the monetary policy rate. However, in the case of the Respondent, the Commission found that the entire loan tenure had elapsed before the Respondent could reconcile the loan. The Commission found that the Respondent took as long as 2 years to restructure the loan following a change in the MPR. The relatively long period taken by the Respondent suggested a lack of precaution in the Respondent's after-sales service to the Complainant.

Submissions to the Commission's Preliminary Report

It was submitted that:

35. Following the approval of the preliminary report, it was duly served on the Respondent and the Complainant on 22nd June 2022 in order for them to make submissions to the report. However, there were no submissions to the report from the Respondent.

Submissions from the Complainant[22]

It was submitted that:

36. On 28th June 2022, the Complainant submitted that during the tenor of the loan, he made verbal submissions on the under deductions of K233.60 to the Respondent and that the Respondent's loan officer advised him that same amounts paid would cover a period of 4 to 5 months and would not create any lapses on the loan repayment schedule.

37. The Complainant submitted that when he calculated the underpayments of K233.60 for the 9 months they ran and the K537.05 instalments that ran for 56 months, he arrived at a total of K32,177.20, which was equivalent to the principal loan repayment figure for the entire loan.

38. The Complainant submitted that his loan of K15,000.00 was contracted from a micro finance and not a commercial bank which accumulates interest on outstanding balances as established from the Respondent's submission in the report and that he sought fair resolution and correct application of the laws which protect consumers in situations such as his.

39. The Complainant submitted that he appealed to the Commission and the Bank of Zambia that his loan was obtained from a micro finance institution and not a commercial bank, and that the Respondent only inherited the condition of a commercial bank because they were liquidated.

Further Submissions to the Preliminary Report

It was submitted that:

40. After the Complainant made submissions to the preliminary report, the Commission further made analysis of the case. Therefore, following the approval of the Preliminary Report, it was duly served on the Respondent and

[22] Complainant's letter to the Commission dated 28th June 2022

the Complainant on 18th July 2022 in order for them to make submissions to the report.

Submissions from the Respondent[23]

It was submitted that:

41. In a letter addressed to the Commission dated 27th July 2022, the Respondent through their legal counsel- Mweshi Banda and Associates submitted the following:

1. ***"Introduction***

1.1 *We refer to your letter dated 15 July 2022 addressed to Atlas Mara which was served on the addressee on 18 July 2022 and advise that we have been engaged to act on behalf of African Banking Corporation T/A Atlas Mara Zambia (our "**Client**" or the "**Bank**") with instructions to respond to your letter under reference, specifically the preliminary report on allegations of unfair trading practices against the Bank dated July 2022 (the "**Report**").*

1.2 *We also refer to our email sent to the Commission on 25 July 2022 in which we requested for an extension of time within which the Bank could respond to the Report and the Commission's response dated 26 July 2022 confirming the grant of an extension of 2 days.*

1.3 *We understand from a review of the Report that the Competition and Consumer Protection Commission (the "**Commission**") initiated their investigations preceding the report based on a complaint received from Naphitali Banda (the "**Complainant**") arising from a loan agreement he had entered into with the Bank.*

1.4 *The Commission issued a Notice of Investigation and an accompanying letter on 19 April 2022 in relation to the complaint made by the Complainant to the Commission. The Commission proceeded to issue a preliminary report dated 21st June 2022 (the "**Initial Report**"), which was served on the Bank on 22 June 2022.[24] In the Initial Report, the Commission proceeded to reject the complaint against the Bank when it made a finding that "the Respondent exercised reasonable care and skill in the provision of the service they are engaged in to provide. The*

[23] Respondent's letter to the Commission dated 27th July 2022
[24] As acknowledged by the Commission in paragraph 39 of the Report

Commission therefore established that the Respondent was not in violation of Section 49(5) of the Act."

1.5 *We note that through the Initial Report and the Report, the Commission introduces a new theory of harm, which it went on to investigate, namely that the Bank failed to supply a service to the Complainant with reasonable skill and care contrary to section 49 (5) of the Competition and Consumer Protection Act No. 24 of 2010 (the "**Act**"). This was notwithstanding the fact that the Notice of Investigation issued by the Commission was for alleged breaches of section 46 (1) as read with section 45 (b) and section 47 (a)(iv) of the Act, which are different theories of harm.*

1.6 *The Complainant's complaint, as summarised in paragraph 1 of the Initial Report and the Report, is that the Bank should stop deductions and refund the Complainant the money they had deducted.*

1.7 *In the Report, the Commission made the following key findings or observations at paragraphs 29 to 38 thereof:*

1.7.1 *The Complainant obtained a loan of K15 000.00 from the Bank on 3 February 2014 that was to be repaid over a period of 60 months in instalments of K537.05.*

1.7.2 *From the loan statement provided by the Bank, the Complainant underpaid the loan from February 2014 to October 2014 by remitting monthly instalments of K233.60 instead of the agreed K537.05 which resulted in arrears of K2,078.32 which had accrued interest and culminated into arrears of K2 427.50 as of 29 October 2014. These arrears continued to accrue interest, resulting in a total arrear balance of K9 327.26 as of 20 April 2022.*

1.7.3 *The monetary policy rate ("**MPR**") rose during the tenure of the loan.*

1.7.4 *The Bank ceased making deductions from the Complainant's salary.*

1.7.5 *The Bank sent a message to the Complainant on 12 November 2019 notifying him of the arrear status of the loan facility through Short Message Service (SMS) and another SMS on 11 March 2020 to the Complainant offering him a discount of K541.86 in order for the Complainant to pay K5876. 72 on the balance owed.*

1.7.6 *In March 2022, the Bank resumed making monthly deductions of K350.00 from the Complainant's salary.*

1.8 *Arising from the above findings made by the Commission in the Report, the Commission determined that the Bank did not exercise reasonable care and skill in management of the Complainant's loan and was therefore in violation of section 49 (5) of the Act, by virtue of the following acts attributed to the Bank:*

1.8.1 *it contributed to the financial burden on the Complainant by keeping silent on the monies owed to them for more than 24 months when they knew that the Complainant's loan was still active with an outstanding balance.*

1.8.2 *being experts as compared to the Complainant, it ought to have taken reasonable steps to resume the deductions to recover the outstanding balances, the Complainant would have prevented the accumulated interest on his loan balance and certainly would not have been subjected to the financial burden placed on him by the Bank's lack of action for more than 24 months.*

2. ***Procedural infringement and burden of proof***

2.1 *The Commission has committed two procedural infringements in this matter. Firstly, it has reopened an investigation that it had already decided not to investigate further. Secondly, the Commission did not issue a Notice of Investigation to inform the Bank that it had reopened the investigation, nor did it provide the reasons that compelled it to do so.*

2.2 *By reopening a closed investigation and introducing a new theory of harm to which submissions from the Bank were not invited prior to the preparation of the Report, the Commission violated the Bank's rights of defence, and consequently, of the rules of natural justice by:*

2.2.1 *introducing a new theory of harm for the first time in the Report. This deprived the Bank from adequately assessing the allegation and facts surrounding the same, and thus building its defence around the allegation. This amounts to a breach of the Bank's rights of defence and of the principle of equality of arms/right to a fair trial; and*

2.2.2 *finding the Bank guilty of violating the Act premised on an allegation that the Bank had no prior notice of when the Commission is obligated to clearly set out the conduct under investigation upfront.*

2.3 ***The Commission had no jurisdiction to reopen a closed investigation***

2.3.1 *It is trite law that an adjudicative body cannot reopen and relitigate disputes that it has already determined as this goes against the principle*

that all disputes must be concluded with finality. In the case of ***Hussein Safieddinne v The Commissioner of Lands, Okwudili Tony Anuluoha, The Attorney General*** *SCZ Selected Judgment No. 36 of 2017, the Supreme Court had this to say:*

"In our previous decision in the case of Societe Nationale Des Chemis De Pur Congo (SNCC) v Joseph Nonde Kakonde (2013)3 ZR 51, we indicated that the rationale for res judicata is that there must be an end to litigation. Basically, the purpose of the principle of res judicata is to support the good administration of justice in the interests of both the public and the litigants, by preventing abusive and duplicative litigation. Its twin principles are often expressed as being (1) the public interest that courts should not be clogged by re-determinations of the same disputes and (2) the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is therefore important that parties to litigation bring forward their whole cases at once.

In the celebrated case of Henderson v. Henderson (1843- 1860) ALL ER 378, it was held that:

"where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." [our emphasis]

2.3.2 *Although the case cited above refers to Courts, it is clearly stated therein that the principle of res judicata exists for the purpose of fostering good administration of justice in the interests of both public and private litigants. It, therefore, extends to a public body such as the Commission.*

2.3.3 *In the Initial Report, the Commission examined the complaint, the facts underlying the complaint and the relevant law, before arriving at a conclusion in paragraph 46 that the Bank had not breached section 49 (5) of the Act. It is, therefore, against the principle of res judicata and good administration for the Commission to relaunch the closed investigation and find the Bank guilty of the same offence it was*

exonerated of by the Commission. It is evident from the Report that the Commission largely duplicated the same underlying factual matrix and legal analysis by reproducing paragraphs 1 to 27 without change. The differences in the Initial Report and the Report are in the addition of the following new paragraphs: 28; 35, 37 to 43, 47, additional definition of reasonable time and reasoning to the new paragraph 49[25], 50, additional wording to the new paragraph 54[26] concerning the Commission's observation that the Bank had ceased loan recoveries from the Complainant's salary at the end of the loan tenure, without notifying him that there was a balance still owed to them; 55 and 56.

2.3.4 *By so doing, the Commission re-determined the same dispute and exposed the Bank to the injustice of being found to have committed a breach of the Act in respect of which it had earlier been found not liable, thereby affecting the Bank's interests.*

2.3.5 *In the judgment of the Court of First Instance of the European Communities, in the case of* ***DuPont Teijin Films Luxembourg SA, Mitsubishi Polyester Film GmbH and Toray Plastics Europe SA v The Commission of European Communities*** *Case T-113/00, it was held as follows in paragraphs 54 and 55:*

"54. It follows that the letter of 28 February 2000 can be read only as giving the Commission's definitive reply to the information received by it pursuant to Article 23 of the GSP Regulation and as bringing to a close, in its first stage, a procedure which might otherwise have led to the initiation of consultation in the Generalised Preferences Committee referred to in Article 23(3) and 31 of the GSP Regulation and, consequently, to the investigation requested by the applicants.

55. It follows from the foregoing that, having regard to its terms and the circumstances in which it was written, the letter of 28 February 2000 had legal effects capable of affecting the applicants' interests since, by that letter, the Commission definitively rejected, without examination, the information submitted by the applicants, thus altering their legal position as persons with an interest in the temporary withdrawal of preferential arrangements who had brought to the attention of that institution a case of the kind referred to in Article 22(1)(e) of the GSP Regulation." [our emphasis]

2.3.6 *The* ***DuPont Case*** *cited above establishes that a decision made by an authority at a preliminary stage is a definitive decision that becomes the*

[25] Paragraph 41 in the Initial Report.
[26] Paragraph 45 in the Initial Report.

subject of, in the context of the European Union, an application to annul it, which in Zambia would be an appeal. This is notwithstanding the fact that the decision is made without escalating it to a decision-making committee such as the Technical Committee. It follows that the decision of the Commission in the Initial Report informing the Complainant and the Bank that the Bank had not breached section 49 (5) of the Act brought the Complainant's complaint to an end and it was not open to the Commission to reopen a closed case for re-determination.

2.3.7 *This is supported by the decision in* ***Haladjian Freres SA v The Commission of European Communities,*** *Case T-204/03, where the Court of First Instance of the European Communities said this in paragraph 29:*

"In that context, the Court of First Instance has held that, when the Commission decides to proceed with an investigation, it must in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants..."

2.3.8 *Further at paragraph 45 of that case, that:*

"The contested decision describes the CES system and sets out the results of the investigation carried out in order to determine whether Haladjian's allegations were well founded, then state's the Commission's reasons for considering that the evidence obtained did not permit it to act on the complaint..."

2.3.9 *The Commission decided against proceeding further with the investigation after considering the facts as presented by the Complainant and the Bank and the relevant law. Having carried out this exercise, it made a decision with full knowledge not to proceed with the complaint further and cannot reopen the complaint as this is prejudicial to the Bank. Significantly, the Commission lacks the jurisdiction to review its own decisions as this is not a power conferred on it by the7 Act. Accordingly, it lacks jurisdiction to reopen the complaint.*[27] *In any event, the Initial Report created a legitimate expectation*[28] *that the Bank would not be*

[27] In the case of Savenda, the Supreme Court frowned upon an arbiter stepping into the arena to the disadvantage of a party to a dispute when it said this:
"The actions by Learned High Court Judge effectively amounted to his stepping into the arena of the dispute to the disadvantage of the Respondent, which we find to be a misdirection on his part deserving of intervention by the Court of Appeal

[28] In terms of Henred Fruehauf Zambia Limited, Appeal No. 8 of 2021, a legitimate expectation arises where the representation underlying the expectation is clear, unambiguous and devoid of relevant qualification; is reasonable; was induced by the decision maker and one which the decision maker is competent at law to make

liable for any offence relating to its trading practices arising from its dealings with the Complainant.

2.4 *The foregoing procedural infringement should alone result into the dismissal of the allegations against the Bank in their entirety as it is clear that on its own assessment, the Commission was satisfied with the Bank's submissions in response to the allegations of conduct which contravened the theories of harm set out in the Notice of Investigation dated 19 April 2022 (the "**Notice**"). This is evident from the Commission's subsequent departure from the conduct under investigation in the Notice to the new theory of harm of which the Bank had no notice.*

2.5 ***The Commission breached the rules of natural justice***

2.5.1 *In the alternative, the Report introduces a theory of harm that the Bank did not have an opportunity to respond to previously and that the Bank is now required to rebut within a limited amount of time. The theory of harm concerns the alleged ceasing of deductions of the loan from the Complainant's salary after the lapse of the initial loan tenure. This theory had not been put forward in the Notice of Investigation. This is despite the fact that the Commission was aware of this fact, as shown at paragraphs 22 and 44 of the Initial Report.*

2.5.2 *We submit that the rules of natural justice and indeed the provisions of the Act relating to the conduct of investigations dictate that the Bank should have known from the beginning the entire offence that it is answerable to, especially with regard to commercial practices that the Commission already had knowledge of. This would have allowed the Bank to properly prepare its defence by providing the relevant exculpatory evidence. The extension of the investigation to a closed case and a new theory of harm so late in the process constitutes not only a breach of the Bank's rights of defence and rules of natural justice but also a breach of the well-established international principle of equality of arms.*

2.5.3 *The Act does not expressly exclude the right to be heard*[29]*. However, the failure by the Commission to give the Bank an opportunity to be heard on the alleged failure to act within a reasonable time is in breach of the rules of natural justice. To this effect, it was held in **Shilling Bob Zinka vs. the Attorney-General** [30]that:*

[29] In Zambia Revenue Authority v Fellimart Investment Limited SCZ Judgment No. 24 of 2017 at page 852, the argument was raised that no tribunal can purport to exercise a greater jurisdiction which it does not in fact possess, which argument was accepted at pages 868 to 869 of that judgment when the Supreme Court agreed that the Tax Appeals Tribunal had no power to grant a stay of execution

[30] SJ SC (1991)

"The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased ("nemojudex in causasua"): and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard ("audialterampartem")... However, where there is no express statutory provision, as in this case, to exclude the "audialterampartem" rule, and a power is being exercised to impose penalties or to deprive a person of his livelihood; legal status (not being terminable at pleasure); personal liberty (not involving an illegal immigrant); property rights or any other legitimate interests or expectations; then a rebuttable presumption arises of the necessity to give prior notice and opportunity to be heard." [our emphasis]

2.5.4 *The Commission misused its powers when it reopened a closed case and proceeded to issue the Report finding the Bank guilty of an offence in respect of which it had no prior notice but a legitimate expectation that it would not be found to have breached arising from the Initial Report.*

2.6 ***The Commission failed to discharge the burden of proving a breach of section 49(5)***

2.6.1 *Further in the alternative, and without prejudice to its rights arising from the procedural infringements committed by the Commission, the Bank submits that the burden of proof that the Bank breached a provision of the Act lies with the Commission.*[31] *The Report is also based on conclusions that have largely been derived from assumptions as to the Complainant's knowledge of the impact of fluctuations of the MPR on his loan and on the status of his account with the Bank. In this regard, it would be unjust and unsafe to make a finding that an infringement of the Act has been committed and proceeding to impose sanctions on the Bank, which are financial in nature, based on assumptions or unsubstantiated assertions. On the contrary, the lack of sufficient, cogent and consistent evidence that the Bank has violated the Act should result in the dismissal of the allegations against the Bank due to the heightened standard of proof in a case of this nature*[32].

[31] In accordance with a plethora of Zambian case law which establishes that the burden of proof lies with he who alleges, the leading case of which is Mohamed v The Attorney General (1982) Z.R. 49

[32] In the Australian case of ***Morley v Australian Securities & Investments Commission*** [2010] NSWCA 331 at 746, the Australian Court of Appeal was of the view that the graver the consequences of a finding, the stronger the evidence needed to support a finding that the allegation has been proved on a balance of probabilities. A similar approach was taken by the European Court of Justice in its judgment arising from a consumer complaint in respect of which the sanction was the imposition of a financial penalty, in the case of ***SL v Vueling Airlines SA,*** case C-86/19 delivered on 9 July 2020 (Judgment No. 62019CJ0086) where the Court found that the aggrieved consumer had to adduce evidence of harm caused by the airline and that the evidence was to be assessed in accordance with the national rules of evidence (at paragraphs 42 and 44)

2.6.2 *As will be shown in this response, the Commission has failed to discharge this burden through manifest errors in relation to the assessment of the underlying facts of the case, of the application of the law and customs applicable to the provision of financial services to the facts of the complaint. However, it should be noted from the outset that the Bank reserves its rights to pursue recourse arising from the violations of its rights of defence and fair dealing.*

3. ***Factual Background***

3.1 *The facts in this case are not in dispute between the parties. These are that the Complainant obtained a loan of K15 000.00 (the "**Loan**")*[33] *from the Bank on 3 February 2014. The Loan was to be paid in equal instalments of K537.05 during the tenure period of 60 months starting from February 2014 until January 2019. During the first 8 months of the Loan tenure, the Complainant underpaid the Loan by remitting monthly instalments of K233.6 instead of the agreed K537.05 as indicated in the Salary Deduction Authorisation Form. Due to the underpayments, the Complainant had accumulated arrears amounting to K2 078.32 which accrued interest of K2 427.50 as at 29 October 2014. This balance continued to accrue interest and as of 20 April 2022, the total arrear balance amounted to K9 372.26. It is important to note that at no point during the tenure of the Loan was the agreed instalment remitted to the Bank. This is evident from the fact that the Complainant remitted the sum of K536.27 for the remainder of the Loan tenure. The consequence of the persistent underpayments of K0.70 for the remainder of the Loan tenure was that the full loan repayment sum could not be recovered during the agreed 60 months.*

3.2 *While the Bank obtained the Salary Deduction Authorisation Form from the Complainant, payment of the instalments was under the control of Payroll Management and Establishment Control ("**PMEC**"). The underpayments in the monthly instalments coupled with the adjustments of the MPR during the subsistence of the Loan tenure resulted in the Complainant's Loan being rescheduled to maintain affordability which resulted in an increased loan tenure from 60 to 68 months. Further, following the adjustment in the tenure, the interest on the outstanding arrears resulted in the further arrears to be paid.*

4. ***The Banking Industry***

4.1 *As the Commission will note, the banking sector is a heavily regulated sector with codes of conduct imposed on banks being stipulated in*

[33] Attached hereto as Annex 1 is a copy of the signed Loan Agreement

*various pieces of legislation. The key legislation is the Banking and Financial Services Act No 7 of 2017 (the "**BFS Act**")*[34].

4.2 *In terms of the BFS Act, various activities have been identified which are considered anti-competitive and an infringement on the rights of the consumer. Section 104 of the BFS Act prohibits misconduct during debt collection which is expressed to be harassing, oppressive or abusive conduct in the collection of a debt*[35]*, or the use of false, deceptive or misleading representation or means when collecting a debt*[36].

4.3 *The BFS Act also stipulates the standard of skill and care to be discharged by a bank when lending money to its customer. This standard is*[37]*:*

"(1) A financial services provider shall, before advancing a credit facility to a customer, assess and determine the customer's ability to pay the credit, based on the customer's current and expected income, current obligations, employment status, other financial resources or assets to be given as security.

(2) A financial service provider shall not advance a credit facility to a customer whose total monthly debts due on outstanding obligations, including under credit facility, exceed a limited prescribed by the Bank.

(3) A financial service provider that contravenes this section commits an offence".

4.4 *Most significantly, the BFS Act prescribes what constitutes "unfair business practices" in the provision of financial services as follows:*

"(a) a practice that is likely to mislead customers in making decisions;[38]

(b) a practice that compromises the standing of honesty and good faith which a financial service provider can reasonably be expected to meet; or

(c) a practice which places pressure on customers and distorts their decisions, by use of harassment or coercion".

4.5 *It is respectfully submitted on behalf of the Bank that what amounts to reasonable care and skill necessary to make a finding that the Bank engaged in unfair trading practices needs to be considered in the context*

[34] Part IX of the BFS Act
[35] Section 104 (i) of the BFS Act
[36] Section 104 (2) of the BFS Act
[37] Section 108 ibid
[38] Section 116(2) ibid

of the BFS Act which obligates the Bank to act honestly and in good faith, without harassing or using oppressive conduct in its debt collection efforts. Further, the standard of care and skill to be discharged is to assess and determine the customers' ability to repay a loan before advancing a credit facility and this duty of care continues throughout the life of the facility.[39]

4.6 *The foregoing submission is supported by the decision in the case of* ***Karak Brothers Company Limited v Burden***[40]*, where the Court stated that:*

"...a bank has a duty under its contract with its customer to exercise reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been obtained in any particular case has to be decided in light of all relevant factors".

4.7 *The above position of the law was restated by the learned authors of* ***Chitty on Contracts****, Volume 1, Twenty-Ninth edition at paragraph 13-032, who stated thus:*

"In the case of a contract under which a person agrees to carry out a service ..., where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable skill and care.... If the contract is one for the supply of professional services, the degree of care and skill required of a professional man is that which is to be expected of a member of his profession (in the appropriate speciality, if he be a specialist) of ordinary correspondence and experience."

4.8 *The approach of considering what constitutes unfair trade practices in the context of the standards applicable to the industry in which the service provider operates was adopted by the English courts in the case of* ***Plevin v Paragon Personal Finance Limited***[41]*, where the debtor alleged that an unfair relationship existed between it and its service provider. The court began its consideration of the question before it by analysing the relevant service industry in paragraph 12 as follows:*

[39] The Banking and Financial Services, Classification and Provision of Loans Directive 2020, directive 4 (1)(a) and (c). this duty was discharged by the Bank when it rescheduled the loan tenures to ensure affordability
[40] [1972 ALL ER 1210
[41] [2014] UKSC 61

"The regulatory framework"

The sale and administration of general insurance and non-investment life business is now a heavily regulated field. The conduct of insurance intermediaries is governed by a statutory scheme which implements the Directive 2002/92/EC on insurance mediation...These rules created duties owed directly by the provider of the service to be insured, actionable under what was then section 150 of the Act..." [our emphasis]

4.9 *In justifying the approach taken in the* ***Plevin Case,*** *the Supreme Court of the United Kingdom made the following observation at paragraph 16:*

"...But he declined to find that the relationship was thereby rendered unfair because the lender had committed no breach of the ICOB rule either in charging the commission or in failing to disclose it. At paragraph 58, he said:

"...the touchstone must in my view be the standard imposed by the regulatory authorities pursuant to their statutory duties, not resort to visceral instinct that the relevant conduct is beyond the Pale In that regard it is clear that the ICOB regime, after due consultation and consideration, does not require the disclosure of the receipt of commission. It would be an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under section 140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates". [our emphasis]

4.10 *It is clear from the above that the duties imposed by the statutory regulatory framework are a relevant, if not a paramount consideration, of whether or not a service provider exercised reasonable care and skill. It is, therefore, expected from an authority conducting an objective assessment to provide reasons for adopting a departure from laid down legal principles as this facilitates the Board's review.*

5. *The Duties imposed on the Bank by law.*

5.1 *Having established the test of the standard of care and skill applicable to the assessment of the Bank's dealings with the Complainant post the date when the loan tenure was to lapse, it is paramount to consider the point at which the duty of care and skill arises. This is in view of Section 49 (5) of the Act which stipulates that:*

"A person or enterprise shall supply a service to a consumer with reasonable care and skill..." [our emphasis]

5.2 *Based on the underlined portion of Section 49(5) of the Act above, the duty of care and skill arises at the time of supply of the service. According to the* ***Oxford Advanced Learner's Dictionary, International Student's Edition****, New 8th Edition, the word supply is defined to mean, inter alia;*

"an amount of something [sic] that is provided or available to be used...

to provide something [sic].... that they need or want..."

5.3 *Owing to the above definition of the word "supply" used in the Act[42], it is submitted on behalf of the Bank that the duty imposed on it by law was to supply, that is, to provide or make available the Loan the Complainant wanted. This not only accords with the Act but most importantly, the BFS Act, as earlier articulated in paragraph 4 above.*

5.4 *Our submission above finds support in the case of* ***Oliver Dean Morley T/A Morley Estates v The Royal Bank of Scotland Plc[43]*** *where the court made the following findings as to when the services were provided at paragraph 60:*

"Breach of a duty to provide banking services with reasonable care and skill

60. The service which the bank provided by the loan agreement was to make funds available for drawdown by Mr. Morley. That service had been provided when funds were initially drawn down in December 2006 and from time to time thereafter ... After the loan term expired in December 2009 and Mr. Morley failed to repay the sums advanced, he was in default and the only question was whether the bank would forebear to enforce its security ..." [our emphasis]

5.5 *We submit that the object of the consumer protection accorded to the Complainant by section 49 (5) of the Act is to safeguard his consumer choice. According to the article by Neil W. Averitt and Robert H. Lande,* ***Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law, Loyola Consumer Law Review,*** *Volume 10 issue 1 (1998), consumer protection should focus more closely on conduct that impairs choice[44]*

"If our model of consumer choice suggests that antitrust law should be modestly expanded, it also suggests that the scope of consumer

[42] Whose broader definition in the context of services has been set out by the Commission in paragraph 35 of the Report
[43] [2021] EWCA Civ 338
[44] At page 13, paragraph C of the Loyola consumer Law review

protection should be modestly contracted. The consumer choice model suggests that unfair consumer practices should be limited to those that have more or less demonstratable effect on consumers ability to exercise effective selection, and that the concept should not be extended to conduct that is thought to be "unfair" on the more general, less predictable moral or equitable grounds."

5.6 *While the foregoing quotation refers to unfair consumer practices, we opine that the same rationalization applies by analogy to the provision of services with care and skill, since this conduct is viewed by the Commission as falling under trading practices. This analogy is evident from the case of* ***Broadwick Financial Services Limited v Spencer and another*** *[2002] 1All ER 446:*

"34.... First, it is obvious that the essential function of the rate disclosure is to provide the prospective debtor with a statement of credit costs that will enable him or her to compare the costs of one or type of credit with another."

5.7 *In paragraph 57 of that case, the judge held that:*

"57. I consider that Broadwick should have told Carrox and Mr and Mrs Spencer that its policy was not to reduce the rates even if market rates fell. This is not a point that was pleaded but was relied on by Mr and Mrs Spencer in closing submissions at trial. However, there is no evidence that they would not have proceeded with the transaction on the same terms if they had been given the information" [our emphasis]

5.8 *Further, in paragraph 59 of the case, Lord Justice Robert Walker, in his dissenting judgment had this to say:*

".. It is very unfortunate for Mr and Mrs Spencer that they did not seek help from Citizens Advice Bureaux (or some comparable advice centre) when they first started to fall into arrears with their building society mortgage. Had they done so, there would have been a much better chance of avoiding the misfortune which had overtaken them" [our emphasis]

5.9 *The portions of the case cited above confirm that a bank's duty is to disclose the cost of borrowing to enable its customer to make a comparison with the cost of borrowing from other lenders. That this disclosure is to take place before the customer borrows from a bank so as not to impair the customer's choice by withholding information that would have affected their decision making and likely resulted in them choosing another lender. In addition, it establishes that the borrower*

must take positive steps to manage their loan and avert negative consequences arising from default.

5.10 *The Complainant entered into a loan agreement with the Bank which disclosed the sums of money the Bank would advance to him including the various fees the Bank would charge the Complainant. Accordingly, the duty imposed on the bank at law to provide a service with care and skill being that of giving the Complainant a loan on agreed terms as to applicable charges, repayment instalments and repayment period was discharged with reasonable skill and care on the date the Complainant was paid the Loan amount.*

5.11 *The duties imposed on the Bank when advancing credit have been set out in paragraph 4.3 above. Those duties are found in Section 108 of the BFS Act which does not impose a duty on the Bank to inform the Complainant that he still owes the Bank money on his Loan, that the Commission has erroneously attributed to the Bank in paragraphs 54 and 55 of the Report. In accordance with the decision in the* ***Morley Case****, after the loan is disbursed and the debtor fails to pay, the only question that the lender has to consider is whether it will forebear to recover the debt.*

5.12 *In* ***Chitty on Contracts****, Volume 2, at paragraph 38-234, the position of the law as to repayment of debts is enunciated as follows:*

"Once a debt is proved to have existed, its continuation is presumed; thus, the obligation to repay a loan is presumed to continue to exist unless the borrower proves that the loan has been repaid or otherwise discharged, or such payment can properly be inferred from all the circumstances.

A receipt is not conclusive but only prima facie evidence that a loan has been repaid". [our emphasis]

5.13 *We opine that once the Bank discharged its duty when advancing credit to the Complainant*[45]*, a corresponding duty to repay the Loan was placed on the Complainant*[46]*. This duty would only terminate upon the Complainant repaying his Loan with cogent evidence to substantiate his belief that the Loan was repaid, in the event of a difference of opinion with the Bank. The Complainant signed a "Salary Deduction Authorisation Form" (the "****Form****") which authorised his employer to*

[45] By disclosing the cost of borrowing in the Loan Agreements in compliance with Section 108 of the BFS Act and the Banking and Financial Services (Cost of Borrowing) regulates Statutory Instrument No. 179 of 1995 (the "L**ending regulations**")

[46] In line with the agreement on loan period No of installments and repayment per month set in the loan Agreement and supported by the ***Broadwick Financial Services Case***.

deduct the agreed monthly instalments from his salary and to remit them to the Bank. It stands to reason that the Complainant had knowledge at all material times as to what deductions, if any, were being made from his salary by his employer, through PMEC, and remitted to the Bank. This information was easily obtained from his salary payslip and bank statements.

5.14 *Failure to ensure that all instalments are paid in full as and when they fell due was clearly a breach on the part of the Complainant.*[47]

5.15 *Further, the agreement of the parties in the Loan agreement was that although the Loan was to be repaid within a fixed tenure, the tenure could be increased in the event of the Loan being rescheduled. This agreement is in the "Salary Deduction Authorisation Form "and couched in the following words:*

"I acknowledge and agree that in the event my loan (s) being rescheduled or my taking of an additional loan, the terms of the Loan Agreement and a salary deduction authorisation Form shall appreciate in favour of the African Banking Corporation in respect of the rescheduled loan and additional loan, together with any amendments, as if the salary deduction authorisation form had been signed and executed by me in respect of reschedule of additional loan."

5.16 *The Report acknowledges in paragraph 51 that it was incumbent on the Complainant to ensure that all monies owed to the Bank are paid as per the Loan Agreement as provided for in the Salary Deduction Authorisation Form. Surprisingly, notwithstanding this finding, the Commission imposes a duty on the Bank to inform the Complainant that there was still a balance owed to it, in paragraph 54 of the Report. The Commission goes on further to find the Bank liable for contributing to the Complainant's financial burden by failing to notify him that he still owed on his Loan for 24 months. It is submitted on behalf of the Bank that not only is this finding unsupported by banking law but is also factually inaccurate.*

5.17 *In **Banking Litigation**, 2nd Edition by David Warne, at paragraph 2-021, the author had this to say about fiduciary duties of a bank:*

"In most situations the relationship between a bank and its customers will be governed by the express or implied terms of a contract. In ordinary course of banking, no fiduciary duty arises..."

[47] National Drug Company Limited and Privatisation Agency v Mary Katongo, Appeal No. 79/2001

5.18 *Further at paragraph 2-022 of* ***Banking Litigation****, it was observed that:*

"...the courts are reluctant to impose fiduciary duties of the bank. Professor (now Judge) Finn has indicated that, given the general recognition that banks are commercial entities with an obvious self interest in the business they transact, he would not expect fiduciary duties to be owed by a bank to a customer..." [our emphasis]

5.19 *It is submitted that the Commission cannot, in the absence of an express legal provision to that effect, impose a fiduciary or legal duty on the Bank to ensure that the Complainant, who has a contractual obligation to repay money borrowed from the Bank, is notified that he has not paid in accordance with the agreement of the parties when he is aware of the terms of the agreement and can see the underpayments being made through PMEC on his payslip[48]. It follows that a bank does not act in breach of its duty to supply its services with reasonable care and skill by allegedly failing to manage its borrowers by reminding them that they are in arrears and the consequences thereof[49]. This would be a mammoth task considering the volumes of loans the Bank dispenses, which is probably why the legislature has not seen fit to impose this onerous obligation on banks. Borrowers such as the Complainant have an obligation to take reasonable care of themselves in the settlement of their financial obligations.*

5.20 *Notwithstanding the foregoing, the Bank sent SMSs to the Complainant on 12th November 2019 and on 11 March 2020 on his telephone number +260 979383535 notifying him of his arrears through an invitation to refinance his Loan. It stands to reason that the Bank would only invite the Complainant to refinance his Loan if there were arrears still outstanding. Consequently, there is no reasonable basis upon which the Complainant could have believed that he had repaid the Loan in full having noted that lower instalments were being remitted to the Bank, as per his submission at paragraph 40 of the Response (which are only admitted to the extent that the Complainant noticed the underpayments but denied in relation to the purported advice obtained from Bank's undisclosed loan officer).[50]*

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[48] In ***Office of Fair Trading v Purely Creative Limited*** [2011] EWHC 106 (Ch), the Court held that the Consumer Protection from unfair Trading Regulations 2008 exist to protect consumers who take reasonable care of themselves, rather than the ignorant, careless or hasty consumer

[49] A contrary view would lead to clothing the Bank with fiduciary duties that do not arise in the provision of financial services

[50] In the case of ***Fine Care Homes Ltd v National Westminster Bank Plc***, Natwest *Markets Plc (formerly Royal Bank of Scotland plc) [2020] EWHC 3233 (Ch),* Mrs Justice Baron made this observation in paragraph 8:

5.21 *Further, the Commission contradicts itself by, on the one hand, stating that the Bank had a duty to act fairly towards the Complainant by notifying him of decisions that would affect him, in paragraph 50 of the Report, while on the other hand finding the Bank guilty of contravening the Act in paragraph 54 and 55 of the Act on the basis that the Bank delayed for 24 months thereby increasing the financial burden on the Complainant by waiting to resume deductions. The contradiction here lies in the fact that the Bank was awaiting confirmation from the Complainant on how he was going to clear the outstanding balance on the Loan before it could resume receiving remittances through PMEC bearing in mind that this would affect the Complainant. This is conduct the Commission earlier found to have been acceptable in paragraph 45 of the Initial Report. As such, it is surprising that the very conduct by the Bank that was earlier categorized as acting fairly towards the Complainant by giving him notice of circumstances that would affect him on one hand is now considered a breach of the Act on the other. This is a manifest error in assessment of the facts. Further, the Commission ignores the fact that deductions were made by PMEC and remitted to the Bank on behalf of the Complainant. As such, the Bank did not cease deductions. Rather, PMEC ceased remittances.*

6. ***Conclusion***

6.1 *The Commission misused its power and violated the Bank's right not to answer to the same case again when it reopened the complaint following its earlier decision dismissing the complaint as per the Initial Report.*

6.2 *The issues the Commission is attempting to determine in the Report are subject to the principle of res judicata.*

6.3 *Alternatively, there having been no fresh notice of investigation issued in respect of the allegation of conduct contravening section 49 (5) of the Act, the Commission breached the Bank's rights of defence.*

6.4 *The Bank is regulated by the Banking and Financial Services Act No. 7 of 2017 and the subsidiary legislation and directives issued pursuant to*

"Given the passage of time, it is inevitable that Mr Somani's recollection of events leading up to the contract for the collar was unclear and he was (understandably) unable to recall the precise details of the many discussions that took place between him and the relevant bank employees in 2006 and 2007. It was therefore surprising that, when confronted with the bank's contemporaneous internal records of particular key meetings, he robustly denied the accuracy of those notes and put forward a different account of what has been said ... I do not, therefore consider Mr Somani to have been a reliable witness and I do not consider that the bank's internal records were fabricated in the way he alleged."

that Act. Accordingly, what amounts to reasonable care and skill in its duties to the Complainant is prescribed by the provisions of the BFS Act.

6.5 *In terms of Section 108 of the BFS Act, the Bank's duty to act with reasonable care and skill arises when providing the service of advancing money to a borrower. It does not extend to management of the Complainant's Loan in terms of the Bank reminding the Complainant to discharge his obligations under the loan agreement.*

6.6 *After expiry of the loan duration, the Bank's only duty is to engage in debt recovery actions that are not harassing, oppressive or abusive hence its numerous attempts to contact the Complainant by SMS. This duty is akin to one to act in good faith and is unrelated to the duty to supply services to a consumer with reasonable care and skill.*

6.7 *The Commission ought not to impose new duties on the Bank that are not statutorily imposed on it as this would result in the anomaly of the Bank being punished for actions in respect of which its regulatory framework did not alert it to be mindful of. Further, the interpretation of Section 49 (5) that the Commission appears to have arrived at, wherein Section 49 (5)'s ambit has been extended to include the Bank's purported failure to inform or communicate with the Complainant herein, falls well outside the wording of the said section 49 (5) of the Act. No such requirement exists at law or at all. In any event, the Bank timeously informed the Complainant that his account was in arrears.*

6.1 *On the totality of the facts, evidence and the law, the Bank has not breached section 49 (5) of the Act as alleged or at all. We therefore request on behalf of the Bank that the Board of the Commission does not adopt any of the assumptions and findings of the Commission as there is no basis for a finding of infringement. Further, the Report fails to disclose any recommendations on the sanctions to be imposed on the Bank for the alleged infringement of the Act thus depriving the Bank the opportunity to advance its representation on this issue in breach of the rules of natural justice."*

The Commissions' Further Response to the Respondent's Submissions to the Preliminary Report

It was submitted that:

42. The Respondent submitted that the Commission committed two procedural infringements in the matter firstly by reopening an investigation that it had already decided not to investigate further and secondly by not issuing a Notice of Investigation to inform the Respondent that it had reopened the

investigation, nor did it provide reasons that compelled it to do so. In response the Commission submits that according to the Commissions administrative guidelines, the Board of Commissioners is the adjudicative arm of the Commission and makes decisions on cases investigated by the Commission, therefore, the Commission had not concluded on the matter as the investigation was still on going and was yet to submit the matter before the Technical Committee of the Board for adjudication.

43. The Respondent submitted that the rules of natural justice and the provisions of the Act relating to the conduct of investigations dictate that the Respondent should have known from the beginning the entire offence that it is answerable to, especially with regard to commercial practices that the Commission already had knowledge of as it would have allowed the Respondent to properly prepare its defence by providing the relevant exculpatory evidence. The Respondent submitted the extension of the investigation to a closed case and a new theory of harm so late in the process constitutes not only a breach of the Bank's rights of defence and rules of natural justice but also a breach of the well-established international principle of equality of arms.

44. The Commission does not dispute that the Notice of Investigation was sent under pursuance of Section 46(1) as read together with Section 45(b) and Section 47(a)(iv) but investigated the matter under Section 49(5). However, the substantive law that confers jurisdiction on the Commission to investigate unfair trading practice among other functions and requires that a notice of investigation shall be served on the person or enterprise subject to the investigation, indicating the specified information, is the Act itself (Section 5(d) and (i); and 55(3), respectively. Regulations 10 and 11 contained in the administrative and procedural guidelines of the Commission and the prescribed notice of investigation are not the substantive law but merely procedural as to how an investigation should be conducted. Furthermore, regulation 10(1) only requires an officer wishing to conduct an investigation to make an application in Form IV. In terms of identifying provisions of the Act, the form indicates that *"the alleged offence appears to be in contravention of Section...."*, meaning this information is only indicative; therefore, it could change in the course of an investigation. Logically, it follows that similarly the sections reflected in the authorization are merely indicative. This status is reasonable by the very nature of an investigation. In practice, the position can only be ascertained once the investigation has been undertaken. It is also instructive that the Act does not void an investigation conducted outside or beyond the indicated sections.

45. In the case of ***Italian School of Lusaka vs Competition and Consumer Protection Commission and Sajeev* Nair**, the Tribunal stated that:

"39. Indeed, Section 53(1) only requires issuance of Notice of Investigation upon opening an investigation; it does not require the formal notice to be re-issued in the event of change of scope of investigation, which was what transpired in this matter. It should, therefore, suffice for the purpose of natural justice that following the Notice of Investigation, any change in the scope of investigation is brought to the attention of the affected party. This notification can be by way of a preliminary report as in this case, giving the Appellant an opportunity to be heard by all issues covered in the investigation, including any additional issue such as alleged violation of a provision of the Act.

41. We further take the position taken by our superior courts that non-compliance with regulatory procedural rules is merely an irregularity which is curable..."

46. This was supported by the decision in the case of ***The Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (Sued as a firm previously T/A Kz Architects) v. Mitre Limited (1995) S.J.***, S.C.Z Judgement No. 20 of 1995, the Supreme Court held that the High Court Rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which was curable. The Court cited its earlier decision in ***Leopold Walford (Z) Ltd v Unifreight*** 1985 Z.R 203 at page 205 where the Court said:

"As a general rule, breach of a regulatory rule is curable and not fatal."

47. Therefore, looking at the facts of the matter, in line with the provisions of Section 55(10) of the Act, the Commission duly served the preliminary report and accompayning letter on the Respondent on 18th July 2022, where the change of the scope of the investigation was presented, thereby giving the Respondent an opportunuity to be heard in accordance with the rules of natural justice. Furthermore, even if there had been an obligation by the Commission to comply with the Notice of Investigation with respect to specifically indicating Section 49(5) of the Act as one of the provisions possibly violated, the failure to do so would have been curable and not fatal.

48. The Respondent submitted that the Commission failed to discharge the burden of proving a breach of section 49(5) of the Act and they are regulated by the Banking and Financial Services Act No. 7 of 2017 and the subsidiary legislation and directives issued pursuant to that Act and that accordingly,

what amounts to reasonable care and skill in its duties to the Complainant is prescribed by the provisions of the BFS Act.

49. While the Commission was aware that the banks were regulated by the Bank of Zambia which enforces the BFSA, the Commission was not bound by the BFSA as it drew its mandate to investigate consumer complaints from the Competition and Consumer Protection Act No. 24 of 2010 which the Respondent's conduct appeared to have breached.

50. The Commission did not dispute the arears accrued due to under payments by the Complainant and changes in MPR. The Commission however, contended the interest accrued from the point the Respondent ceased the initial deductions to the point they resumed the deductions. Having known what was owed to them, the Respondent ought to have recovered their money as they had known since 2019 what would be due to them as it was not covered in the monthly instalment. However, they ceased the deductions leading to accrued interest and took over 2 years to resume deduction, a matter which the Commission was disputing. The Commission did not receive any proof other than email correspondence between the Respondent's employees of SMS to be sent out to client's who had arrears. The Commission was not availed any actual SMS that was sent to the Complainant. However, it also observed with concern the time it took for the Respondent to effect the deductions after the initial tenure elapsed. The Commission noted with concern that while the MPR changes occurred throughout the tenure period of the Complainant's loan, the Respondent took unreasonably long to recommence loan repayment deductions after the initial loan tenure elapsed.

51. The Respondent submitted that, *"A financial service provider shall not advance a credit facility to a customer whose total monthly debts due on outstanding obligation including under credit facility, exceed a limited prescribed by the Bank".* The Commission found that the loan was already advanced, in addition there was no proof that the aforementioned submission from the Respondent would have caused such delay on the Respondent's obligation to resume recoveries. The Commission established that continuing on loan recoveries through deductions might have given the Complainant an indication that the loan was still running, but they stopped for 24 months which gave the impression that the loan was fully paid.

52. The Commission established that the obligation to repay the loan was presumed to continue to exist unless the borrower proved that they had repaid the loan in full. While that was the case, the Respondent had a duty to resume the deductions immediately after the initial loan tenure lapsed. However, the Commission found that the Respondent failed to give justifiable

reasons for the delay in recommencing the loan repayment deductions and the collection of the interest accrued from the lapse of the initial loan tenures to the time they recommenced deductions. Further, the Respondent failed to show proof of efforts made to recover their funds after the initial loan tenures had lapsed, on account of the Complainant's financial position.

Submissions From the Complainant[51]

It was submitted that:

53. On 20th July 2022, the Complainant submitted that he acknowledged receipt of the preliminary report in which the Commission made further application of Section 55(10) of the Competition and Consumer Protection Act, No 24 of 2010 to his submissions to the preliminary report.

54. The Complainant submitted that the Commission's application of Section 55(10) was in order and that it was a law which protected him as a consumer from unfair trading practices as in this case before the Commission.

55. The Complainant submitted that his appeal was that the report be availed to the Technical Committee of the Board for a speedy conclusion and disposal of the case.

Further Investigations

Review of Complainant's payslips

It was submitted that:

56. The Commission noted a key point in the Respondent's submission of 23rd May 2022, stating that *"Loan deductions dropped off the Complainant's payslip in June, 2019 leaving a balance K5,863.57 as at 28th August 2019 when the said instalment was received."* The Respondent did not however state why they fell off. Therefore, the Commission reviewed the Complainants payslips for the period of May, June and July 2019 in order to establish if the dropping off was caused by deductions from the Complainant's salary going beyond the prescribed 60% of basic pay by PMEC.

57. It was found that on 31st May 2019, the Complainant had a basic pay of K3,157.00 and a net pay of K2,215.59. It was revealed that the Respondent made a deduction of K536.27.[52]

[51] Complainant's letter to the Commission dated 20th July 2022
[52] Complainant's payslip dated 31st May 2019

58. It was revealed that on 30th June 2019, the Complainant had a basic pay of K3,157.00 and a net pay of K2,024.76. It was revealed that the Respondent made a deduction of K536.27 from the Complainant's salary.[53]
59. It was revealed that on 31st July 2019, the Complainant had a basic pay of K3,283.25 and a net pay of K2,723.96. It was revealed that the Respondent did not make any deduction from the Complainant's salary.[54]

60. Therefore, there was still enough space for the Respondent to have continued with deductions in July 2019.

Review of the Salary Deduction Authorization Form[55]

It was submitted that:

61. The Commission reviewed the salary deduction authorization form signed by the Complainant authorizing his employer to deduct money from his salary for purposes of the loan in question. The Commission found the following salient terms-

"I, the undersigned, request and authorize my employer named above to deduct from my monthly salary the amounts due and payable by me at any particular time and pay the amounts so deducted African Banking Corporation as repayment on a Loan Facility issued by African Banking Corporation to me. I further understand and undertake that this is an irrevocable instruction and cannot be cancelled by me until all amounts due have been paid to African banking Corporation...." **and**

"I acknowledge and agree that in event of my loan(s) being rescheduled or my taking of an additional loan, the terms of the Loan Agreement and this Salary Deduction Form shall operate in favour of African Banking Corporation in respect of the rescheduled loan and additional loan, together with any amendments, as if the Salary Deduction Authorisation Form had been signed and executed by me in respect of the rescheduled or additional loan."

62. The Commission opined that these terms gave the Respondent the right to be sending deduction instructions to the Complainant's employer until the loan was fully paid.

[53] Complainant's payslip dated 30th June 2019
[54] Complainant's payslip dated 31st July 2019
[55] Salary Deduction Authorization Form between the Respondent and the Complainant

Further Submissions to the Preliminary Report

It was submitted that:

63. The Commission served the Preliminary Report on that parties for the third time on 26th March 2024 after taking into consideration all the submissions on 26th March 2024. Neither party made submissions to the preliminary report.

Relevant Findings

It was submitted that:

64. The Commission found that the Complainant obtained a loan from the Respondent amounting to K15,000.00 at an annual interest rate of 18.75% and that the loan was to run for a period of 60 months and the Complainant was to repay the loan in monthly instalments of K537.05.[56]

65. The Commission found that from February 2014 to October 2014, the Complainant underpaid on his monthly repayment instalments.[57] The Commission found that the total balance of the underpayments totalled to K2,078.32 which accrued interest resulting in arrears of K2,427.50 as of 29th October, 2014 and continued to accrue interest resulting in an arrear balance of K9,372.26 as of 20th April, 2022.

66. The Commission found that in 2015, the Bank of Zambia adjusted the Monetary Policy Rate from 9.75% to 15.5%[58] which resulted in the Respondent revising its annual effective interest thereby increasing the tenor of the Complainant's loan from 60 months to 68 months.

67. The Commission found that on 17th February 2016 the Respondent published a notice in the Zambia Daily Mail notifying all its clients that it had adjusted the interest rates on all its loan products upwards to 19.5%[59].

68. The Commission found that the Complainant's Salary Deduction Authorisation Form had a clause that read, *"I, the undersigned, request and authorize my employer named above to deduct from my monthly salary the amounts due and payable by me at any particular time and pay the amounts so deducted to African Banking Corporation as repayment on a Loan Facility issued by African Banking Corporation to me. I further understand and*

[56] Complainant's loan agreement dated 3rd February 2014
[57] Complainant's Account Statement submitted by the Respondent
[58] https://www.boz.zm/BOZANNUALREPORT2015.pdf accessed on 21st December 2023
[59] Respondent's Newspaper Statement dated 17th February 2016

undertake that this is an irrevocable instruction and cannot be cancelled by me until all amounts due have been paid to African banking Corporation...."[60].

69. The Commission also found that the Complainant's Salary Deduction Authorisation Form had a clause that read, *"I acknowledge and agree that in the event of my loan(s) being rescheduled or my taking of an additional loan, the terms of the Loan Agreement and this Salary Deduction Authorisation Form shall operate in favour of African Banking Corporation in respect of the rescheduled loan and additional loan, together with any amendments, as if the Salary Deduction Authorization Form had been signed and executed by me in respect of the rescheduled or additional loan...."*[61].

70. The Commission found that in July 2019, the Respondent ceased making deductions from the Complainant salary[62] and the Complainant had remitted a total amount of K32,436.27 to the Respondent[63].

71. The Commission found that on 12th November 2019, the Respondent sent an internal email to themselves which stated "*See below approved SMS to be sent out to customers on the attached list. Let's aim to shoot this one today*" of which the SMS read as; "*Refinance your loan with a top up of up to K320,000 and get a discount on your existing Loan. Call 202 or visit your nearest Branch for details. Tcs & Cs apply (158 characters).*[64]"

72. The Commission found that on 11th March 2020, the Respondent through their internal processes sent an email to themselves which read "*Good Morning Stephen, kindly see attached as requested. Please refer all clients on the Collections list to us to advise the discount offered. Regards Mutinta*" of which the Complainant would be offered a discount of K541.86 so that he could pay K5,876.72 on the balance that he owed[65].

73. The Commission found that the Complainant denied having received any communication from the Respondent that he was owing them any money or that the loan tenor had been adjusted from the 60 months to 68 months[66].

74. The Commission found that in March 2022, the Respondent resumed making deductions of K350.00 from the Complainants salary[67].

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[60] Salary Deduction Authorization Form between the Respondent and the Complainant
[61] Salary Deduction Authorization Form between the Respondent and the Complainant
[62] Complainant's payslip dated 31st July 2019
[63] Complainants Account Statement from 3rd February 2014 to 20th Aoril 2023
[64] Respondent's email to the Commission dated 13th June 2022
[65] Respondent's email to the Commission dated 12th June 2022
[66] Tele-record between the Complainant and the Commission dated 16th June 2022
[67] Complainant payslip dated 31st March 2022

Previous Cases Involving the Respondent

It was submitted that:

75. A review of the Respondent's file revealed that there was a case by Mr. Allan Moosho in which the Respondent was found to have violated Section 49(5) of the Act. In this case, the Board on 9th August 2022, fined the Respondent 0.5% of their annual turnover.

Analysis of Conduct

It was submitted that:

76. In analysing the case for possible violation of Section 49(5) of the Act, the following assessment tests are used:

Whether Atlas Mara is a "person" or an "enterprise";

It was submitted that:

77. Refer to paragraph 11 of the report.

Whether Atlas Mara supplied a service to a consumer;

It was submitted that:

78. The Act defines a "*service*" as *"includes the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment."* The Commission found that the Respondent offered the Complainant a loan facility as evidenced by the Loan Agreement between the Respondent and the Complainant dated 3rd February 2014.[68]

Whether there is a consumer;

It was submitted that:

79. There is a consumer. Refer to paragraph 10 of the report.

[68] Preprinted Loan Agreement between the Respondent and the Complainant dated 3rd February 2014

Whether Atlas Mara supplied a particular service to the Complainant with reasonable care and skill.

It was submitted that:

80. According to Black Laws Dictionary Reasonable Skill is defined as, "*Such skill as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment.*"[69] While reasonable skill is defined as "*such skill as ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment.*"[70] Common law has established that a duty of care is owed to persons one could reasonably have contemplated may be harmed by his action (or inaction in certain cases). However, even though a duty of care is owed, no liability attaches unless the harm suffered was of a foreseeable kind.[71] Duty of care is a legal obligation which is imposed on an individual, requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence.[72] The Commission therefore established that reasonable care and skill is such care and skill as an ordinarily prudent person or competent body would exercise under the conditions existing at the time an act is required to be performed.

81. Similar to the matter at hand, a bank's duty of care focuses on its customer's interest and treating them fairly. With whatever decision the bank makes, customers must be treated fairly by informing them at an appropriate time and within reasonable time, especially on decisions that more likely may directly affect them. The timely information given should enable customers to make informed decisions regarding the services provided by a bank. In an event of an increase in the cost of borrowing resulting from a rise in MPR, it is common practice for banks to extend the loan tenure to recover what is due to them while at the same time not to effect high monthly instalments on clients.

82. In the case under review, the Commission found that the Complainant obtained a loan facility from the Respondent worth K15,000.00 with a monthly repayment amount of K537.07 and was scheduled to run for a period of 60 months at an interest rate of 18.75% per annum. The loan was scheduled to run from February 2014 to January 2019. According to the loan agreement the Complainant was supposed to pay the Respondent **K32,176.28** in total; that is, if the interest rate and deduction amount

[69] Black Laws Dictionary, 4th Ed, 1968

[70] Black's law Dictionary, 8th Edition, p504

[71] John Mbaluto (2021), Obligated: Examining the duty of care in banking.

[72] https://lawhandbook.sa.gov.au/ch01s05.php

remained the same and the remittances were done on time by the Respondent. However, a check of the loan statement revealed that as of 31st January 2019, the loan balance was K8,412.10 instead of being K0.00. By 31st January 2019 the Respondent had received a total of **K28,682.38** from the Complainant through his employer.

83. The Respondent submitted that the loan was not fully settled as expected because of two factors, with the first being that in the first 8 months of the loan tenor, the Complainant underpaid his required monthly repayment instalments which resulted in accumulated arrears amounting to K2,078.32 of which it accrued interest of K2,427.50 as of October 2014[73]. The second factor was that the loan was rescheduled in 2016 after the Respondent revised its annual effective interest rate.

84. The Commission established that the Respondent continued causing deductions from the Complainant's salary since the loan was not settled. The Commission opined that the Respondent had every right to do so in line with the terms *"I, the undersigned, request and authorize my employer named above to deduct from my monthly salary the amounts due and payable by me at any particular time and pay the amounts so deducted African Banking Corporation as repayment on a Loan Facility issued by African Banking Corporation to me. I further understand and undertake that this is an irrevocable instruction and cannot be cancelled by me until all amounts due have been paid to African banking Corporation...."* and *"I acknowledge and agree that in the event of my loan(s) being rescheduled or my taking of an additional loan, the terms of the Loan Agreement and this Salary Deduction Authorisation Form shall operate in favour of African Banking Corporation in respect of the rescheduled loan and additional loan, together with any amendments, as if the Salary Deduction Authorization Form had been signed and executed by me in respect of the rescheduled or additional loan"* found in the salary deduction authorization form.

85. The Commission established that the deductions stopped in June 2019. At this point a total of **K32,436.27** had been recovered from the Complainant. According to the loan statement and submissions from the Respondent, the June 2019 deduction was received by them from the Complainant's employer in August 2019. The question is why did the deductions stop in June 2019 when the loan had not been settled fully and given the terms from the salary deduction authorization form cited above? The Respondent in their response to the NoI stated that *"loan deductions dropped off the complainant's payslip in June 2019 leaving balance of K5,863.57 as at 28th August 2019 when the said instalment was received."* The Respondent did not however state why the

[73] Complainant's Account Statement submitted by the Respondent

loan deductions dropped off. The Commission reviewed the Complainant's payslip for July 2019 and found that he had a basic pay of K3,283.25 and a net pay of K2,723.96; meaning that deductions should have continued. The Commission argues that the deductions dropped off because the amount deducted from the Complainant had passed the expected **K32,176.28** as it stood at **K32,436.27** as at June 2019. The Respondent should have continued with deductions as they did in January 2019 to ensure that the loan is settled in line with the terms cited from the salary deduction authorization form.

86. In terms of informing the Complainant about the status of his loan, the Respondent submitted that they sent text messages to the Complainant's number, 0979383535 on 12th November 2019 and 11th March 2020 relating to the loan in question (see annex 1), but the Complainant denied ever receiving these messages from the Respondent. The Respondent did also not provide any proof that the messages were delivered to the Complainant. The Competition and Consumer Protection Tribunal, in the case of **African Banking Corporation Zambia T/A Atlas Mara v the Competition and Consumer Protection Commission (2023)** held that; *"in general banking practice, a lender is expected to inform the borrower of an adjustment in pricing and the effects thereof, on an existing loan. Therefore, it would be considered an act of negligence if the lender did not communicate pricing adjustments to its borrowers... the tribunal further held that the appellant had a statutory duty to exercise reasonable care and skill in the manner in which the Complainant's loan was managed. The duty inter alia that the Appellant informs the Complainant of any adjustment in the terms and conditions of the loan.... 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...."* Considering the cited case, the Respondent should have communicated to the Complainant about the outstanding amount of the loan and provided options such as extending the loan tenure, increasing the repayment amount, or allowing the Complainant to settle the loan at the balance from 2016. The Respondent failed to provide proof to the Commission that they had communicated with the Complainant regarding his loan status, despite having the Complainant's contact details. Therefore, the Respondent did not manage the Complainant's loan with reasonable care and skill by failing to communicate his loan status to him.

87. Returning to the matter of stoppage of deductions in July 2019, the Commission is of the view that it created an impression in the Complainant that he had settled his loan. This was a reasonable conclusion on the part of the Complainant given that the loan deductions had continued beyond January 2019, the indicative end of tenor; to June 2019. The Commission

also established that the Complainant's June 2019 payslip showed a deduction period of 000.

88. The Commission opined that the Respondent ought not to have stopped the deductions because they fully knew about the status of the loan given the underpayments, late remittances and increase in the effective interest rate; and the right they had to restructure the loan and continue with deductions as per the signed salary deduction authorization form. The Commission noted that the Respondent only resumed deductions from the Complainant's salary in March 2022. The Commission noted that it was right for the Respondent to ensure the loan was fully settled by the Complainant, but the Respondent ought not to have contributed to the Complainant's financial burden by stopping the deductions when the Complainant's loan had a balance and despite them having a right to continue with deductions as contained in the signed salary deduction authorization form. This failure led to the loan accruing interest whilst the Complainant was not aware that his loan had an outstanding balance.

Board Deliberation

89. Having considered the facts, evidence and submissions in this case, the Board resolves that that the Respondent violated Section 49(5) of the Act as they did not exercise reasonable care and skill in providing the service to the Complainant.

Board Determination

90. The facts and evidence of this case have shown that the Respondent engaged in unfair trading practices, hence was in violation of Section 49(5) of the Act

Board Directives

91. The Board hereby directs that;

i. The Respondent is fined 0.55% of their annual turnover for breach of Section 49(5) of the Act in accordance with Section 49(6) of the Act and the applicable cap in line with the Commission's Guidelines for Issuance of Fines. (See appendix for details);

ii. The Respondent restructures the Complainant's loan to the balance as at end of the initial loan tenure and only recover the loan balance outstanding as at the date when the initial loan tenure elapsed and

exclude the interest accrued as at the date of resumption of loan recoveries;

iii. The Respondent submits the restructured loan within ten (10) days of receipt of the Board Decision in accordance with Section 5(d) of the Act;

iv. The Respondent submits their audited annual books of accounts for 2021 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.

Note: any party aggrieved with this order or direction may, within thirty (30) days of receiving this order or direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 13th June 2024

.....

Chairperson
Competition and Consumer Protection Commission

Appendix 1-Calculation of Fine

The Calculation of the recommended fine was determined as follows-

(a) The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines sets a base of 0.5% for offences relating to Part VII of the Act with the following caps;

Offence	Starting Fine	Maximum Fine in Kwacha
Unfair trading practice False or misleading representation Price Display Supply of defective and unsuitable goods and services Section 49 except for Section 49(1)	0.5% of turnover	• K1,000 for turnover up to K50,000 • K10,000 for turnover above K50,000 up to K250,000 • K40,000 for turnover above 250,000 up to K500,000 • K70,000 for turnover aboveK1,500,000 • K150,000 for turnover above K1,500,000 up to K3,000,000 • K200,000 for turnover above K3,000,000 up to K5,000,000 • K500,000 for turnover above K5,000,000
Display of Disclaimer	0.5% of turnover	K30,000

(b) The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines – further provides for additions as follows-

(i) The starting point of a financial fine will be a fine of not less than 0.5% of annual turnover for first time offenders.

(ii) (The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.

(iii) Thereafter, the Commission will be adding a 10% of the fine determined in step one above for each aggravating factor

(c) Whether the Respondent is a repeat offender under Section 49(5);

The Commission's review of the case file for the Respondent showed that the Respondent is a repeat offender of this Provision of the Act. As such the fine was calculated as follows:

(i) Stating with baseline fine of 0.5%

Therefore, the Commission has observed that the total fine sums up to
0.005+0.1(0.005)
0.005+0.0005
0.0055
0.55%

Annex 1-Text Messages sent to the Complainant as submitted by the Respondent

(i) Text message sent on 12th November 2019

Refinance your loan with a top up of up to K320,000 and get a discount on your existing Loan. Call 202 or visit your nearest Branch for details. Tcs & Cs apply (158 characters)

(ii) Text message sent on 11th March 2020

270952521	Chipata	NAPHITALI . BANDA	2060000023205-1	Ministry of Health	5,876.72	397.62	18.00	126.24	541.86