IN THE MATTER OF THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

2022/CCPT/020/CON

IN THE MATTER OF: SECTION 49(5) OF THE COMPETITION AND CONSUMER PROTECTION ACT NO.24 OF 2010

IN THE MATTER OF: THE COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES 2012, STATUTORY INSTRUMENT NO.37 OF 2012

BETWEEN

AFRICAN BANKING CORPORATION ZAMBIA LIMITED T/A ATLAS MARA — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Mr. J.N. Sianyabo - Chairperson
Mrs. M.B. Muzumbwe-Katongo - Vice Chairperson
Mr. D. Mulima - Member
Mrs. B.S. Chaila-Sichizya - Member
Mr. B. Tembo - Member

For the Appellant: Mrs. M. Banda-Mutuna - Messrs. Mweshi Banda and Associates Legal Practitioners

For the Respondent: Ms. M. Mtonga - Manager, Legal Services, Competition and Consumer Protection Commission
Ms. T. Chola - Legal Officer, Competition and Consumer Protection Commission
Ms. S. Mafuta - Legal Officer, Competition and Consumer Protection Commission

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J U D G M E N T

LEGISLATION REFERRED TO:

1. The Banking and Financial Services Act No.7 of 2017
2. The Competition and Consumer Protection Act No.24 of 2010
3. The Competition and Consumer Protection (Tribunal) Rules 2012
4. The Fees and Fines Act, Cap.45 of the Laws of Zambia
5. The Fees and Fines (Amendment) Act No.11 of 2013
6. The Fees and Fines (Fee and Penalty Unit Value) Regulations 2015
7. The Competition and Consumer Protection Commission Guidelines for Administration of Fines 2019
8. Bank of Zambia CB Circular No.5 of 2012
9. Bank of Zambia CB Circular No.25 of 2012
10. Bank of Zambia CB Circular No.19 of 2015

CASES REFERRED TO:

1. Credit Africa Bank Limited (In Liquidation) v Mudenda (SCZ 10 of 2003) [2003] ZMSC 73 (18 September 2003)
2. Development Bank of Zambia v Stalwart Investments Limited and Others (HPC 481 of 2015) [2016] ZMHC 137 (16 June 2016)
3. Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR
4. Oliver Dean Morley (t/a Morley Estates) v Royal Bank of Scotland plc [2020] EWHC 88 (Ch)
5. Trustees of Maximum Miracle Centre v Equity Bank (K) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)
6. Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (S.C.Z. Judgment 7 of 1997) [1997] ZMSC 17 (28 May 1997)

OTHER REFERENCES

1. Garner, B. A. (2009). *Black's Law Dictionary* (9th ed.). St. Paul, Minnesota: West.
2. Bank of Zambia Annual Report 2014
3. Bank of Zambia Annual Report 2016

SIANYABO, J.N., Chairperson, delivered the judgment of the Tribunal

1 INTRODUCTION

1.1 This judgment relates to the Notice of Appeal brought before the Competition and Consumer Protection Tribunal (hereinafter the **"Tribunal"**) by African Banking Corporation Zambia Limited T/A Atlas Mara (hereinafter the **"Appellant"**) on 19th September, 2022, pursuant to section 60 of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter the **"Act"**). The appeal relates to the Decision of the Board of Commissioners (hereinafter the **"Board"**) of the Competition and Consumer Protection Commission (hereinafter the **"Respondent"**) which was delivered on 19th August, 2022, wherein the Appellant was found to have breached section 49(5) of the Act.

2 RELIEFS BEING SOUGHT

2.1 The Appellant seeks the Tribunal to grant the following reliefs:

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

3 BACKGROUND

3.1 The background to the matter is that on 6th May, 2022, the Respondent received a complaint from Mr. Allan Moosho (hereinafter **"the Complainant"**) alleging that sometime between 2012 and 2013, he acquired a credit facility worth ZMW15,000.00 (Fifteen Thousand Zambian Kwacha) (hereinafter **"Loan 1."**) from the Appellant. The said Loan 1 was in January 2014 refinanced through a five (5)-year loan facility in the sum of ZMW30,000.00 (Thirty Thousand Zambian Kwacha) (hereinafter **"Loan 2."**). The latter was to be repaid in December, 2019 and the Complainant claims he settled the said loan in full on the due date.

3.2 The Complainant alleges to have applied for a loan of ZMW75,000.00 (Seventy-Five Thousand Zambian Kwacha) (hereinafter **"Loan 3."**), which was approved and disbursed to him, after which he drew ZMW60,000.00 (Sixty Thousand Zambian Kwacha). Later, in an attempt to make further drawings, the Complainant discovered that the Appellant had blocked access to the remainder of the money, which was in the sum of about ZMW15,000.00 (Fifteen Thousand Zambian Kwacha).

3.3 Upon engaging the Appellant over the development, the Complainant alleged that the Appellant attributed the embargo to an amount of ZMW23,000.00 (Twenty-Three Thousand Zambian Kwacha) that was yet to be settled on Loan 2.

3.4 Further, the Complainant alleged that after negotiations the Appellant then agreed to release a sum of ZMW5,000.00 (Five Thousand Zambian Kwacha) to the Complainant and applied the remaining ZMW10,000.00 (Ten Thousand Zambian Kwacha) towards liquidating the ZMW23,000.00 (Twenty-Three Thousand Zambian Kwacha) reported balance on Loan 2. Furthermore, the Complainant alleged that he later visited the Appellant's office in Mumbwa, where he presented pay slips showing evidence of all the supposedly outstanding repayments having been deducted from his salary.

3.5 According to the Complainant, the Appellant's representatives in Mumbwa attributed the ZMW23,000.00 (Twenty-Three Thousand Zambian Kwacha) balance on Loan 2 to a combination of missed payments and upward adjustments in interest rates between 2016 and 2017. The Complainant further alleged that the representatives in Mumbwa claimed to have communicated the interest rate adjustments to him but he denied ever receiving any communication to that effect.

3.6 The Complainant alleged that after passage of time, he in April, 2022 discovered that his pay slip for that month showed that the Appellant had initiated deductions of ZMW500.00 (Five Hundred Zambian Kwacha) for an intended period of forty (40) months, which was aimed at expunging a purported balance of ZMW20,000.00 (Twenty Thousand Zambian Kwacha) on Loan 2.

3.7 It was these new deductions, that then led the Complainant to seek the intervention of the Respondent, in stopping the Appellant effecting any further deductions and requesting a refund of amounts that had been deducted at the time.

3.8 Following receipt of the complaint, the Respondent sent to the Appellant a Notice of Investigation (hereinafter the **"Notice"**) and accompanying letter dated 9th May, 2022, which documents were received by the Appellant on 10th May, 2022.[1] The said documents outlined the complaint as submitted to the Respondent by the Complainant and stated the Respondent's mandate in the matter pursuant to section 55(4) of the Act. Further, the Appellant was required to respond to the Notice and the accompanying letter *in scripto* within 14 days of receipt.

3.9 On 27th May, 2023, the Respondent received the Appellant's written reply dated 26th May, 2023, in which it submitted that:[2]

(i) Loan 2 was in the sum of ZMW28,000.00 (Twenty-Eight Thousand Zambian Kwacha) and not ZMW30,000.00 (Thirty Thousand Zambian Kwacha);

(ii) There was an upward adjustment in the Bank of Zambia Policy Rate (hereinafter the **"Monetary Policy Rate" or "MPR"**) in 2016;

(iii) As a result of the increase in MPR in 2016 the Respondent extended the loan tenor by eight (8) months;

(iv) The loan extension was signed for and covered in the Complainant's loan agreement;

[1] CCPC, *Record of Proceedings*, 25th October, 2022, pg.6-10
[2] Ibid., pg.11-12

(v) The Complainant overpaid on the first five (5) instalments of Loan 2 by remitting sums of ZMW1,792.41 (One Thousand Seven Hundred and Ninety-Two Zambian Kwacha and Forty-One Ngwee) instead of ZMW1,094.25 (One Thousand and Ninety-Four Zambian Kwacha and Twenty-Five Ngwee). The overpayment summed to ZMW3,490.00 (Three Thousand Four Hundred and Ninety Zambian Kwacha) over the five (5) month period;

(vi) The overpayments were refunded to the Complainant in two instalments of ZMW1,396.00 (One Thousand Three Hundred and Ninety-Six Zambian Kwacha) and ZMW2,094.00 (Two Thousand and Ninety-Four Zambian Kwacha) on 21st April, 2015 as well as 5th June, 2015 respectively.

(vii) The Complainant missed repayments in June, 2015 as well as March, April and June, 2016.

(viii) The combination of the missed repayments and extended loan tenor arising from the upward adjustment in interest rates resulted in an outstanding loan balance of ZMW17,929.92 (Seventeen Thousand Nine Hundred and Twenty-Nine Zambian Kwacha and Ninety-Two Ngwee) as at 18th April, 2020.

(ix) The instalment for December, 2019 was only received on 18th April, 2020 and attracted interest for the period it was outstanding and added to the balance of ZMW21,562.13 (Twenty-One Thousand Five Hundred and Sixty-Two Zambian Kwacha and Thirteen Ngwee) as at 31st December, 2020.

(x) In January, 2021, the Complainant obtained Loan 3 to refinance the ZMW21,562.13 (Twenty-One Thousand Five Hundred and Sixty-Two Zambian Kwacha and Thirteen Ngwee) in addition to loans held with three non-bank financial institutions.

(xi) The Appellant denied knowledge of applying the sum of ZMW10,000.00 (Ten Thousand Zambian Kwacha) towards settlement of Loan 2. Instead, it was a sum of ZMW5,000.00 (Five Thousand Zambian Kwacha) that was applied towards the balance of Loan 2 to leave an outstanding amount owing of ZMW16,562.13 (Sixteen Thousand Five Hundred and Sixty-Two Zambian Kwacha and Thirteen Ngwee).

To support the submissions in (i) to (xi) above, the Appellant adduced copies of the loan statement and loan settlement accounts.[3]

4 RESPONDENT'S FINDINGS FOLLOWING INVESTIGATION OF THE COMPLAINT

4.1 Upon receipt of the Appellant's reply to the Notice, the Respondent proceeded with investigations into the complaint. On 9th June, 2022 the Respondent served the Appellant as well as the Complainant with the Preliminary Report[4] and accompanying letter dated 8th June, 2022[5], which informed the Appellant of a possible violation of section 49(5) of the Act and which also established that:[6]

(i) ...in January, 2014, the Complainant acquired a loan facility of K28,000.00 from the Respondent to be repaid over a period of 60 months at a monthly repayment amount of K1,094.25.

(ii) ...at the time the Complainant was making his last payment on his loan, he had missed instalments for the months June, 2015, March, 2016, April, 2016 and May, 2016, thereby pushing the date of the last instalment from

[3] CCPC, *Record of Proceedings*, 25th October, 2022, pg.13-20
[4] Ibid., pg.21-33
[5] CCPC, op. cit., pg.33
[6] CCPC, op. cit., pg.27-28

December, 2019 to April, 2020 in line with the initial loan tenure of 60 months.

(iii) ...during the Complainant's loan tenure, the Bank of Zambia had adjusted the monetary policy rate upwards from 9.75% in 2014 to 15.5% in 2015; and thereafter reduced it to 12.5% in 2017 and to 11.50 in 2019.

(iv) ...at the time the Complainant was making the final instalment on his loan in April, 2021, the Respondent had not effected the adjustments in the monetary policy rate on the Complainant's loan.

(v) ...due to the adjustments in the monetary policy rate by the Bank of Zambia and the missed instalments by the Complainant, the loan went into arrears thereby accruing interest leading to an accumulated loan balance of K17,929.92 as at 18th April, 2020 to K21,562.13 as of December, 2020.

(vi) ...in January, 2021, the Complainant acquired another loan facility from the Respondent in order to refinance his loans with the Respondent, Bayport, Tottengram and IZWE, of which the Respondent was only able to recover K5,000.00 as the Complainant had withdrew [sic] the rest of the funds.

4.2 On account of the foregoing, the Respondent concluded that the Appellant had breached section 49(5) of the Act.

4.3 Further, the Respondent found no previous violations of the Act by the Appellant.

4.4 Furthermore, the Appellant was requested to respond to the Preliminary Report within seven (7) days from date of receipt of the letter.

5 COMPLAINANT'S RESPONSE TO THE PRELIMINARY REPORT

5.1 On 13th June, 2022 the Respondent acknowledged receipt of an email dated 11th June, 2022[7] from the Complainant following release of the Preliminary Report. In the said email, the Complainant submitted that:

(i) Loan 3 was in the sum of ZMW80,000.00 (Eighty Thousand Zambian Kwacha), which amount included loan insurance;

(ii) The loan insurance should be paid back to customers after they finish paying the loan;

(iii) Loan 2 was in the sum of ZMW28,000.00 (Twenty-Eight Thousand Zambian Kwacha) but wondered why the loan repayments were in the sum of ZMW1,094.25 (One Thousand and Ninety-Four Zambian Kwacha and Twenty-Five Ngwee) instead of the sum of ZMW1,093.00 (One Thousand and Ninety-Three Zambian Kwacha) per figure indicated on the payslip.

(iv) The alleged missing instalments in June 2015, March 2016, April 2016 and May 2016 were deducted from his salary and therefore, he could not be faulted for non-payment.

(v) The new deductions of ZMW500.00 (Five Hundred Zambian Kwacha), which were to run for forty (40) months were commenced without his knowledge and approval; and

(vi) If the Appellant allocated a K5,000 towards the arrears or so-called accrued interest and it claims that the Complainant owed it a K21,562.13, then why didn't it subtract the K5,000 from what it claimed the Complainant owed?[8]

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[7] CCPC, *Record of Proceedings*, 25th October, 2022, pg.34
[8] CCPC, *Record of Proceedings*, 25th October, 2022, pg.34

5.2 Further, the Complainant submitted copies of payslips for September 2014, June 2015 and May 2016.[9]

6 APPELLANT'S RESPONSE TO THE PRELIMINARY REPORT

6.1 The Appellant did not respond to the Preliminary Report.

7 DECISION OF THE BOARD

7.1 Upon assessing the recommendations of the investigator of the complaint, the Board on 9th August, 2022, determined that the Appellant engaged in unfair trading practices resulting in a breach of section 49(5) of the Act.[10] The Board further directed as follows:[11]

i. *The Respondent is fined 0.5% of their annual turnover for breach of section 49(5) of the Act in accordance with section 49(6) of the Act and the applicable cap in line with the Commission's Guidelines for Administration of Fines 2019...*

ii. *The Respondent restructures the Complainants' [sic] loans to the balances as at the end of the initial loan [sic] and only recover the loan balances outstanding as at the end of the initial loan tenures [sic] elapsed and excluded the interest accrued as at the date of resumption of loan. The Respondent submits the restructured loans to the Commission within ten (10) days of receipt of the Board Decision in accordance with section 5(d) of the Act.*

[9] Ibid., pg.37-39
[10] CCPC, op. cit., pg.64
[11] CCPC, op. cit., pg.64-65

iii. The Respondent submits its latest annual books of account to the Commission for calculation of the actual fine within thirty (30) days of receipt of the Board Decision according to section 5(d) of the Act.

iv. The Research and Education Unit conducts a market survey regarding commercial banks' adjustments of customers' loan tenures based on MPR changes, as there is no indication of downward adjustments on customers' loan tenures when the MPR is adjusted downwards, yet there are notable upward adjustments when the MPR is adjusted upwards.

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

7.3 The Decision was served on the Appellant on 12th August, 2022, accompanied with a letter dated 10th August, 2022.

7.4 Having been aggrieved by the Decision, pursuant to section 60 of the Act, the Appellant sought the intervention of the Tribunal by way of Notice of Appeal (hereinafter the **"Appeal"**) filed on 19th September, 2022, and supported by similarly dated affidavit sworn by one Simon Mwansasu, a Scheme Loans Manager in the employ of the Appellant.

8 GROUNDS OF APPEAL

8.1 In contesting the Decision, the Appellant advanced seven (7) grounds of appeal stating that:[12]

(i) The Respondent erred both in law and fact, when it found the Appellant liable for breaching section 49(5) of the Act contrary to banking custom,

[12] Atlas Mara, *Notice of Appeal*, 19th September, 2022.

laws and regulation, which prescribe the standard of care and skill for banks.

(ii) The Respondent erred both in law and in fact, when it found the Appellant guilty of engaging in unfair trading practices in the absence of evidence supporting such a finding.

(iii) The Respondent arrived at its decision due to a manifest error in assessment of the facts and error of principle that the Appellant was responsible for informing the Complainant that he still owed the Appellant due to missed instalments and adjustments in the monetary policy rate before ceasing to make deductions on his loans.

(iv) The Respondent erred both in fact and at law, when it failed to acknowledge that the Complainant was accountable for breaching his obligations under the loan agreement.

(v) The Respondent misdirected itself when it found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the Monetary Policy Rate in 2016.

(vi) The Respondent erred both in law and fact when it directed the Appellant to "restructure the Complainant's loans to the balances outstanding as at the end of the initial loan tenures and only recover the loan balances outstanding as at the date, when the initial loan tenures elapsed" excluding interest when it is not empowered to do so and contrary to evidence submitted to show that: the Complainant were notified of the increase in the MPR in 2016; would not remit the loan instalments in full on time or at all; and had given their prior permission to the Appellant to increase their loan tenors in the event of a restructure.

(vii) The Respondent erred in law, when it abrogated its Guidelines for Administration of Fines, 2019 published in a daily newspaper of general circulation in Zambia, when it purported to fine the Appellant in accordance with the revised Appendix 1 to its decision which is different from fines in the published guidelines.

9 RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

9.1 In opposition to the grounds of appeal filed by the Appellant, the Respondent On 25th October, 2022, filed the following responses:[13]

(i) The Respondent did not err in law and in fact when it found the Appellant liable for breaching section 49(5) of the Competition and Consumer Protection Act No.24 of 2010 (the Act) as the record will show that the Appellant did breach the aforesaid provision.

(ii) The Respondent was on firm ground when it found the Appellant liable for unfair trading practices and there is evidence to support this finding.

(iii) Contrary to the Appellant's assertion in ground three, the Respondent did not err in fact and in law as the communication in question would have prevented the loan balance from accruing interest as the Complainant would have met his obligation upon receipt of the communiqué.

(iv) The record will show, it did acknowledge that the Complainant had not paid four (4) instalments on his loan, hereby pushing the date of the last instalment from December, 2019 to April, 2020.

[13] CCPC, *Notice of Grounds in Opposition to Grounds of Appeal*, 25th October, 2022.

(v) It found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the monetary policy rate in 2016.

(vi) The Respondent is mandated under the Act to impose such sanctions as it may deem necessary.

(vii) That contrary to the Appellant's assertion in ground seven, Appendix 1 of the decision is the conversation [sic] of the fee units appearing in the Administration of Fines Guidelines, 2019 to the nearest round figure in Kwacha.

9.2 Further the Respondent sought the following reliefs:

(i) That the Honourable Tribunal upholds the decision of the Board dated 9th August 2022.

(ii) The appeal herein be dismissed forthwith with costs, as it lacks merit.

(iii) Any other relief the Tribunal deems fit.

THE APPEAL HEARING

10 APPELLANT'S EVIDENCE-IN-CHIEF

10.1 The Appellant called one witness, Mr. Stephen Kabungo, the Complaints Manager for the Appellant (hereinafter **"AW"**). **AW** testified that sometime in 2014, the Complainant obtained a 5-year loan of ZMW28,000.00 (Twenty-Eight Thousand Zambian Kwacha) from the Appellant. As the loan was obtained in mid-December 2014, it was only drawn down in January, 2015.

10.2 **AW** further submitted that the Complainant was to repay the loan in monthly instalments of ZMW1,094.25 (One Thousand and Ninety-Four Zambian Kwacha and Twenty-Five Ngwee), over its life but instead remitted ZMW1,792.00 (One Thousand Seven Hundred and Ninety-Two Zambian Kwacha) for the first five (5) months of the loan.

10.3 According to **AW**, the additional sums received by the Appellant were reimbursed to the Complainant in two cash instalments of ZMW1,396.00 (One Thousand Three Hundred and Ninety-Six Zambian Kwacha) on 21st April, 2015 and ZMW2,094.00 (Two Thousand and Ninety-Four Zambian Kwacha) on 5th June, 2015.

10.4 **AW** added that it was the Appellant's practice to refund borrowers, when excess loan repayments were received though in other cases the borrowers initiated such reimbursements.

10.5 In further testimony regarding the refunds, **AW** submitted that as long as the refunds are done properly, the loan will not be affected. However, if the refunds are coming on the understanding that first of all, the instalments have been delayed, it means the interest will still accrue, while the customers will insist on being refunded.

10.6 On the timing of receipt of repayments, **AW** testified that the Appellant had little control over the promptness of remittances as this was the responsibility of the Payroll Management and Establishment Control (hereinafter **"PMEC"**), a unit within the Government of Zambia. He further testified that in the event of delays in receipt of instalments, the Appellant's Loan Scheme Administrator contacted PMEC monthly. One such case involved the January, 2015 instalment, which was only received on 18th February, 2015.

10.7 **AW** also submitted that in the event of prolonged delays in remittances as was the case in 2018 and 2019, the Appellant sought the intervention of the Bankers Association of Zambia (hereinafter **"BAZ"**).

10.8 In addition, **AW** testified that the MPR increased in 2016, which led to extension of the tenor of Loan 2 in lieu of the repayments being raised.

10.9 Furthermore, **AW** testified that the Complainant had pre-consented to the extension of the loan tenor by signing the loan agreement and that it is common knowledge that an increase in the MPR would result in high interest costs.

10.10 Regarding the extension of the loan tenor, **AW** testified that it was increased in order to make it easier for the Complainant to meet repayments.

10.11 When asked by counsel for the Respondent on whether the Complainant was informed of the interest rate adjustment per guidelines[14] from the Bank of Zambia (hereinafter **"BOZ"**), **AW** avowed that he was not sure if the Complainant was communicated to directly about the interest rate adjustment and subsequent increase in the loan tenor.

10.12 **AW** further testified that PMEC declined to adjust neither the tenor nor the repayment amount until after the sixty (60) months had elapsed. However, **AW** did not adduce any evidence to corroborate his statement.

10.13 In response to a question by the Tribunal on how unpaid interest was treated, **AW** responded that it is added to the principal.

10.14 Regarding the Appellant's responsibility in informing the Complainant of the balance remaining in April, 2020 prior to new deductions starting, **AW** testified that the Appellant was duty bound to inform the Complainant and that it did through the print media and letters to line ministries.

11 APPELLANT'S SUBMISSIONS

11.1 The Appellant's counsel submitted Heads of Argument as follows:

Ground One and Two

11.2 The Appellant's counsel argued Grounds One and Two together and firstly, challenged both the Respondent and the Board's interpretation of section 49(5) of the Act and the alleged violation thereof. In addition, counsel argued that the Respondent misdirected itself by translating the purported non-

[14] BOZ, *Letter dated 30th April, 2019*

communication of the MPR adjustment and the missed contributions to a lack of reasonable care and skill.

11.3 Counsel further submitted that failure to communicate the status of Loan 2, at the end of the 60-month period, was insufficient basis for the Appellant to be accused of a lack of reasonable care and skill in the management of the loan.

11.4 Citing the case of ***Oliver Dean Morley (T/A Morley Estates) v The Royal Bank of Scotland PLC***[15] (hereinafter the **"Morley Estates case"**), counsel for the Appellant argued that in line with the holding of the court in the **Morley Estates** case, reasonable care and skill was to make funds available for drawdown by a client and that service had been provided when funds were initially drawn down and from time to time thereafter. She further stated the service which both parties in this Appeal had agreed upon, was the supply of loan facilities.

11.5 Counsel concluded therefore, that having successfully disbursed Loan 2 to the Complainant, a violation of section 49(5) of the Act could not have occurred.

11.6 Further, counsel argued that moreover, the Banking and Financial Services Act, No.7 of 2017 (hereinafter **"BFSA"**) did not compel the Appellant to inform the borrower after disbursement of the loan but prior.

11.7 In addition, it was counsel's view that in the process of extending Loan 2 to the Complainant, the Appellant had complied with the provisions of section 108 and 116 of the BFSA, as read with section 49(5) of the Act.

[15] [2021] EWHC Civ 388

11.8 In support of Ground Two, the Appellant's counsel cited the case of ***Averrit and Lande (1998)***[16], where it was stated as follows:

> ***"...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."***

11.9 On account of the foregoing, the Appellant urged the Tribunal to quash the Board's declaration that the Appellant violated section 49(5) of the Act.

Ground Three to Five

11.10 Grounds Three to Five were equally argued together.

11.11 Firstly, the Appellant's counsel argued that the Respondent's finding that the Appellant did not implement the increase to the MPR during the initial tenor of Loan 2, was erroneous as the Record of Proceedings showed that the Complainant's loan tenor was extended by eight (8) months. In addition, counsel referred to the testimony of **AW** in which it was submitted that the Appellant notified its customers about the upward adjustment of the MPR by issuing notices through line Ministries.

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[16] Averrit, N.W. and Lande, R.H. *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*. Loyola Consumer Law Review, Volume 10 Issue 1 (1998)

11.12 Secondly, counsel submitted that the alleged delayed loan repayments could not be blamed on the Appellant but was a matter between the Complainant and PMEC. Further, counsel argued that contrary to the Respondent's position, PMEC was not an appointed agent of the Appellant but the Complainant.

11.13 In addition, counsel submitted that the delay in PMEC adjusting the loan tenor and loading the new payment schedule could be attributed to system challenges faced by PMEC. Therefore, counsel submitted that it was unfair to blame the Appellant for the Complainant's lack of receipt of communication regarding the extension of the loan tenor.

11.14 Citing the case of ***Broadwick Financial Services Limited v Spencer and another***[17], counsel argued that in order for the Complainant to make an informed decision on whether or not to borrow, the Appellant's duty was to disclose the loan pricing before disbursement.

11.15 Counsel also referred to **AW's** submission that a higher interest rate charged to the Complainant meant that the Appellant was expected to make a higher remittance to BOZ of interest earned on the loan.

11.16 Further, counsel submitted that the Respondent misdirected itself in the interpretation of the entries in the account statements by stating that the loan rescheduling was effected after 18th April, 2020, when in fact, the loan was rescheduled before the said date.

11.17 Lastly, counsel also alluded to **AW's** submission that the Complainant requested for a refund of the overpayments, hence the funds not being available to apply towards loan prepayment.

Ground Six

11.18 Counsel submitted that the Respondent's powers were limited to those pursuant to sections 49(6) and 49(7) of the Act, which state as follows:

"...49(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

49(7) In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-

(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or

(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard."

11.19 Therefore, counsel considered the directive of the Board for the Appellant to restructure Loan 2 as an attempt to deprive the Appellant of its interest earnings and was *ultra vires*.

Ground Seven

11.20 In Ground Seven, counsel acknowledged the Responcent's authority to issue guidelines pursuant to section 84 of the Act, which reads in part as follows:

"(1) In the exercise of its functions under this Act, the Commission may make such guidelines as are necessary for the better carrying out of the provisions of this Act.

(2) The Commission shall publish the guidelines issued under this Act in a daily newspaper of general circulation in Zambia, and the guidelines shall not take effect until they are so published.

(3) The guidelines issued by the Commission under this Act shall bind all persons regulated under this Act."

11.21 However, counsel submitted that the guidelines so issued needed to comply with section 84(2) of the Act which obliged the Respondent to publish the guidelines in a newspaper of general circulation before the guidelines can take effect. Counsel argued that the guidelines relied upon to fine the Appellant were not the same as those published by the Respondent. On this account, counsel further submitted that the applicable fine should be ZMW50,000.00 (Fifty Thousand Zambian Kwacha) and not the ZMW500,000.00 (Five Hundred Thousand Zambian Kwacha) stipulated in the Decision.

11.22 It was counsel's opinion that by virtue of not having published a correction to the guidelines, the Respondent could not apply the amended fines without abrogating section 84(2) of the Act. In view of this, counsel submitted that should the Tribunal uphold the directives of the Board, the Respondent can only charge the Appellant ZMW50,000.00 (Fifty Thousand Zambian Kwacha) as a fine in view of the fine unit published.

11.23 Citing the case of ***AEG v The Commission***[18], where costs were awarded to the successful party, counsel submitted that costs in *casu* be awarded to the Appellant.

12 RESPONDENT'S SUBMISSIONS

12.1 In response to the Appellant's arguments in support of Grounds One and Two, counsel for the Respondent hinged its submissions on the notes to the

[18] European Court of Justice, Case 107/82, Judgment dated 25.10.1983

Consumer Rights Act, 2015 of the United Kingdom[19] regarding the concept of reasonable care and skill, which state that reasonable care and skill focuses on the execution, rather than the end result of the service.

12.2 Counsel for the Respondent further argued that pursuant to an April 2019 directive from BOZ, the Appellant was duty bound to inform the Complainant on the implications of a change in MPR. Counsel further alluded to **AW**'s submission during cross-examination to the effect that the Complainant was not advised of the options to either extend the loan tenor or monthly instalments, following the alleged increase in MPR in 2016.

12.3 Counsel also referred to **AW**'s additional submission that the payroll deductions that were the source of repayment of Loan 2, were based on a Memorandum of Understanding (hereinafter **"MOU"**) with PMEC. To this effect, counsel for the Respondent argued that the Appellant charged the remission of loan instalments to a third party who was not a party to the agreement and who the Complainant had no authority over. Counsel for the Respondent further submitted that the MOU referred to in the testimony of **AW** was not produced as evidence.

12.4 In addition, counsel for the Respondent submitted that the Appellant did not communicate to the Complainant the alleged four (4) missed repayments, despite reflecting as deductions on the Complainant's payslip.

12.5 Regarding the additional deductions following extension of the loan tenor, counsel for the Respondent submitted that there was no justification for the Appellant to have taken two (2) years to effect the deductions.

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[19] Consumer Rights Act 2015, United Kingdom

12.6 In support of the application of section 49(5) of the Act on the decision of the Board, counsel for the Respondent cited the 2014 case of ***Mbwe Motors Limited v CCPC***[20] in which this Tribunal espoused as follows:

> ***"...where there is a significant imbalance in the parties' rights and obligations under a contract, the natural inclination of an adjudication should be to favour the weaker party..."***[21]

13 APPELLANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

13.1 In rebutting the Respondent's submissions on Grounds One and Two, the Appellant's counsel made the following arguments.

13.2 Firstly, counsel challenged the Respondent's application of the **Consumer Rights Act, 2015**[22] of the United Kingdom and argued that by focusing on the end result of the service, which was the non-communication of the loan tenor extension to the Complainant rather than what happened at the start (disbursement), the Respondent misinterpreted the law.

13.3 Secondly, counsel objected to what she considered an attempt by the Respondent to transfer the burden of proof from itself as the accuser, to the Appellant. To buttress this argument, counsel cited the case of ***Sobek Lodges Limited v Zambia Wildlife Authority***[23], whereby the Supreme Court of Zambia quoted from ***Phipson on Evidence*** to the extent that so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by

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[20] Cause No.2014/CCPT/011/CON
[21] Para.13
[22] Consumer Rights Act 2015, U.K. legislation
[23] (2011) Z.R. 235

all parties, the party who has this burden has not discharged it, the decision must be against him. Thirdly, counsel argued that the Respondent had in its reply submitted new evidence *inter alia* that passing instalments of ZMW500.00 (Five Hundred Zambian Kwacha) for a tenor of 40 months was a breach of the loan agreement. However, counsel further argued that implementation of the ZMW500.00 (Five Hundred Zambian Kwacha) deduction was delayed because the Appellant had to engage PMEC to reload the rescheduled loan. Counsel added that this involved PMEC assessing the debt service ratio (DSR) of the Complainant because ideally, the Complainant should have availed, to the Appellant, a statement of what is owed to other institutions.

13.4 Regarding the extension of the loan tenor by the Appellant, counsel submitted like **AW** before, that the Complainant had given its prior authority in the loan agreement.

13.5 In addition, counsel also disputed as erroneous the Respondent's submission that the Appellant had, at the expense of the Complainant, earned huge profits on the loan in question.

13.6 Lastly, counsel opined on the matter of application of general and specific laws that the BFSA promulgated after the enactment of the Act has overriding effect insofar as it promulgates a banks standard of care for purposes of consumer laws, particularly that it is a specific rather than a general law like the Act.

13.7 In relation to Grounds Three to Five, counsel firstly, challenged the Respondent's retrospective application of the BOZ directive of 2019, which implored banks to give borrowers the option to either pay higher instalments or have the loan tenor extended, whenever MPR increased. Counsel argued that the loan in *casu* was rescheduled in 2016 and therefore, the 2019 directive was not applicable.

13.8 Secondly, the Appellant's counsel also disputed the role of PMEC and submitted that contrary to the Respondent's view that PMEC was an agent of the Appellant, PMEC is a government department responsible for processing of the civil service payroll and was not engaged by the Appellant to transmit instalments deducted from customers such as the Complainant.

13.9 Thirdly, counsel took issue with the Respondent's reference to the loan repayment process as consisting of two (2) steps. This was considered by counsel as new evidence that had not initially been adduced by the Respondent and to which the Appellant had not responded.

13.10 Counsel did not respond to the Respondent's submissions to Ground Six.

13.11 Lastly, counsel's main submission regarding Ground Seven was that the Respondent purported to alter fines that were published but that this was not supported by a publication of the correction, which in counsel's opinion was the proper way to proceed.

14 CONSIDERATION OF THE MATTER

14.1 We have considered the evidence adduced as well as submissions by both parties in the matter and noted that the Appellant has opposed the Decision of the Board by raising seven (7) Grounds of Appeal. Based on the foregoing, the Tribunal opines that there are three key questions to be determined.

14.2 First, is whether the Appellant exercised reasonable skill and care in the management of the Complainant's Loan 2 in the Appellant's books. The question is phrased as such for it was on basis of the allegation of the Respondent, that its Board examined and found the Appellant to have breached section 49(5) of the Act.

14.3 Second, whether the Board was right to direct that the Appellant restructures the Complainant's loan in accordance with the Board's directives.

14.4 Third, whether in finding that the Appellant violated section 49(5) of the Act, the Respondent applied the correct fines in line with published guidelines of the Respondent as regards application of fines.

14.5 In answering the foregoing questions, the Tribunal elected to consider the grounds of appeal, separately.

15 GROUND ONE

15.1 In Ground One, the Appellant assailed the Respondent's finding of a breach of section 49(5) of the Act. In considering this ground of appeal, the Tribunal first looked at the definitions of the terms **"reasonable care"** and **"reasonable skill."**

15.2 According to Black's Law Dictionary, reasonable care means:

"...a test of liability for negligence, the degree of care that a prudent and competent person engaged in the line of business or endeavour would exercise under similar circumstances."[24]

15.3 And reasonable skill is defined as:

"...the skill ordinarily possessed and used by persons engaged in a particular business."[25]

15.4 The Respondent interpreted reasonable care and skill to mean:

"...whether the Respondent informed the Complainant that he was still owning [sic] them due to missed instalments and adjustments in the monetary policy rate before ceasing to making deductions on his loan [sic] April, 2020."[26]

15.5 The Tribunal notes that there is no dispute that the Complainant borrowed money from the Appellant. However, the contention seems to have arisen from the consequences of an alleged increase in the MPR in 2016 as well as the four (4) delayed instalments on Loan 2.

15.6 The Tribunal agrees with the Appellant that an increase in the MPR had the effect of raising the Complainant's cost of borrowing as the interest rate charged on the loan rose, consequently. In such an event, the Appellant had the option of either increasing the Complainant's instalments or extending the repayment period.

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[24] Garner, Bryan A. *Black's Law Dictionary*, 9th Edition, pg.240
[25] Ibid., pg.1514
[26] CCPC, *Record of Proceedings*, 25th October, 2022, pg.28

15.7 The alleged increase in the MPR, then raises the question of what the responsibilities of the respective parties to Loan 2 were. In general banking practice, a lender is expected to inform the borrower of an adjustment in pricing and the effects thereof, on any existing loan. Therefore, it would be considered an act of negligence if the lender did not communicate pricing adjustments to its borrowers.

15.8 In the matter of ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited***[27], the court opined that:

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

15.9 The court's position in the **Muiruri case**, *supra*, was based on the fact that the bank had arbitrarily increased interest rates on the loan arguing that the terms and conditions of the loan gave it the discretion to apply interest without reverting to the borrower. In disputing the extent of the debt, the borrower had requested the bank for a proper statement of acccunt on the loan showing all the interest rate changes.

15.10 In the case of ***Trustees of Maximum Miracle Centre v Equity Bank (Kenya) Limited***[28] the court stated *obiter dicta* that:

> ***"Parties are bound by terms of their agreement...the lender's right to vary interest is not absolute... cannot be exercised willy-nilly to charge exorbitant interest."***

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[27] *[2014]* eKLR 13
[28] [2021] KEHC 237 (KLR) 4

15.11 It is the Tribunal's considered view that in a lender-borrower relationship, where the borrower is advised by the lender of an increase in the loan pricing, he or she has the responsibility *inter alia* of allowing the lender to either deduct the resultant higher repayment amounts or to extend the tenor. In the worst-case scenario, the borrower could choose to refinance the loan by borrowing elsewhere.

15.12 Based on the foregoing, the Tribunal then raises the question of whether the Appellant, as expected in common banking practice, communicated the alleged change in MPR of 2016, the eventual rise in the interest cost, and subsequent repayment amounts of the loan, to the Complainant.

15.13 According to **AW**, the Appellant informed the Complainant of the upward adjustment in the MPR and the resultant decision taken to increase the loan tenor by way of letters sent through the line ministries. In the same vein, **AW** had earlier testified that he was not sure if that communication was directly to the Complainant or not. However, the Tribunal notes that no evidence was adduced to prove that the Appellant communicated the alleged adjustment of MPR in 2016 and that the Complainant received such communication.

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

15.15 Further, **AW** argued that it was common knowledge to any borrower that an upward adjustment in the loan pricing resulted in either higher interest payments or extended loan tenor. However, the Tribunal disagrees with the Appellant's position as regards the common-knowledge view of the implications of upward adjustments in loan pricing. Our considered view is that a borrower will not always fully understand the mechanisms by which loans operate. As such, the lender has a duty to inform the borrower of the implications of any material changes to either the terms and conditions or the structure of a loan.

15.16 In view of the foregoing, it is our considered view that the Appellant ought to have informed the Complainant of the duration by which the loan tenor had been extended. Based on the prior notification of the extension, the Complainant would not have been surprised, when the Appellant began to deduct extra loan repayments close to two (2) years after the initial agreed period of sixty (60) months.

15.17 Having considered all the available evidence and arguments from the parties, the Tribunal finds no merit in Ground One and upholds the finding that the Appellant did not exercise reasonable care and skill when offering its service to the Complainant and, therefore, in breach of section 49(5) of the Act.

16 GROUND TWO

16.1 Ground two challenges the Respondent's finding that the Appellant engaged in unfair trading practices, arguing that there was no evidence to support the charge. The Tribunal will assess the merits of Ground two on basis of existing law and evidence on record.

16.2 Section 45 of the Act states as follows:

"a trading practice is unfair if -

a) it misleads consumers;

b) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or

c) it places pressure on consumers by use of harassment or coercion;

and thereby distorts, or is likely to distort, the purchasing decisions of consumers."

16.3 According to **AW**, the loan tenor was extended in order to maintain affordability of the loan by keeping repayments unchanged. If we consider that argument, it follows that, when the MPR reduced, the cost of borrowing to the Complainant would have reduced. The reduction would then have presented the Complainant with the option of either keeping the repayment amount unchanged or reducing it to the new level. Further, the consequence of keeping the repayment amount unchanged would have been for the loan tenor to reduce.

16.4 However, based on the evidence on record, whereas the Complainant was charged a higher interest rate as a result of the purported upward adjustment in the MPR in 2016, he did not get the benefit of a reduction in the interest rate as a result of the downward adjustment in the MPR during the tenor of the loan. This is clearly an unfair business practice by the Appellant. This treatment of local currency loans is not as per BFSA and common practice as

argued by witness for the applicant in the case of the ***Development Bank of Zambia v Stalwart Investments Limited and Others***[29], where it was submitted as follows:

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

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

16.6 Therefore, we find no merit in the second ground of appeal and uphold the decision of the Board that the Appellant engaged in unfair business practice.

17 GROUND THREE

17.1 Ground Three of the appeal alleges that the Respondent erred in assessment of facts and principle in placing the responsibility of updating the Complainant on the status of the loan, on the Appellant.

17.2 **AW** submitted that whenever the MPR was adjusted by BOZ, the Appellant placed in a newspaper of wide circulation, notices of impending adjustments

[29] [2016], ZMHC 137 9

of the applicable borrowing rates on loans. **AW** further testified that borrowers were informed by letters sent through the line ministries. However, in both cases, **AW** did not adduce any evidence to back his testimony. Therefore, it is our considered view that, having the Complainant's contact details, the Appellant had a duty in two instances:

17.3 Firstly, to inform the Complainant of any adjustments in the loan terms and conditions (including the interest rate and tenor).

17.4 Secondly, to seek the Complainant's decision, in the case of interest rate adjustments, on whether the Complainant wanted the tenor either extended, reduced or maintained. However, there is no evidence of the Appellant's communication of the interest rate adjustment and the ramifications thereof.

17.5 In view of the fact that there were outstanding payments, the Appellant had a right to ensure full repayment of the loan by the Complainant. However, the Appellant's failure to communicate the new interest rates and ramifications thereof is in itself an act of negligence on its part and as such failed to exhibit reasonable care and skill in the management of the Complainant's loan.

17.6 Counsel for the Respondent, submitted that communication would have caused the Complainant to meet his obligation upon receipt of the communiqué. Our considered view is that this is a possibility rather than fact. Notwithstanding, what was critical is the communication, which evidence in *casu* was absent.

17.7 In view of the foregoing, Ground Three fails on account that the duty to communicate the interest rate adjustment and loan tenor extension was on the Appellant.

18 GROUND FOUR

18.1 Ground Four of the appeal contends that the Respondent failed to acknowledge that the Complainant was accountable for breaching his obligation under the loan agreement.

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

"The Commission established that due to the adjustments in the monetary policy rate by the Bank of Zambia and the missed instalments by the Complainant, the loan went into arrears thereby accruing interest leading to an accumulated loan balance of K17,929.92 as of 18th April, 2020 to..."[30]

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

18.4 Therefore, the Tribunal does not find any merit in this ground of appeal and find that the Respondent had acknowledged that the Complainant was accountable for breaching his obligation under the loan agreement, when the Complainant missed four (4) payments during the first sixty (60) months of the loan.

19 GROUND FIVE

19.1 In Ground Five, the Appellant submitted that the Respondent misdirected itself when it found that the Appellant did not effect adjustments to the Complainant's loan following adjustments to the MPR in 2016.

19.2 For the sake of context, the Tribunal perused the BOZ CB Circular No.5 of 2012, in which BOZ announced the introduction of the MPR. The MPR was the benchmark rate on which commercial banks would price their local currency loans going forward. CB Circular No.5 of 2012 states in part as follows:

> *"...effective from 2nd April, 2012 all commercial banks are expected to realign their base lending rates to the BOZ Rate." The actual lending rate, therefore, shall be the BOZ Rate plus a margin. The margin will be set by commercial banks on the basis of their risk premium assessments."*

19.3 A subsequent pronouncement was made by BOZ through CB Circular No.25 of 2012 in which a margin cap of nine (9) percentage points over the MPR was established thus giving a total lending rate of 18.25% per annum. The imposition of a mandatory margin cap meant that no loan with a variable rate of interest could be priced above the limit of MPR plus 9% per annum. In January 2014, the MPR was 9.75%.[31]

19.4 The cap on the margin was removed on 4th November, 2015 through issuance of CB Circular No.19 of 2015, which empowered the commercial banks to determine the margin that could be charged in addition to the MPR on a loan. However, owing to the absence of a copy of the loan agreement or any other supporting evidence, the Tribunal was unable to determine whether the Complainant's interest rate margin increased or not.

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[30] CCPC. *Record of Proceedings*, 25th October, 2022, pg.62
[31] BOZ, *Annual Report 2014*, pg.1

19.5 Further, CB Circular No.19 of 2015 also introduced the following consumer protections:

"1. A financial service provider shall ensure that the would-be borrower understands the key terms and conditions of the credit agreement before this is concluded with the borrower;

2. A financial service provider shall disclose the interest and all related costs of the borrowing to the potential borrower;

3. A financial service provider shall base any fees charged to the borrower on the actual cost of the underlying service or operational activity and shall display such fees at all its branches; and

4. The borrower's understanding of the credit agreement will be signified by the borrower signing off on the Key Facts Statement for Consumer Credit..."

19.6 In assessing the merits of Ground Five, the Tribunal examined the loan account statement[32] produced by the Appellant. The Tribunal found that the only interest rate adjustment on the loan was applied on 30th June, 2016, and showed the rate to be 32.5%.

19.7 In relation to the Respondent's evidence on interest rate adjustments, the Tribunal considered the 2016 Bank of Zambia Annual Report which stated as follows:

"In line with the inflation objective, the Bank of Zambia maintained a tight monetary policy stance and kept the Policy Rate at 15.5%

[32] CCPC, *Record of Proceedings*, 25th October, 2022, pg.13-17

throughout the year."[33]

19.8 Contrary to the Appellant's numerous submissions to the effect that the interest rate adjustment in 2016 was necessitated by the increase in MPR in the same year, we note that there was no increase in the MPR in 2016 and therefore, the increase in interest rate in that year was unjustified.

19.9 It was further submitted by **AW**, during cross-examination, that while an upward adjustment in the MPR resulted in an increase in the interest rate, it followed that the converse was also correct. In addition, **AW** stated that in fact the Appellant passes on the benefit of such downward MPR adjustment to the customers.

19.10 Also worth noting is **AW**'s testimony and which was corroborated by the loan statement that the loan management fee was calculated as a sum of ZMW16,800.00 (Sixteen Thousand Eight Hundred Zambian Kwacha), which translated to a fixed monthly fee of ZMW280.00 (Two Hundred and Eighty Zambian Kwacha) for the duration of Loan 2. However, a closer scrutiny of the said loan statement revealed that varying management fees were charged by Appellant during the life of Loan 2.

19.11 Therefore, the Tribunal finds the Appellant's submissions on oath that BOZ increased the MPR in 2016, to be false. To this effect section 72 of the Act states as follows:

> *"a person who knowingly gives false evidence regarding any matter which is material to a question in any proceedings before the*

[33] BOZ, *Annual Report 2016*, Lusaka. BOZ, pg.1

Tribunal commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both."

19.12 Therefore, we would like to sternly warn parties and witnesses to refrain from giving false and unverified information to the Tribunal.

19.13 On the basis of the facts and evidence produced *in casu*, we agree with the Respondent's finding that the Appellant effected only one interest rate adjustment, which was the upward adjustment on 30th June, 2016. Therefore, we find no merit in Ground Five of the appeal and conclude that the Respondent did not misdirect itself when it found that the Appellant implemented only one interest rate adjustment on Loan 2.

20 GROUND SIX

20.1 The Tribunal has summarised Ground Six into three (3) arguments, which are now presented below.

Firstly, the Appellant argued that the Respondent had no legal power to direct it to restructure Loan 2 and this point hinged on the assertions that *"the Complainant were [sic] notified of the increase in the Monetary Policy Rate in 2016; would not remit loan instalments in full on time or at all; and had given their prior permission to the Appellant to increase their loan in the event of a restructure."*[34]

20.2 In considering the foregoing argument, the Tribunal notes that the Act empowers the Respondent with a general responsibility to protect markets and

[34] Atlas Mara, *Notice of Appeal* dated 19th September, 2022, pg.3

consumers. In particular, the Respondent is empowered to, *inter alia,* review the trading practices pursued by enterprises doing business in Zambia, investigate unfair trading practices and unfair contract terms, and impose such sanctions as may be necessary.[35] Therefore, the Board in directing the Appellant to restructure the second loan given to the Complainant was acting within its mandate to protect consumers and redress unfair trading practices and contract terms.

20.3 Secondly, the Appellant alleges that it notified the Complainant of the purported increase in MPR in 2016. As the Tribunal observed earlier, the Appellant did not adduce any evidence to the Board or the Tribunal, to support this position.[36]

20.4 Further, as stated earlier, it was our finding that MPR was not increased by BOZ in 2016.[37] In view of this position reconstruction of the loan is imperative.

20.5 In addition, it is not in dispute that during the life of Loan 2, PMEC either missed some payments or the amounts were remitted late to the Appellant.

20.6 The need to reconstruct the loan is also buttressed by our finding that the failure of the Appellant to adjust interest rates whenever the MPR reduced, was a violation of the BOZ loan pricing guidelines, and as such, an act of unfair trading. It is our considered view that it would be unjust for Loan 2 not to be reconstructed.

20.7 Further, reconstructing of Loan 2 is imperative to ensure that under the circumstances, the Complainant was not, *inter alia,* subjected to penal

[35] Section 5(b) and (f) of the Act
[36] Para.15.13
[37] Para.19.7

interest, which was illegal, as was held in the matter of ***Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited***[38] and restated in ***Credit Africa Bank (In-liquidation) v Joseph Dingani Mudenda.***[39]

20.8 In addition, reconstructing the loan from the Complainant's perspective is imperative to ascertain firstly, whether or not the loan was fully repaid in April 2020; secondly, the number of months by which the loan tenor was increased, following the purported increase in the MPR; and lastly, to establish the correct outstanding balance, if any.

20.9 In the event that the reconstructed loan reveals an outstanding loan amount, the Tribunal is of the considered view that the Appellant would be on firm ground to demand prompt settlement of such monies, at the applicable interest rate.

20.10 Thirdly, the appellant argues under Ground Six that the Complainant had given it prior permission to increase their loan tenors in the event of a restructure. In line with this ground, **AW** submitted that the Complainant had given the Appellant its prior authorisation to extend the loan tenor in the event of an increase in the interest rate. While this may be true, the Tribunal was unable to verify the claim as the signed loan agreement was not produced as evidence during the hearing. As the Tribunal guided earlier *in casu*, the courts have held that such express authority even if existing, is not absolute. This means that following the extension of the loan tenor, the Appellant was still duty bound to formally advise the Complainant of the new final repayment

[38] (S.C.Z. Judgment 7 of 1997) [1997]
[39] (SCZ 10 of 2003) [2003]

date. Otherwise, with the lack of information the Complainant would not have known the new loan settlement date.

20.11 Therefore, based on the foregoing, the sixth Ground of Appeal fails. The Tribunal concludes that the Respondent did not err in law or fact, when it directed the Appellant to restructure Loan 2.

21 GROUND SEVEN

21.1 Lastly, Ground Seven challenged the Respondent's application of the 2019 Guidelines for Administration of Fines (hereinafter the **"Guidelines"**). In this regard, the Appellant argued that the Respondent erred in law when it abrogated its Guidelines for Administration of Fines, 2019 published in a daily newspaper of general circulation in Zambia when it purported to fine the Appellant in accordance with the revised Appendix 1 to its decision which is different from fines in the published guidelines.

21.2 The Board found the Appellant in breach of section 49(5) of the Act. In this regard, section 49(6) of the Act states that a person who, or an enterprise which, contravenes section 49(5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

21.3 The Appellant submitted that the fine that the Respondent had imposed on it, was different from that which was stated in the Guidelines.

21.4 In assessing the Appellant's submission regarding the Guidelines, the Tribunal relied on the provisions of the Fees and Fines Act, Cap.45 of the laws of Zambia (hereinafter **"FFA"**), the Fees and Fines (Amendment) Act No.11 of 2013 (hereinafter the **"Amendment Act"**) and the Fees and Fines (Fee and Penalty

Unit Value) (Amendment) Regulations, S.I. No.41 of 2015 (hereinafter the **"Regulations"**).

21.5 Section 2(1) of the FFA, defines fees and fines as follows:

"In this Act, unless the context otherwise requires-

[a] "fee" includes tax, levy, charge and any other impost, whether or not a service is provided in exchange for the payment thereof;

[b] "fine" means any pecuniary penalty that may be imposed by a court for an offence."

21.6 Further, the Tribunal perused the fines published by the Respondent and noted that the maximum fines set out in Annex 1 of the Guidelines were stated as **"fee units".** In addition, section 49(6) of the Act provides that what should be levied is a fine and not a fee. However, we note that in section 3 of the FFA both the fee and penalty unit are valued at ZMW0.30 (Thirty ngwee), and the methodology of computing the respective fee or penalty unit is the same.

21.7 Further, the Tribunal assessed the evidence produced by the Appellant, and found that the turnover in excess of the value of ***"16,666,666.7"*** fee units, when converted at ZMW0.30 (Thirty Ngwee) per fee unit, translated to **ZMW5,000,000.00** (Five Million Zambian Kwacha). In addition, the Tribunal noted that a turnover above ZMW5,000,000.00 (Five Million Zambian Kwacha) attracts a maximum fine of ***"1,666,66.67"*** fee units, which is equivalent to ZMW50,000.00 (Fifty Thousand Zambian Kwacha). However, we noted that contrary to the fines published in the Guidelines, the Respondent's Decision

Report,[40] stated the fine for turnover above ZMW5,000,000.00 (Five Million Zambian Kwacha) as ZMW500,000.00 (Five Hundred Thousand Zambian Kwacha).

21.8 Further, we noted that the cap for turnover greater than ZMW50,000.00 (Fifty Thousand Zambian Kwacha) but less than ZMW250,000.00 (Two Hundred and Fifty Thousand Zambian Kwacha) was in the Decision Report[41] stated as ZMW30,000.00 (Thirty Thousand Zambian Kwacha) rather than the ZMW10,000.00 (Ten Thousand Zambian Kwacha) published in the Guidelines.

21.9 In addition, the Tribunal noted that in response to the Appellant's submission, counsel for the Respondent acknowledged that the Guidelines stated that the maximum fine for turnover above ZMW5,000,000.00 (Five Million Zambian Kwacha) was ZMW50,000.00 (Fifty Thousand Zambian Kwacha). However, counsel for the Respondent stated that the fine as currently stated in the Guidelines was a typographical error and thus should not be taken literally. Further, counsel for the Respondent argued that the authors of the Guidelines could not have intended a lower fine for a larger turnover.

21.10 It is our considered view that in its current form, the published fine creates an absurdity that needs to be urgently cured.

21.11 In considering the importance of the Guidelines in regulating unfair business practice, the Tribunal urges the Respondent to take immediate measures to correct the typographical errors.

[40] CCPC, *Record of Proceedings*, 25th October, 2022, pg.66
[41] Ibid.

21.12 Therefore, on account of the obvious typographical errors in the Guidelines, the Tribunal does not find merit in Ground Seven of the appeal and finds that the Respondent applied the correct fine in relation to the Board's directive to the effect that the Appellant be fined 0.5% of the Appellant's turnover pursuant to section 49(6) of the Act.

22 CONCLUSION

22.1 The Appeal fails on all of the seven (7) grounds.

22.2 On the balance of law and evidence produced in the matter, the Tribunal upholds the Respondent's finding that the Appellant failed to exercise reasonable care and skill, and by so doing breached section 49(5) of the Act.

22.3 In view of our finding that there was no increase in the MPR in 2016 and that there were reductions in the MPR in the course of the tenor of Loan 2, the Tribunal orders the Appellant to reconstruct the loan and furnish the Respondent, as well as the Complainant, a detailed and independently verified statement of account of the said loan within thirty (30) days from the date of delivery of this judgment. The statement of account must show all debits and credits and applicable interest rates from the inception of the loan.

22.4 Costs are awarded to the Respondent.

22.5 A party aggrieved by the decision of the Tribunal may appeal to the High Court for Zambia within thirty (30) days of this judgment.

Dated the 9th day of November 2023

Mr. J.N. Sianyabo
CHAIRPERSON

Mrs. M. B. Muzumbwe-Katongo
VICE CHAIRPERSON

Mr. D. Mulima
MEMBER

Mrs. B. S. Chaila-Sichizya
MEMBER

Mr. B. Tembo
MEMBER