REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC. NO. 3 OF 2016

STANLEY NJOGU KARARI T/A MONACO ENGINEERING LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

1. Monaco Engineering Limited (the Plaintiff or Monaco) sues one of its bankers, Standard Chartered Bank of Kenya (the Defendant or Standard Chartered or the Bank) on allegations of breach of Duty and Contract.

2. Through a facility letter of 11th March 2013, the Bank granted Monaco an overdraft facility for Kshs.9,600,000/=. That facility was renewed through a subsequent letter of 30th April 2014. At the request of Monaco, the second facility was converted into a term loan and formalized in a facility letter of 29th September 2014.

3. Monaco asserts that, implied from the agreement in respect to the account and the facility letters and as a banker, Standard Chartered owed it duties to :-

a) Observe reasonable care and skill in and about the whole range of banking business within the said contract.

b) Give the Plaintiff clear information about the products and services, including charges such as levies and penalties.

c) Give the Plaintiff clear information about how the account, the overdraft facilities and the terms loan facilities worked, the terms and conditions thereof and the full and proper interest rates applicable.

d) Help the Plaintiff use the account and other services by sending regular and accurate statements and to keep the Plaintiff informed about changes in the interest rates, charges or terms and conditions in respect of the account, the overdraft facilities and the term loan facilities.

e) Quickly and sympathetically deal with things that go wrong and consider all cases of financial difficulty systematically and positively.

f) Forward accurate and timely information to the Plaintiff where the Defendant knew or ought to have known that the Plaintiff was relying on the Defendant to do so in connection with any proposed transaction of which the Defendant was or ought to have been aware.

4. It is those duties, in addition to others terms of contract, that the Bank is said to have breached. The alleged breaches are discussed in some detail later in the decision.

5. Monaco grieves that because of negligence of duty and breach of contract on the part of the Bank it has suffered loss and damage in the sum of Kshs.845,067,500/=. It craves for Judgment for this sum and the following orders:-

a) Declaration that the Defendant breached the contract between it and the Plaintiff in respect of the operation of the Plaintiff's account, overdraft facilities and term loan facilities;

b) An order directing the review and audit of all debits and credits made by the Defendant to the Plaintiff's account with the Defendant with respect to the Defendant's operation of the Plaintiff's account, overdraft facilities and term loan facilities for the period running from 2009 to 2005;

c) General damages for breach of contract, negligence and wrongful forwarding of information to a credit reference bureau leading to the listing of the Plaintiff with the said bureau;

d) Interest if any at Court rates;

e) Any other or further relief that the Court may deem just, fit and expedient to grant.

6. On its part, the Bank contends that it owed Monaco the normal duty of care of a Banker to a customer and not the duties set out by Monaco in its pleadings. It denies breach of duty or contract.

7. The hearing of the matter comprised of eight witnesses, six for Monaco and two for the Bank. Because of the multiplicity of matters raised, it is preferred that the evidence of those witnesses be discussed as they fall relevant. It is needless to rehash all that they said. The parties did provide this Court with an agreed set of issues, each preferring to propose their own. Taking those into account, together with what the pleadings reveal, the following emerge:-

i. What is the nature and scope of the duty owed by the Bank to Monaco?

ii. Is the Bank guilty of Breach of that duty and if so in which way?

iii. Did the Bank breach the terms of the facility letters by charging uncontracted interest and levying wrong charges?

iv. Did the Bank furnish inaccurate information to the Credit Reference Bureau?

v. If the Bank is liable, did Monaco suffer any loss?

vi. If so, has Monaco proved that loss?

vii. What is the appropriate order on costs?

8. Although counsel did not submit on the general nature and scope of duty owed by the Bank to Monaco, a discussion in that respect may be important in focusing on the grievance by the customer that there is dereliction of duty on the part of the Bank. The Court of Appeal in the case of in James Mweu & another v Kenya Commercial Bank [2019] eKLR held as follows ,partly, on the general duty of a bank to its customer, and also in respect to payment of a cheque;

"In honouring its customer's instructions, a bank is under duty to exercise due diligence as well as reasonable care and skill. In Karak Brothers Company Ltd -v- Burden(1972) 1 All ER 1210 it was expressed:

'…. 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 attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business."

9. I start by considering the complaints arising from the overdraft facilities granted by the Bank to Monaco. Stanley Njogu Karari (PW 1) and Peter Macharia Gachoki (PW 2) are directors of Monaco. They signed the first facility letter on 12th March 2013. From the letter of offer, the facility was to be secured by personal guarantees of Kennedy Murimi Karari and the two Directors. In addition, a legal charge was to be taken over LR. Nairobi Block 82/4785 (See D. Exhibit 1b Pages 1-13).

10. It does not seem controversial that it took some time before the securities were perfected and the Bank takes the view that the perfection of the charge was a condition precedent to operationalization of the contract.

11. It turns out that on 7th May 2013 (P. Exhibit Pages 58), Monaco writes as follows to the Bank:-

"Attached herewith is a list of Chqs already issued from our Ac No. 0102025390600. The cheques listed have been issued out the Payees and banked in their Accounts. All this was done based on your assurance that the Account is Activated.

Kindly do whatever it takes to ensure these cheques are cleared. Otherwise it is going to be very costly."

12. It is common ground that the cheques were dishonoured and charges levied on Monaco. Monaco is unhappy as it asserts that a Mr Marete, an officer of the bank, had assured its director that the account would be activated. Murimi (DW 1) for the Bank gave evidence that the cheques were dishonoured because security had not been perfected and the facility had not been activated at the time the cheques were

presented.

13. Later, on 28th May 2013 (P. Exhibit 61), and upon the return of the cheques, Marete writes to Monaco:-

> "Attached please find,
>
> The charges for unpaid cheques will be reversed on the last day of the month."

Indeed there was reversal and the cheques were later honoured.

14. So while the charges were reversed, Monaco's case is that it had to pay Kshs.67,600/= to the creditors whose cheques were returned unpaid and had to suffer Bank charges. It seeks this amount.

15. The Bank retorts that while it waived the bank charges it does not admit any wrong doing. And that in the email communicating the waiver, the Bank did not offer an apology as would be normal if the dishonour was due to a mistake by the Defendant.

16. Now, Marete did not testify in these proceedings. Murimi explained that Marete had left the Bank 3 months prior to the time he was to give evidence. Nevertheless he did not explain why he was unavailable to give evidence. This Court finds that in the absence of rebuttal evidence by Marete and evidence of the supposed practice that an apology would only be tendered by the Bank if a mistake was attributable to it, I find that on a balance of probabilities, the dishonoured cheques were presented on the assurance by the Bank that the overdraft account was operational.

17. That said, Monaco did not present any evidence that its creditors suffered bank charges upon the return of the cheques and proof that Monaco had to pay them Kshs.67,500/= or any sum at all. That claim has to fail.

18. The Court notices that in the final submissions to Court, counsel for Monaco pitches for damages for the dishonoured cheques. This will not be considered by the Court because it will be to permit the Monaco to travel outside his pleadings. In respect to the dishonoured cheques for the value of Kshs.4,143,790/=, Monaco only sought damages of Kshs.67,500/=

19. There is also another cheque for Kshs.400,000/= which was returned unpaid (P. Exhibit Page 316) by the Bank on 7th March 2014 citing insufficient funds. Monaco had a debit balance of Kshs.7,360,111.75/= before the cheque was presented. If the cheque was paid then it would take the debit to Kshs.7,827,611.75/= which would be within the overdraft limit of Kshs.9,600,000/=. Murimi was had put to explain why the cheque was dishonoured. Unlike another cheque for Kshs.804,700/= (P. Exhibit Page 313), I have to find that the Bank has not given a satisfactory answer for failing to pay it.

20. In respect to the returned cheque of Kshs.804,700/=, the Court accepts the Bank's explanation that the funds were insufficient and even if some arrangement fee (which is disputed by Monaco and is discussed presently) had not been paid.

21. Yet regarding the returned cheque of Kes 400,000.00, it was paid two days later and in his evidence, Karari stated that the Company suffered the bank charge because of the erroneous nonpayment. It was his further evidence that it would have had reputational impact on his Company had the payee noticed that the cheque had been returned. Given these were the only complaints in regard to that cheque, no case is made out for an award of general damages in that respect. As to the charges incurred, this would be specific damages which I cannot grant because they were not pleaded.

22. On 17th December 2013, the Bank debited Monaco's account in the sum of Kshs.189,000/= narrated as 'ARR FEE ON MORTGAGE LOAN (P. Exhibit Pages 64 and 311). Monaco contends that this charge was unwarranted as it did not have a mortgage with the Bank. It is common ground that Monaco did not have such a facility, so how does the Bank explain this charge?

23. Murimi's testimony was that:-

> "The statement of account at Page 64 of the Plaintiff's Bundle of Documents shows a debit of Kshs.189,000/= as an arrangement fee on a mortgage loan and excise duty on that fee of Kshs.18,900/= on 17th December 2013. This debit was passed because we had not charged this fee at the time of the original grant of the overdraft facility."

24. That evidence would then take the Court to the facility letter of 11th March 2013. It is provided as follows on arrangement fees:-

> "Arrangement fees will be charged at 1% of facility amount, subject to minimum fee of equivalent of Kes10,000/= on each of the above funded facilities to be recovered up-front on acceptance of these facilities and thereafter the Arrangements fees will be charged and recovered up-front on an annual basis on the existing limits on the Facilities set out therein. The Arrangement fees will be debited to the Borrower's account on or about the anniversary of the date of the initial acceptance of the facility whether or not a subsequent acceptance of the Arrangement has been made or signed. Recovery of the Arrangement fees does not in itself constitute placement of funds at Borrower's disposal."

25. The arrangement fee would be 1% of the facility amount which was Kshs.9,600,000.00. It would then be expected that the fee be Kshs.96,000.00. Counsel for Monaco put questions to Murimi on the inflated sum. The answer he gave did not explain why the charge was for Kshs.189,000/= and not Kshs.96,000/=. He ventured to state that:-

"And this is the annual charge, it is not a one-off charge, it is annual."

Even that explanation will not do because the charge was levied before the first anniversary of the facility. I find that there was an overcharge of Kshs.93,000/=.

26. There was a proposition by Counsel for the Bank that the claim was compromised because Monaco signed the second and third facility letters without any reservation of claims or disputes and that Macharia (PW 2), had in cross-examination stated that the third facility letter was a compromise agreement.

27. I think I need not consider the Bank's answer because to be fair to the Bank, although not raised by either party, the amount paid out in both arrangements fee and excise duty on 13th December 2013 appears to have been paid back to Monaco on 13th March 2014 (See P. Exhibit Page 317). A concern to Monaco, of course, would be the impact the wrongful debit would make on its account between the date it was paid out and the date it was refunded. The Court shall return to this.

28. Taken up also in regard to the erroneous narration, is that it caused the Company's potential financiers to believe that it was concealing some information on a mortgage loan and consequently refused to advance finances to it. This argument shall be discussed later.

29. I turn to another matter. Monaco grouses of overcharge of interest in both the overdraft and loan facilities.

30. For a start there is concession by the Bank that, even before these proceedings, it had admitted to a wrong charge of some Kshs.456,312.40/= but made amends by crediting the amount to the customer's account on 16th September 2016. Monaco is however unhappy that it took 6 months to do so.

31. A more substantial question has to be whether other than this admitted and rectified error, the Bank is guilty of overcharging interest. This puts the evidence of Wilfred Abincha Onono (PW 5) on center stage.

32. Mr. Onono is a member of the Institute of Certified Public Accountants (ICPAK) and the managing consultant of Interest Rates Advisory Center Ltd (IRAC). IRAC is said to specialize in financial consultancy and undertakes objective and independent audit of borrowing contracts and interest recalculations. He was instructed by Monaco to recalculate interest on its overdraft and loan accounts. He prepared a report dated 22nd October 2018.

33. The highlights of the account in respect to the overdraft is that the recalculation yielded the following in favour of Monaco:-

June 2013	-	29,562.74
November 2013	-	14,193.02
December 2013	-	22,062.23
January 2014	-	16,849.13
April 2014	-	132,558.87
May 2014	-	69,435.60
June 2014	-	63,123.26

Then there was a shift in favour of the Bank.

August 2014	-	0.02
September 2014	-	17,031.21

34. A feature of IRAC's workings was that the results were in favour of the customer when the interest rate applied was 19% p.a. It is the applied rate that was responsible for the outcome. That is where the report begins to implode.

35. When shown the letters of offer in respect to the overdrafts, the rates of interest contracted for the first facility was 21% p.a and 24% p.a. for the second. Asked why he applied a rate of 19%, Onono stated that it was on instructions of the client because it was the client's understanding that the interest to be charged was 19%. With respect, there was no basis for carrying recalculations on rates outside the contract.

36. As argued by Counsel for the Bank, it is of some significance that when the correct rate of interest was used, the Bank was found to have undercharged.

37. I turn to the finding on the loan account, the witness states that he applied the contractual interest being at a variable rate of Kenya Banks

Reference Rate (KBRR) plus a margin (i.e 9.13% + 6.77% = 15.9%). He further stated that interest on arrears is not applied because the facility provides for penalty on overdraft not on loan. This latter observation is drawn from the following conditions in the facility letter of 29th September 2019:-

> "Additional interest rate on overdrawn overdraft facility – Means 24% per annum or such rate as this Bank may stipulate from time to time."

38. That is rather curious because the facility letter was in respect to a loan and not an overdraft and it is common ground that at that point no overdraft facility was in place. Nevertheless, Murimi attempted to explain it. The gist of his evidence, as I understand it, was that the penalty clause needed to be looked at from the context that the purpose of the facility was to finance the conversion of an existing overdraft facility to a term loan and in the event the customer continued to overdraw, notwithstanding the conversion, then the overdraw attracts a penalty interest of 24%. Whatever one makes of that explanation, it does seem common ground that, at least on the loan, no penalty interest was to be charged.

39. On working out its recalculation, IRAC returns the following finding on the loan account:-

> "SCB's outstanding balance as on 21/02/2016 is a debt of Kshs.7,422,213.63 while IRAC's recalculated cleared balance is Kshs.6,992,632.40 indicating a recalculation difference of Kshs.429,581.23 in favour of Monaco Engineering Limited.
>
> The Transaction CRB report dated 6th July 2015 states that the loan account was in arrears of Kes.41,500.10 after the payment dated 21st April 2015. IRAC's report on this period indicates that the account was not in arrears.
>
> The CRB report dated 17th August 2015 notes that the loan was in arrears of Kes.805,457.20 after the payment dated 30th June 2015. IRAC's report indicates the account is in arrears of Kes.218,811.67".

40. From the Court transcripts, senior counsel Fraser for the Bank, was concerned whether Mr. Onono was aware that the Bank had accepted that there were some errors and had passed credits. To this question, Mr. Onono responded in the negative. Arising from this would be whether or not the report took the correction into account. For its importance, Mr. Kounah for Monaco made a follow up in re-examination. Mr. Onono stated that although he was not aware of the admission and refund, he would have nevertheless captured the refund if it was reflected in the account.

41.The evidence available is that the refund was first credited into the customer's account and then passed to the loan account on 11th September 2015 (See P. Exhibit Page 334). Although Onono could readily remember whether or not he took into account the correction, his report is explicit that he give regard to it;

> **"8.5 The letter dated 26th October 2015 was from the bank to Onyango Oyieko & Co. Associates informing that the additional interest charged the client's facility was recalculated as was agreed and credited to the client's account. The refund was evident from the account statement for month of September 2015."**

42. There is no doubt that Mr. Onono is an accountant and would have the credentials, just like any other accountant, to verify whether a bank customer's account has been properly charged. In that sense he is an expert in that field. The Court is to treat his evidence within the parameters discussed by Mativo J Christopher Ndaru Kagina vs Esther Mbandi Kagina [2016]eKLR as follows;

> "Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence….
>
> In my view it's correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. [17] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative [18] or manifestly illogical. [19] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable….
>
> An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. [20] In my opinion, the factors which the court may take into account in determining the reliability of expert opinion, include:-
>
> a. the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
>
> b. if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
>
> c. if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the

opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

d. the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

e. the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

g. if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

h. whether the expert& methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In addition, in considering reliability, and especially the reliability of expert evidence, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:-

a. being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

b. being based on an unjustifiable assumption;

c. being based on flawed data;

d. relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

e. relying on an inference or conclusion which has not been properly reached."

43. A substantial part of the report on recalculations on the overdraft was debunked as it was based on the application of non-contractual interest. That is disregarded by this Court. On the loan account, the issue of refunded interest appears to have been captured and I saw no further effort by the Bank to discredit IRAC's workings on this part. Stated in the report is that IRAC gave due regard to the contractual interest rate of the loan facility and relevant statements of account. In addition, the Bank did not point out any errors in the recalculation. I hold and find that Monaco has, on a balance of probabilities, demonstrated that there was an overcharge on the loan.

44. To keep within the strait-jacket of the actual issues raised as regards the Credit Reference Bureau Reports, the Court falls back to the pleadings. Monaco complains that the Bank wrongfully listed the Plaintiff with the CRB as a defaulter when it was not in default. Second, it failed to notify it of the wrongful negative CRB listing as required by law. Lastly, that despite repeated demand the Bank failed to retract the wrongful negative CRB listing notwithstanding that it was aware that Monaco was relying on them in connection with the Plaintiff's request for funding from other financiers.

45. Counsel for both sides have ably set out the relevant provisions of the law in regard to Credit Referencing.

46. Regulation 18 (1) and (2) of the Credit Reference Bureau Regulations, 2013 requires Banks to share CRB's information concerning a customer's positive credit facilities as well as the customer's non-performing credit facilities.

47. Regulation 25 imposes a duty on a credit information provider as follows:-

" 25. (1) A credit information provider furnishing negative information to a Bureau regarding credit extended to a customer or arising from a product or service rendered to a customer shall, in writing or through electronic means, issue to the customer a notice of intention to submit the negative information within thirty days before submitting of the negative information to a Bureau or within such shorter period as the contract between the credit information provider and the customer may provide.

(2) A credit information provider shall not furnish any information relating to a customer to any Bureau if the credit information provider knows or has reasonable cause to believe that the information is inaccurate.

(3) A credit information provider shall not furnish information relating to a customer to any Bureau if the credit information provider has been notified by the customer, at the address specified by the credit information provider for such notices, that the specific information is inaccurate.

(4) Despite sub-regulation (3), the credit information provider may submit the credit information to a Bureau once it has addressed the customer's concern on the inaccuracy of the credit information either by re-affirming the accuracy of the information to the customer or rectifying the inaccuracy.

(5) A notice issued under sub-regulation (2) shall explain the basis of the inaccuracy of the information and shall be in writing and where the notice is oral, the credit information provider shall reduce it into writing.

(6) Where the credit information provider has been notified of any inaccuracy in the credit information and where there is reasonable cause to believe that the information may not be accurate, the credit information provider shall inform all the Bureaus to which the information has already been submitted of this fact within five days of the notification and shall within fourteen days carry out investigations and inform the Bureaus of the outcome of the investigation.

(7) A credit information provider has a duty to-

(a) correct any inaccurate or erroneous information when the fact of inaccurate or erroneous information comes to their knowledge or attention; and

(b) inform the Bureaus within five days from the date of learning of the inaccurate or erroneous information.

(8) A credit information provider who has furnished credit information to a Bureau shall, within thirty days from the date the information was furnished to a Bureau, notify the customer that his credit information has been forwarded to the Bureau.

(9) A credit information provider which intentionally, recklessly or negligently submits inaccurate information to a Bureau or which does not adequately address customers' complaints on the inaccuracy of information submitted or to be submitted to a Bureau shall be barred by the Central Bank or the concerned Bureau from submitting information to the Bureau or any other Bureau as the case may be."

48. Regulation 50(1) sets out some responsibilities of institutions to be:-

"(a) notify the customer within one month before a loan becomes non-performing that the institution shall submit to a Bureau the information on the loan immediately it becomes non-performing:

Provided that for loans whose repayment interval or period is less than one month, the notice shall be served two weeks before the loan becomes non-performing;

(b) notify each customer, within thirty days of the first listing, that his name has been submitted to all licensed Bureaus;

(c) issue an adverse action notice to a customer against whom a decision has been taken or determination made, in whole or in part, that is adverse to the interests of the customer based on information obtained from a Bureau".

49. Under discussion are three CRB reports. The first is that requested by Equity Bank and submitted by Credit Reference Bureau Africa Limited t/a Transunion (P. Exhibit Pages 343-348). As observed by the Bank it ought to be a 6 page report and page 1 of the report has been left out.

50. Prior to the issuance of the report, the Bank had on 10th January 2015 (P. Exhibit 342), in compliance with Regulation 50(1) (b) notified Monaco that was it submitting information concerning it to two CRBs being Transunion CRB and Metropol CRB.

51. The Bank advised that it was required to share with the CRBs information concerning a customer's positive credit facilities as well as a customer's non-performing credit facilities. Yet I do not think that the letter fully spelt out the nature of information which it is required to share. Look at Regulation 18(1) again:-

"18. (1) Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer's non-performing loan and any other negative information and may include details specified in sub-regulation (4)."

52. So in terms of negative information, the information to be shared is not limited to non-performing credit facilities. In this regard Regulation 2 assigns the following meaning to the term "negative information".

"negative information" means any adverse customer information relating to a customer which includes-

(a) non-performing loan or credit default or late payment on all types of facilities or claims;

(b) dishonour of, other than for technical reasons, cheques meant for settlement of credits in favour of institutions;

(c) accounts compulsorily closed other than for administrative reasons;

(d) proven cases of frauds and forgeries;

(e) proven cases of cheque kiting;

(f) false declarations and statements;

(g) receiverships, bankruptcies and liquidations;

(h) tendering of false securities; and

(i) misapplication of borrowed funds."

53. Looking at the report, I agree with counsel for the Bank that it did not report any non-performing account. A non-performing loan being when its principal or interest is due and unpaid for 90 days or more (Clause 1.4.8.1 of Central Bank of Kenya's Prudential Guidelines on Risk Classification of Assets and Provisioning). However, for the fact that the report has some entries of arrears (even though not exceeding 90 days), and therefore credit default, the report reveals some negative information. What should be of concern is whether the information is inaccurate.

54. On this, Monaco has been able to demonstrate two inaccurate entries. That there existed an overdraft account with arrears of Kshs.10,376,770.80 with a worst period of 62 days. This was simply not true as the overdraft account had been converted to a loan through the facility letter of 29th September 2014.

55. The second error, and this must be read in conjunction with the IRAC report, is that there were arrears on the term loan of Kshs.41,550.10 for a worst period of 10 days. The Court, as noted earlier, accepted the evidence of IRAC that there were no arrears as at 21st April 2015.

56. The effect, if any, of these errors and whether liability attaches shall be discussed shortly.

57. The second report is that requested by Co-operative Bank of Kenya Limited. It is dated 17th August 2015 (P. Exhibit Pages 348,351). This report is certainly incomplete as only Pages 3 and 5 of a 7 page document are produced.

58. Gleaned from the material furnished to Court, I make the following observations. Unlike for the first report the notice required under Regulation 50(1) is missing. Second, the same error as that in the first report in regards to a non-existing overdraft account persists. Then in respect to arrears as at 30th June 2015 it is said to be Kshs.805,457.20 as opposed to Kshs.218,811.67 returned by the workings of IRAC.

59. Following this second report, Monaco writes as follows:-

"We are very disappointed when a request to Standard Chartered to look on some issues is made and then it goes unattended to. Mr. Anthony Njeru is assuming our mails where pertinent issues are raised.

You are letting your customers down by not attending to their request.

We would also request that Standard Chartered Bank updates its credit reference data with TransUnion bureau which has listed us as defaulters. (We don't have any overdraft facility with you).

Acting on earlier issues raised through Mr. Anthony Njeru will be appreciated."

60. On 23rd September 2015, the Bank notifies Monaco that it shall be sharing adverse CRB information with Transunion CRB and Metropol CRB. The report that followed the sharing is that of 20th January 2016 by Transunion. On this report, IRAC does not point out any errors. Important as well, is that the overdraft facility that had previously been wrongly listed as active is now listed as "CLOSED" (See P. Exhibit Page 365).

61. For the errors or inaccuracies contained in the credit bureau information, Monaco seeks general damages and has proposed a sum of Kshs.2.5 Million and cites various authorities. In addition, the Court is urged to award aggravated damages as Monaco asserts that the Bank was reluctant to correct the errors.

62. The Bank, on the other hand, argues that Regulation 19(1) gives it protection.

63. There is an important role that CRB plays in enabling access to credit. It ensures credit flows to those who show they deserve it and avoids those who have a record for default. But it is acknowledged that in sharing customer information, institutions will from time to time give inaccurate information. Such is the nature of human fallibility. Yet, so that credit referencing is not detracted by claims or fear of claims, certain errors are insulated by the law. This is the effect of Regulation 19(1) which reads:-

"19. (1) A suit, prosecution or other legal proceedings shall not lie against the Central Bank, Bureau, an institution or chairperson, director, member, auditor, adviser, officer or other employee or agent of such Bureau or institution or any other person authorised under these Regulations to submit, receive, use or share credit information, for any loss or damage caused or is likely to be caused by anything which is done or intended to be done in good faith in pursuance of these Regulations or guidelines issued hereunder."

64. The protection however does not extend to acts done maliciously or in bad faith. Evidence of bad faith will vary from situation to situation. And so, for example, where the error is in the first place innocent, a refusal to correct it will be construed as an act in bad faith. This flows from the duty imposed by Regulation 25, Sub-regulation 4 to 7 to correct inaccurate or erroneous information. Those read:-

"(4) Despite sub-regulation (3), the credit information provider may submit the credit information to a Bureau once it has addressed the customer's concern on the inaccuracy of the credit information either by re-affirming the accuracy of the information to the customer or rectifying the inaccuracy.

(5) A notice issued under sub-regulation (2) shall explain the basis of the inaccuracy of the information and shall be in writing and where the notice is oral, the credit information provider shall reduce it into writing.

(6) Where the credit information provider has been notified of any inaccuracy in the credit information and where there is reasonable cause to believe that the information may not be accurate, the credit information provider shall inform all the Bureaus to which the information has already been submitted of this fact within five days of the notification and shall within fourteen days carry out investigations and inform the Bureaus of the outcome of the investigation.

(7) A credit information provider has a duty to-

(a) correct any inaccurate or erroneous information when the fact of inaccurate or erroneous information comes to their knowledge or attention; and

(b) inform the Bureaus within five days from the date of learning of the inaccurate or erroneous information."

65. Of significance however is that a Plaintiff whose action is premised on an assertion that the information provider did not act in good faith is duty bound to specifically plead the acts of bad faith and provide the particulars thereof. This is because the Plaintiff will be urging an exemption to the general rule. In the view of this Court it is a matter that requires to be particularized as envisaged by Order 2 Rule 10(1) of the Civil Procedure Rules;

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

66. When this Court turns to the Plaint of Monaco, it does not find any allegation of bad faith on the part of the Bank. But the Court will assume, arguendo, that Paragraph 13(j) of the Further Amended Plaint pleads bad faith. It reads:-

"Despite repeated demand that the Defendant does so, failing to retract the wrongful negative credit reference bureau listing upon notice thereof by the Plaintiff and despite being informed by the Plaintiff that the Plaintiff was relying on the Defendant to do so in connection with the Plaintiff's request for funding from other financiers."

67. What is the evidence in this regard? In the email of 21st August 2015 reproduced in Paragraph 61 of this decision, Monaco's specific complaint is that it had been listed as a defaulter when it did not have an overdraft facility with the Bank. There is then their lawyer's letter of 9th October 2015 (P. Exhibit Page 359 and 360) which protests the Banks pre-listing notification of 23rd September 2015 (P. Exhibit Page 358). In that pre-listing notification, the Bank had alleged that the loan account was in default of overdue interest of Kshs.224,932.12 with arrears of Kshs.1,344,503.94 because full installments had not been paid for 63 days. This protest is about the loan account.

68. The third protest is in regards to the "Individual Dispute Filing Form" of 14th March 2016 (P. Exhibit 367). In this, just as in the email of 21st August 2015, Monaco dwells on the listing that it is a defaulter on an overdraft which was non-existing.

69. How does the Bank respond to these protests? The evidence is that on the continued listing of the overdraft, a correction was made so that in the CRB report of 20th January 2016 the overdraft facility was listed as closed (P. Exhibit Page 365). The correction had been made and there is no further fault on the Bank.

70. As to whether the loan was in arrears, the Bank, in its letter of 29th March 2016, insists that the information was correct. The protest on the loan account was in the letter of 9th October 2015. Yet there is evidence from its own quarters (IRAC) that as at 17th August 2015 the loan was in arrears of Kshs.218,811.67. So that in so far as the customer was in default, the CRB reports were accurate. What was erroneous was the extent of default (IRAC report). Yet, and this is crucial, the protest letter of Monaco, gave the impression that there was no default at all. It did not protest the accuracy of the sum said to be in arrears. Put differently, the Customer did not ask the Bank to make a correction of the amount in arrears. For that reason, this Court is unable to impute bad faith on the Bank. It may have erred in the figures but there is no evidence that the errors were reckless or motivated by malice.

71. The Court turns to another issue in connection with the CRB report. It is alleged by Monaco that because of the wrongful listing, it was unable to access credit from Co-operative Bank of Kenya and FaAia Group of Companies. As to the former, I have to agree with the lawyer for the Bank that Monaco was unable to produce any evidence that Co-operative Bank of Kenya declined to grant it facilities because of the negative listing.

72. Mr. Muriithi Wachira is a Director of FaAia Group of Companies. His witness statement is a two page document. In regard to the CRB

report this is all he says:-

> "In America we work with credit score (Kenyan CRB Report).

At the hearing the witness was not asked any questions about the CRB reports. This cannot be sufficient evidence to show that the facilities from FaAia were not forthcoming because of the CRB listing.

73. In Paragraph 14(f) (i) of the Further Amended Plaint, Monaco avers that it lost financing opportunity because the Bank failed to provide it with regular statements of account and subsequently failed to supply corrected and certified copies of statements of accounts when it requested.

74. In his witness statement, Wachira says:-

> "The statement and offer letter had serious mistakes. We were unable to locate Monaco in Nyota House."

75. On his part Karari lists what he claimed to be anomalies and discrepancies that were raised by the international financier to be:-

a) 22 cheques that had bounced.

b) A cheque worth Kshs.400,000/= bounced yet the statement shows overdraft was Kshs.7.4 Million.

c) Interest rate on the loan statement not in line with the offer letter wherein the former read 24% while the latter read 15.9%.

d) Service charge charged twice in April.

e) Debt interest of February not understood.

f) Excise duty and monthly Bank charge charged 5 times.

g) A mortgage of Kshs.209,000/= on an overdraft.

h) They could not trace Monaco Engineering at Nyota House Accra Road.

i) A loan statement dated 1st January 2010 yet we had said we don't have an account with any multinational Bank prior to 2012.

j) Discovery that we were listed in CRB with very low credit score.

76. Although Monaco alleged this catalogue of supposed anomalies and discrepancies that were of concern to FaAia, the only written communication produced by Monaco in respect to insufficiency of documents sought by the financier is an email of 21st August 2015. For its importance, the Court reproduces it:-

> "*To the Director*
>
> *Monaco Engineering Limited,*
>
> *NAIROBI.*
>
> *21ST August 2015*
>
> *Dear Sir,*
>
> *Further to our discussion with you and some of my partners when you came to U.S.A you promised to send us some information on the matters pertaining to us doing some international trade with you.*
>
> *However, even having been talking to you for the last four months you have not given us the confirmation as to whether the statements you sent to us from Standard Bank are the authentic true copies from the Bank.*
>
> *Me and my partners are very disappointed with you Mr. Karari because we have put a lot of rescuses in place to have this project started but you have failed us for not paying attention to what you promised you will do.*
>
> *While, we are giving you 21 days to send us the information we requested and a certified copy of Monaco Engineering as an Excellence in trade from the Embassy of the United State of America U.S Commercial Service Kenya (Gold Award Recipient 2015).*
>
> *Please, treat this issues as urgent.*

Yours faithfully

FaAia Group Int.

John(919)9314505."

77. In his evidence, Karari alludes to telephone conversations in which the financiers raised a number of items in the Bank statements.

78. But Wachira of FaAia gave telling information as what really led to the finance failing. In answering questions in re-examination, Wachira stated that on going through the documents, the financiers came to the conclusion that the documents were not authentic and so they backed out. This evidence is consistent with the contents of the email of 21st August 2015 in which all that the financier was seeking in respect to the statements was *"confirmation as to whether the statements you sent to us from Standard Bank are the authentic true copies from the Bank."* On the evidence before Court, it reaches a conclusion that this was the only issue raised by the financiers regarding the statements.

79. Standard denies that it failed to authenticate its customer's statements. On its part Monaco states that they had on several occasions, through oral communication, sought certified copies of the statements from the Bank. Both Mr. Karari and Mr. Macharia were pressed to explain why they did not make a written request or demand to the Bank on what was obviously important for their application for international finance. All they said was that they had lengthy meetings on this issue, and the issues referred to the email of 21st August 2015 included the issue of the statements.

80. Counsel for the Bank then raises an interesting aspect regarding what the financiers had requested. A plain reading of the letter is that the financiers wanted a confirmation from Monaco that the statements were authentic true copies from the Bank. The financiers did not require the confirmation to come from the Bank itself. The Bank had no role to play and cannot be held to have failed.

81. If, nevertheless, it is assumed that what the financiers required was certified copies, then it has to be asked whether indeed Monaco sought those from the Bank. In the letter, the financiers state that they had been in discussion with Monaco for four months and Monaco had not provided the confirmation they needed. In the letter they give Monaco 21 days to resolve the issue. Is it possible that Monaco would not have made a written demand to the Bank of what was possibly a deal breaker? I think not and hold that there is no cogent evidence that Monaco had sought certified copies of statements from the Bank and that the Bank had failed to do so.

82. There is then the allegation by Monaco that its credibility was in question because FaAia was unable to locate it in Nyota House whereas the Bank statements indicated that it would be their physical address. Nothing much can turn on this because in the account opening documents (D. Exhibit Page 2), the registered address given by Monaco to the Bank is LR No. 209/525/30 Nyota House Accra Road. Although Monaco's case was that it was a Bank official (Mr. Marete) who filed in this information, Monaco cannot disown its contents because both Karari and Macharia signed the document as Directors and declared:-

> "We represent that the information provided by us in this form and in any other document(s) provided by us to the Bank is true, accurate and complete."

Conclusion:

83. In the end, this Court has to find that a very substantial portion of the Plaintiff's claim has not been proved. The only aspect of the Plaintiff's claim that has been proved is that there was a possibility of an overcharge on the loan account.

84. If, however, I had found the Bank liable for negligence and wrongful listing then I would have awarded General Damages of Kshs. 500,000.00 as there was no evidence that any real loss had been suffered by the Company because of the listing. As to special damages of Kshs. 845,000,000.00, the Plaintiff showed Court various contracts it says it was unable to either perform or win because the finances did not come through. What the Plaintiff did not do was to provide cogent evidence on how it arrived at the colossal claim. For example, evidence of not just the expected earnings but also projected expenses should have been placed before Court. The tenuous evidence before Court was insufficient to prove the special damages pleaded.

85. For that reason, the order sought by the Plaintiff, and which is deserving is that there be a review and audit of the Plaintiff's terms loan with the Defendant from the time of its inception to date so as to reveal the true status of the account. In this regard the parties are hereby directed to agree on and appoint an Independent Accountant to take those accounts and file a report within 45 days of the date of that appointment. In default of such agreement each party to appoint an accountant and the two accountants to appoint an umpire and the three to prepare a report of the accounts within 45 days of the appointment of the umpire. Where parties agree on one accountant, his costs will be shared equally by the parties. However, where three accountants are appointed each party will bear the costs of its accountant while the cost of the umpire will be shared equally by the parties.

86. The final decision of this Court, including the aspect of costs, shall await the filing of the said report.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Fraser for Defendant

No appearance for Plaintiff