IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 434 OF 2013

BETWEEN:

ECOBANK MALAWI LIMITED **PLAINTIFF**

AND

HARVEY KALAMULA **DEFENDANT**

Coram: JUSTICE M.A. TEMBO,

Nampota, Counsel for the Plaintiff
Nyirenda, Counsel for the Defendant
Kakhobwe, Official Court Interpreter

JUDGMENT

This is the judgment of this Court following a trial of this matter. The defendant is a former employee of the plaintiff. The plaintiffs' claim is for the sum of K1, 309, 871.90 being a outstanding loan due from the defendant which loan the defendant had obtained in the course of his employment with the plaintiff. The defendant denied the plaintiff's claim. It is convenient to set out the plaintiff's statement of claim and the defendant's defence.

The plaintiff's statement of claim is as follows

1. The defendant was at all the material times a holder of account number 00100037000108301 holden at the plaintiff's head office in the City of Blantyre.

2. The defendant was at all material times an employee of the plaintiff. In the course of his employment he obtained from the plaintiff the following loans:
   a. Car loan
   b. Education loan
   c. Insurance loan
   d. Personal loan

3. It was expressly agreed between the plaintiff and the defendant that in the event of termination of services, the defendant would pay interest on all loan balances on the aforesaid account at the Ecobank Malawi Limited at the base lending rate per annum which rate would be determined and published from time to time by the said plaintiff on all sums outstanding together with all charges levied on such account.

4. The plaintiff's services were terminated by letter dated 15th August, 2011. At the date of termination there was loan balance of K1,277,026.68.

5. By the said letter dated 15th August 2011 the plaintiff reminded the defendant that the above loan would now attract commercial interest rate in terms of the bank's policy.

6. The plaintiff further repossessed the motor vehicle herein and sold it to Mr Chifundo Madumba.

7. Following the said sale of the motor vehicle as at the 30th of November, 2012 the balance of the loan was K397,738.42.

8. As at the 1st day of June 2015 the said account was overdrawn by K1,309,871.90.

9. The defendant has not made good the said overdrawn sums and the same remain due and unpaid.

   Particulars

   a) Account transaction history ranging from the 23rd of November 2012 to the 1st of June, 2015……....……K1,309,871.90

10. By a demand letter dated the 20th August, 2013 the Plaintiff has demanded the aforesaid sums including interest and other charges from the defendant but the defendant has not paid the said sums or any interest thereon.

11. The Plaintiff will contend at the trial that as a result of the breach of the aforesaid contract the Plaintiff has incurred damages by way of legal collection costs on a sliding scale which it is liable to pay to its Legal Practitioners pursuant to the Legal Education and Legal Practitioners Act on the basis of *restitutio in integrum*.

12. The plaintiff will further contend at the trial that as a result of the breach of the aforesaid contract the Plaintiff is entitled to 15% legal collection costs pursuant to the Legal Practitioners (Scale and minimum charges) Rules under the Legal Education and Legal Practitioners Act.

    And the Plaintiff claims-

    a) Payment of the said sum of K1,309,871.90.
    b) Further interest at the Ecobank's lending base rate plus 10% on the claim herein from the 2nd day of June 2015 to the date when the claim herein will have been settled in full and;
    c) Reimbursement of legal collection costs on a sliding scale pursuant to the Legal Practitioners (Scale and minimum charges) Rules under the Legal Education and Legal Practitioners Act *restitutio in integrum* basis.
    d) Reimbursement of 15% collection costs on the sum of K1,196,480.79 pursuant to the Legal Practitioners (Scale and minimum charges) Rules under the Legal Education and Legal Practitioners Act.
    e) Party and party costs to be taxed.

The defendant's defence is as follows

1. The defendant refers to paragraph 1 of the statement of claim and denies being the holder of account number 0010037000108301 and puts the plaintiff to strict proof thereof. The defendant states that he never opened such an account with the plaintiff and the defendant is not aware of the stated account number. The defendant's account number with the plaintiff is account number 0010147001082301.

2. The defendant admits contents to paragraph 2 of the statement of claim.

3. The defendant refers to paragraph 3 of the statement of claim and denies the contents thereof and puts the plaintiff to strict proof of the same. The defendant states that there is no such express agreement as stated by the plaintiff at all between the plaintiff and the defendant.

4. The defendant admits the contents of paragraph 4 of the statement of claim as true.

5. The defendant refers to paragraph 5 of the statement of claim and admits as true the contents thereof. The defendant however pleads that the issue of loans between the plaintiff and the defendant was governed by written agreements/contracts between the plaintiff and the defendant and in the agreements aforesaid there is no mention of commercial interest rates being applicable in any event at all.

6. The defendant admits as true the contents of paragraph 6 of the statement of claim.

7. The defendant is not aware of the contents of paragraph 7 of the statement of claim

8. The defendant refers to paragraph 8 of the statement of claim and states that he is not aware of the contents thereof. The defendant further states that the only account that he has with the plaintiff, being account number 0010147001082301 has no overdraft facility and it is therefore not possible that the said account be overdrawn by such a huge amount of MK1,309,871.90 and without the knowledge of the defendant himself.

9. The defendant denies the contents of paragraph 9 of the statement of claim and puts the plaintiff to strict proof thereof.

10. The defendant denies the contents of paragraph 10 of the statement of claim and puts the plaintiff to strict proof thereof.

11. The defendant refers to paragraph 11 of the statement of claim and denies being in breach of any contract with the plaintiff. The defendant states that it is the plaintiff who is in breach of contract and also negligent in handling the defendant's issue herein.

Particulars

(a) Opening and operating account number 0010037001082301 without the knowledge, consent and/or approval of the defendant.

(b) Deliberately selling the vehicle repossessed from the defendant below the reserve price or true market value with intention to claim the balance from the defendant.

(c) Failure to notify the defendant that the repossessed vehicle has been sold and at what price.

(d) Failure to give a chance to the defendant to redeem the vehicle and/or make good of the loans.

(e) Charging commercial interest rates on the defendant's outstanding loans without any such agreement between the bank and the defendant.

(f) Failure to be open and transparent to the defendant on an issue that concerned him

12. The defendant refers to paragraph 11 and 12 of the statement of claim and denies the contents thereof and puts the plaintiff to strict proof of the same. The defendant states that the matter herein falls within the jurisdiction of the magistrate's court and there is no good reason for commencing these proceedings in the High Court. If the plaintiff does succeed in their claim herein the defendant pleads that the plaintiff's costs of the action be on the lower court's scale.

13. The defendant denies being liable to pay the sum of MK1,309,871,90 to the plaintiff and puts the plaintiff to strict proof of the same.

14. The defendant denies being liable to pay interest at the defendant's base lending rate plus 10% as there is no such agreement between the plaintiff and the defendant.

15. The defendant pleads that the actual cost of the repossessed vehicle at the material time was enough to take care of all the defendant's loans had the plaintiff acted fairly, in good faith and in an open and transparent manner in the circumstances of this case.

16. Save as herein before expressly admitted, the defendant denies each and every allegation of fact contained in the plaintiff's statement of claim as if the same were set forth and traversed seriatim.

The plaintiff correctly submitted that from the foregoing this Court has to determine the following. Whether the defendant had a loan with the plaintiff. Whether interest is payable at the Commercial lending rates. Whether the defendant owes the plaintiff the sum of K 1,309,871.90 as at the 1st of June, 2014. Lastly, whether the plaintiff is entitled to reimbursement of collection costs.

The plaintiff called one witness. The witness for the plaintiff was Jessie Bisika who is the plaintiff's head of Early Warnings, Remedials and Recoveries in Malawi. She adopted her witness statement which formed her evidence in-chief. She indicated to this Court that she joined the plaintiff in March 2012. Further, that her duties involve recovery of debts. She stated that she knew the defendant and that he is a former employee of the plaintiff. She stated further that when the defendant's services were terminated he had an outstanding loan.

She stated that when the defendant applied for the loan he completed a loan application form which she tendered in evidence and was marked as exhibit JB6. Further, that at the time of the termination of the defendant's services the plaintiff had amended its conditions as well as the application form for a loan to provide for commercial rates to be payable on outstanding loans of members of staff after termination of their services. The amended loan application form was tendered in evidence and marked as exhibit JB6A. The relevant term added after the amendment provided that upon termination of employment the bank may apply to all sums owed by a member of staff to the bank such commercial interest rates as the bank may deem fit.

She further stated that at the date of termination of the defendant's services there was an outstanding sum in the loan account for K1, 227, 026.68. She produced a letter the plaintiff wrote to the defendant on 15th August 2011 advising the defendant of the outstanding loan. The latter was marked as exhibit JB1. She further stated that the plaintiff brought to the defendant's attention the plaintiff's policy which required that when there is an outstanding loan the same would be transferred to a commercial account thereby attracting commercial interest rates. She added that since the defendant was aware of such a change he did not dispute the contents of exhibit JB1.

She stated that the plaintiff requested the defendant to surrender his vehicle which he had bought using the loan he got from the plaintiff. The request was by a letter dated 26th August 2011 and the letter was tendered in evidence and marked as exhibit JB2. She further stated that the vehicle was sold through Trust Auctioneers to Mr Chifundo Madumba as is shown by a letter dated 22nd December 2011 which was tendered in evidence and marked as exhibit JB3. This is actually a letter to the Road Traffic Directorate advising that the defendant's vehicle had been seized by

the plaintiff upon the defendant's failure to settle a loan that he had got from the plaintiff to finance the purchase of the vehicle and that the same had been sold to Mr Chifundo Madomba and authorizing change of ownership of the same. This Court observes that this letter does not mention that Trust Auctioneers was involved in the sale.

Ms Bisika further told this Court that exhibit JB3A, a bank statement for the defendant's account number 0010147001082301, shows that the vehicle herein was sold at K930, 000.00 as per an entry made on that account on 22nd December 2011. She stated that at that date the defendant's liability had increased to K1, 298, 066.91 and that after deducting the K930, 000.00 the balance was K368, 066.91. She further stated that as at 30th April 2012 the defendant's account debit balance had grown to K428, 769.64.

Ms Bisika stated that on 17th May 2012 the defendant's pension benefits amounting to K84, 911.10 were applied to the outstanding loan leaving a debit balance of K343, 858.54. She added that as at 3rd October 2012 there was a debit balance of K397, 738.42 that was later transferred to a commercial interest earning account that appears in a bank statement she tendered in evidence and was marked as exhibit JB4. The number for that account is 0010037001082301. This account was opened in terms of the plaintiff's policy. Ms Bisika stated that as at 23rd November 2012 this account's debit balance was K397, 738.42. Further that this account continued to attract commercial interest and that as at 31st July 2013 the debit balance was K556, 620.45 and that as at 31st March 2014 the debit balance was K771, 891.66. She added that as at 1st June 2015 the debit balance stood at K1, 309, 871.10.

During cross-examination Ms Bisika stated that she joined the plaintiff in 2012 and that she was not working for the plaintiff at the time the defendant's services were terminated by the plaintiff in August 2011. She stated further that the demand for the defendant's vehicle and the sale of the same happened before she had joined the plaintiff but that she has first hand information on the matters because she got hand over notes from her predecessor in her office. She stated further that there are records at her office. She told this Court that the vehicle herein was sold by auction and that the reserve price was K1, 200, 000.00. She added that there were three bidders and one of them submitted the highest bid. She however did not produce

documents to prove that the auction took place and she stated that the reason was that she was not asked to and she thought the defendant was satisfied since he kept quiet about the issue of the sale of the vehicle.

Ms Bisika stated that at the time the defendant signed the loan application form in exhibit JB6 he never signed for the new provision on charging of commercial interest rates on outstanding loans of former employees of the plaintiff.

With respect to exhibit JB3A Ms Bisika stated that she did not have the interest rate applicable but that she could check her office records. She however stated that the applicable interest was base lending rate plus penalty that translates to the commercial interest rate. She stated further that this rate was applied since 2011. She added that this commercial lending rate was applied on the outstanding debit in the account and was not based on the loan agreement but rather was a system application of the loan. She stated further that anyone opening an account knows that a debit balance will attract a penalty interest and that the system recognizes the account status and so the interest rate herein was not applied depending on the loan agreement .

Ms Bisika then stated that the defendant's loan was liquidated upon his dismissal by the plaintiff. Further, that there was an agreement governing the loans of the defendant. She added that the plaintiff did not apply the wrong interest rate. She stated further that when the defendant left the plaintiff's employment his staff account was moved to a normal customer account and that normal customer account attracted commercial interest.

She stated further that the plaintiff decided to amend the loan application form, exhibit JB6A, to make clear that members of staff who left the plaintiff would be subjected to the commercial interest rate. Further, that the plaintiff charged the new rate since the defendant was no longer an employee of the plaintiff and that this applies to all former employees of the plaintiff including the defendant herein.

Ms Bisika stated that she was told by her predecessor in her office that the defendant did not dispute the contents of exhibit JB1. She stated further that Mrs Mluwira is the one who wrote exhibit JB1 and that she did not find her at the plaintiff when she started working there. She added that it was not documented that the defendant went to see Mrs Mluwila about exhibit JB1. She added that she

expected the defendant to have written on the important matter in exhibit JB1 if at all he disputed its contents. She added further that since there was no response in writing from the defendant it is hard for the plaintiff to believe that the defendant objected to or disputed exhibit JB1.

Ms Basika then stated that the defendant was advised of the sale of the vehicle herein by way of the letter to the Road Traffic Department marked as exhibit JB3 which was copied to the defendant. She added that this letter was not addressed to the defendant. Further, that it was not signed for by the defendant because it was sent by post and that the defendant's address is not included on the said letter because he was only copied.

Ms Bisika told this Court that since 2012 when she joined the plaintiff the defendant had never written to her on the issue herein. Further, that she had seen the emails sent by the plaintiff on the matter herein but that these were sent to the wrong people at the plaintiff's operations department. She added that the issue herein was a credit or human resource issue which if she had been written to by the defendant she would have dealt with after March 2012 when she joined the plaintiff.

Ms Bisika further stated that exhibit JB3 was copied to the defendant and so was sent to him. She added that if the plaintiff did not tell the defendant of the auction of the vehicle herein at least at the time the defendant surrendered the motor vehicle herein he was told that it would be sold. She did not agree that the plaintiff never told the defendant about the auction sale of the motor vehicle herein. She added that Mr Madumba was dealing with the plaintiff's human resource officer, Mr Chaduka, when he got the motor vehicle herein. She further stated that the money from the motor vehicle auction sale herein was deposited in the defendant's bank account but she said she did not know who provided the defendant bank account details. She added that Trust Auctioneers brings cash or a cheque to the plaintiff in transactions such as the one herein when the motor vehicle was sold. She reiterated that the K930, 000.00 was applied to the defendant's account on sale of the defendant's motor vehicle. Further, that as at 30th April 2012 the defendant's account debit stood at K428, 769.64. She stated that the defendant was advised of this fact. She stated that this advice was communicated to the defendant through a

letter from the plaintiff's human resources department which counsel for the defendant took during mediation and never returned to her.

Ms Bisika further stated that it is normal for the plaintiff's human resources department to communicate about pension benefits. She stated that she assumed that this was done with regard to the defendant's pension benefits before the same were applied to the defendant's loan herein. She added that the plaintiff opened a new account for the defendant in November 2012. She however said she would have to check with the plaintiff's human resources department to see if the defendant was told about the opening of this new account.

During re-examination, Ms Bisika stated that the plaintiff received K930, 000.00 on the sale of the motor vehicle repossessed from the defendant after the deduction of auctioneers commission and expenses. She further stated that this is not reflected in the documents submitted in evidence herein. She however added that this K930, 000.00 is reflected in exhibit JB3 as an entry on 22nd December 2011. She added that the K930, 000.00 was credited on the defendant's account and that before that credit the account debit was K1, 200, 000.00. She pointed out that in the defendant's defence there are no issues to do with Trust Auctioneers. She further stated that the issue of the commercial interest is in paragraph 4 under employees acceptance in the amended loan application form marked as exhibit JB6A. She clarified that the old loan application form did not have a clause on the commercial interest.

She added that usually the loan interest rates for the plaintiff's members of staff is different from that for the plaintiff's customers. Further, that if one overdraws the staff account then one is charged the base lending rate plus penalty. She added that even in the absence of the amended clause in the new loan application form in exhibit JB6A an overdrawn staff account would be charged the commercial interest rate. She further added that previously the plaintiff had challenges on the issue of interest so the loan application form was amended to put the matter on commercial interest on loans in black and white that if a staff member left the plaintiff then outstanding loans would attract commercial interest rate. She added further that the defendant knew of this position although it was previously not stated clearly in black and white. And further that all staff members knew that an overdrawn staff account would attract commercial interest. Further, that this was the practice on

interest on staff loans over the years and that the penalty interest is usually 10 per cent.

Ms Bisika stated that in exhibit JB1 commercial interest rate was mentioned and that the plaintiff got no reaction from the defendant on that aspect.

The defendant testified next. During examination in chief the defendant adopted his witness statement which is in the following terms

1. I was employed by the plaintiff as a Treasury Back Office officer in June 2009.

2. Sometime in August 2010, I applied for a motor vehicle loan from the plaintiff. I applied for a sum of MK1, 300, 000.00. This was because I found a car (a 2001 Toyota CAMI) which was being sold at that price. In fact the car was being sold at MK1, 500, 000. 00 but I had to negotiate the price and bring it down to MK1, 300, 000.00 considering my level of entitlement at that time for the Bank to have the loan approved.

3. The plaintiff approved and granted me the loan. The terms of the loan as spelt out in the loan application form were that I would repay the loan in 48 monthly instalments with 8% interest. The loan application form is attached hereto and exhibited marked "HK 1". I did not sign any other agreement with the plaintiff concerning this loan apart from the mentioned loan application form, nor does the application form refer to any other conditions or policy for the loan apart from the application form itself. I also took out an insurance loan, which was kind of automatic if you have a car loan, to cover insurance of the vehicle.

4. Sometime in August 2011 I was called by the plaintiff to a disciplinary hearing because the plaintiff alleged that I had failed to return a check of a customer whose account had no funds. It was not my job to do so. However following the disciplinary hearing I was summarily dismissed from my employment. I was written a dismissal letter on 15th August 2011. I protested against the contents of that letter and appealed to the bank's appeals committee. The appeals committee by their letter of 26th September 2011 upheld the decision of the disciplinary committee to summarily dismiss me. I was not satisfied with the reasons for the dismissal and the way my case was handled by management and in May 2013 I commenced legal proceedings in the Industrial relations court. I attach hereto IRC Form 1 and the same is exhibited marked "HK 2". The matter is still in the Industrial relations court at Blantyre as matter number IRC 258 of 2013. It was only after I had commenced legal proceedings against the Bank in the Industrial relations court that the Bank decided to commence the present proceedings in August 2013.

5. At the time of dismissal, apart from the loans already stated above, I had an outstanding personal loan and also an education loan.

6. Following the dismissal, the plaintiff started demanding that I should surrender the car that I purchased with the loan that I got from the bank. At this time I had not defaulted on the monthly payments and the agreed 48 months had not run. At this point I had serviced the loan for one whole year and there was nothing to warrant the bank to repossess the vehicle. The demands to surrender the vehicle were thus kind of surprising to me. However because of the pressure I was getting from the plaintiff and their promise to consider my request to retain the vehicle only after it has been parked at their yard, I surrendered the vehicle to them.

7. That at the time of the demand, the car was in perfect condition. It had no scratches or engine problems and I had not made any accident with the vehicle. The vehicle was surrendered to the plaintiff in that perfect condition.

8. At the time the vehicle was being surrendered to the plaintiff, the price of the same at the local market was ranging from MK1,400,000.00 to MK1,800,000.00. The same vehicle now cost between MK3,300,000.00 to MK4,300,000.00. The vehicle was comprehensively insured at MK1,300,000.00. Attached hereto are the current quotations for the vehicle and MRA estimated duty on the car, all marked "HK 3" which shows that the car's value was not below what I may have owed the bank at that particular time.

9. From the day I was dismissed by the plaintiff, I have always been willing to settle the outstanding amounts, if any, with the plaintiff, as a loan. I communicated this to the Bank on several occasions and I even engaged lawyers who wrote a letter to the plaintiff explaining my position. The letter is attached hereto and the same is marked "HK 4". The bank never replied to this letter. When my lawyers tried to follow up on the matter with the defendant, they were told by Mrs. V. Mluwila that I should surrender the vehicle first and then the Bank will consider my proposal. The vehicle was thus surrendered on that understanding. But it was only a trick, as that was the last time I heard from the Bank on the issue.

10. After the vehicle was surrendered, I have written the bank on so many occasions to follow up on my request but the bank never responded. Some of the e-mails that I sent to the bank are attached hereto and marked "HK 5, HK 6, HK7, HK8, HK 9 and HK 10.

11. During my stay with the plaintiff's bank, Mrs Jessie Bisika was not with the Bank. Her position was created after I had left the bank and possibly at the time she was joining the Bank in 2012. The e-mails that I was writing to the Bank were being addressed to responsible people that I knew can attend to my issue. At that time issues like mine were

being dealt with by the Bank's credit committee (BCC). Refer to the e-mail attached hereto and marked "HK 10" in which Mr Tedious Namangwiyo states that the issue was still with the said BCC for consideration. Mr.Benson Jambo was a member of the Bank's credit committee, Mr. William Nchembe was head of risk, Grace Mphepo was head of operations and IT, Tedious Namangwiyo was legal officer, Susan Saukila was head of Human resource. Most of these people were members of the Bank's credit committee but all these officers never replied to my e-mails. If these people were not responsible to handle my issue they could have said so, in a one line reply to my mails and direct me to the right person. Grace Mphepo once replied to my e-mail but it was clear from the reply that she was in fear to reply or handle my issue because of the plaintiff's Managing Director (see exhibit marked HK 7). Tedious Namangwiyo is the only other person who replied as already mentioned above, saying that he would come back to me once the BCC members had concluded my issue. That was in November 2011 and he never again communicated to me after that.

SALE OF THE VEHICLE

12. The plaintiff eventually sold the vehicle without even letting me know that they intended to do so or give me a chance to redeem the vehicle. This was done with the bank's full knowledge that I was still waiting to hear from them on my proposal to redeem the vehicle. If the bank was of the view that I was not suitable to be considered to service the loan as requested, they could at least have communicated my unsuitability to me so that I know and may be offer an alternative in settling the loan. But actually I have come to know that the vehicle was sold through court papers and the witness statement of Jessie Bisika which is filed in these proceedings.

13. After the plaintiff sold the vehicle, the bank never communicated to me and they have up to date not communicated to me on how much the vehicle was sold at and how it affected my loan with the bank. On top of that, the plaintiff also received my pension benefits and they have never communicated to me how much was received and how the funds were utilized.

14. There was no public advertisement for the sale of the vehicle. There was no public or any auction conducted for the vehicle. There was no attempt by the bank to sell the vehicle at the best price on the market. The Bank simply agreed with one person on the price and that person, one Chifundo Madomba, made a cash deposit of MK930, 000.00 into my account on 22nd December 2011. Mr. Madomba could not have known my account number unless one of the defendant's officers who was dealing with my issue told him. A copy of my bank statement to that effect on account number 0010147001082301 is attached hereto and exhibited marked "HK 11". Why the plaintiff chose to sell the vehicle to one Chifundo Madomba and why the plaintiff agreed to sell the vehicle to him

at a meagre MK930,000.00 is not known and was never communicated to me. All I know is that if the plaintiff had sold the vehicle through trust auctioneers as the plaintiff claims, the procedure is that Mr. Chifundo Madomba could have made payment to trust auctioneers who in turn would have raised a cheque in favour of the plaintiff accompanied by some documentation detailing the purchase price paid by the buyer plus the auctioneer's fees and expenses. There is nothing of that sort in my case. There is a direct cash deposit into my account by the buyer through the Bank's teller number 4, signifying that the bank was dealing directly with the said buyer.

15. The plaintiff had a duty to set a reserve price for the vehicle and get the best price for the vehicle on the market considering that the sale of the vehicle was not normal but was intended to settle a loan. The plaintiff also had a duty to account to me on the proceeds of the sale because it directly affected my loan.

16. The plaintiff's conduct in handling my issue has been in bad faith and bent to victimize me all along. If the bank had handled my case in good faith the loan could have been settled by now, either through my servicing the loan by myself or the proceeds of the sale of the vehicle itself could have been enough to settle the same. The loan could have been paid off by the proceeds of the sale of the vehicle alone but the bank deliberately and negligently sold the vehicle at a giveaway or lower price to victimize me by resorting back to me with the intention to claim the balance from me.

17. The bank has not been transparent at all in dealing with my issue and they have kept a lot of information to themselves which ought to have been disclosed to me as a concerned party. The plaintiff has hidden information from me and kept quiet for years in the hope of making more money on me through un agreed interest charges. These proceedings are just meant to shut me up because of the proceedings that I commenced against the bank in the IRC.

18. There was no reason for the plaintiff to sell the vehicle when I had shown interest to keep it. The Bank could have let me service the loan as earlier agreed in writing between the bank and myself, more so because I was the banks former employee.

MY ACCOUNT WITH THE PLAINTIFF

19. I have an account with the plaintiff and the same is account number 0010147001082301. I did not open and have never operated any other account with the plaintiff and I do not know account number 0010037001082301. If the said account number 0010037001082301 does exist in my name with the plaintiff, the opening of the same was never communicated to me and it has been opened and operated without my

knowledge, consent or authority. That account might as well belong to someone else, who knows about its existence. Further, at no point did I ever apply for, or have an overdraft facility with the plaintiff.

20. I have no outstanding loan with the plaintiff. I serviced the loan for one year and the Bank got that money plus my pension benefits on top of the vehicle which I surrendered to the bank which had a much higher value than the outstanding loan at the time I surrendered the vehicle. The vehicle was enough to settle all my outstanding loans after the sale of the same, had the sale been handled by the plaintiff fairly and in a transparent manner.

21. I lost my job for no apparent reason, I lost my one year servicing of the loan, I lost my pension benefits and I lost a vehicle all at the hands of the plaintiff and the plaintiff want to victimize me more by claiming that there is a balance that I ought to settle. The plaintiff just want to make extra money on me when infact the balance, if any at all, has come about because of their own negligence and fault.

22. If at all my account with the plaintiff is in overdraft, it is because of the plaintiff's own fault, negligence and lack of good faith in handling my issue.

During cross-examination, the defendant stated that he had worked for the plaintiff for two years. He admitted taking a staff loan from the plaintiff. He also stated that he knew that the plaintiff charges commercial interest rates on loans. Further that he knew that the plaintiff's staff loan interest rates and customer loan interest rates are different. He however stated that he did not know that commercial interest rates are 10 per cent above the base lending rate. He further stated that he was working in the plaintiff's treasury department and was entitled to staff loan interest rates on getting a loan as an employee of the plaintiff.

The defendant indicated that he was aware that when an employee leaves the defendant's employment he becomes liable to commercial interest rates on any outstanding staff loans. He then added that when such an employee leaves the plaintiff's employment he agrees with the plaintiff on the rate of interest on outstanding staff loans. He further stated that he was made aware of the fact that on leaving the plaintiff's employment any staff loan outstanding attracts interest at commercial rate.

With respect to the letter of his dismissal marked as exhibit JB1, the defendant indicated that when he received the same he responded by way of an of appeal contained in a letter he wrote to the plaintiff. He however indicated that he did not dispute the part of the letter of dismissal which indicated that the outstanding loan would attract interest at commercial lending rate. The defendant was also referred to his own email dated 28th November 2011 to the plaintiff, marked as exhibit HK5, by which the defendant asked for his outstanding car loan to be commercialized. The defendant in fact stated that he cannot dispute that the commercial lending rate was the one payable on his outstanding loan herein.

The defendant stated that his letter of termination showed that then the outstanding loan was K1, 227, 026.68. He further stated that it is correct that as at 28th November 2011 the said loan stood at about K1, 250,000.00 as per his own email dated 28th November 2011 and marked as HK5. He however stated that he could not confirm that the loan went up due to the commercial lending rate.

The defendant was referred to exhibit JB3A and HK11 and he stated that these documents are the same except that HK11 covers an earlier period too. They are a copy of a statement for bank account number 0010147001082301 for the defendant. He further stated that as at 15th June 2012 the balance in both exhibit JB3A and HK 11 is -341, 940.09.

The defendant was referred to exhibit JB4, a statement of a bank account number 0010037001082301 covering the period between 23rd November 2012 and 31st March 2014, and he stated that these do not represent his bank account.

The defendant was then referred to exhibit HK11 and stated that it goes up to transactions on 15th June 2012. He however stated that it should have covered the last transaction on 23rd October 2012. This last transaction had a description ‘funds transfer- account to account closure’ and it showed a credit balance of K397, 738.42, as in exhibit JB3A. He indicated that the statement he got in exhibit HK11 only went up to 15th June 2012.

The defendant was referred to exhibit JB4 and stated that the opening balance on that account statement on 23rd November 2012 is the same as the closing balance on the same date in exhibit JB3A. He however stated that he does not think exhibit JB4 is a continuation exhibit HK11. He stated that he was not given exhibit JB4.

The defendant was referred to the entry on exhibit JB3A for 30th November 2011 and he stated that the balance then was –K1, 298, 066.91. He further stated that by then he was no longer an employee of the plaintiff and he did not make any deposit to this account. He further stated that he did not deposit K930, 000.00 to the account on 22nd December 2011. He added that he had only been told in this Court of the sale of his motor vehicle through Trust Auctioneers. He however stated that he knows that on a sale Trust Auctioneers gets a commission. He added that he did not have any knowledge of the details of the sale alleged by the plaintiff herein or that the sale was for a price higher than the K930, 000.00 indicated by the plaintiff. He stated that after the deposit of the K930, 000.00 the account balance shows – K368, 066.91.

The defendant stated that he bought the motor vehicle herein at K1, 300, 000.00 in 2010. He further stated that the plaintiff sold the said vehicle after a year. He added that in the intervening period the Malawi Kwacha had lost some value. He also stated that the vehicle must also have depreciated in value. He however stated that he could not say that the K930, 000.00 was not a gross undervalue for the motor vehicle herein. He added that he had insured the said motor vehicle at K1, 300, 000.00 in 2011. He further added that in 2011 the price of the same vehicle sold herein was K3, 000, 000.00 and that that is the market value.

The defendant then stated that he has always been willing to settle the loan herein. He further stated that he never made any payment on the loan herein after 28th November 2011 because the plaintiff did not respond to his emails concerning the said loan. He added that the loan herein was liquidated and so he could not pay installments but he tried by email to open communication with the plaintiff on the way forward on the loan herein.

The defendant was referred to exhibit JB7 which is a demand letter from the plaintiff's legal practitioners addressed to the defendant and dated 20th August 2013. By that letter, which the defendant got, the plaintiff's legal practitioners demand that the plaintiff pay the sum K556, 620.45 being the loan herein and interest by that date. The defendant stated that he did not pay the sum demanded by the legal practitioner of the plaintiff. He further stated that failure to pay up was not a demonstration of his willingness to pay. He added that he did not prolong proceedings herein by his unwillingness to pay.

The defendant was then referred to exhibit HK2 which shows his claim against the plaintiff in the Industrial Relations Court. He stated that the claim in exhibit HK2 is not connected with the plaintiff's claim in the present matter. He stated that the said claim is a different one but related to the present matter. He further stated that he does not recall when his claim before the Industrial Relations Court last progressed. He stated that he recalled appearing at a pre-trial conference before the Industrial Relations Court but he could not recall when that happened. He added that he is proceeding with his claim and is not aware that the plaintiff wants to dismiss the said claim for want of prosecution.

The defendant stated that the sum of K930, 000.00 was credited after he had left the plaintiff's employment and he now understood that the sum constituted proceeds of the sale of his motor vehicle herein. He further stated that he never made any payments to the account.

The defendant told this Court that the entry at 17th May 2012 on exhibit JB3A was a credit of pension and the one on 15th June 2012 was account to account benefits withdrawal.

He then told this Court that he wanted this Court to order that he did not owe the plaintiff any money. He stated that the sale of his motor vehicle should have paid up the loan if the sale was transparent. He further stated that he had proposed to the plaintiff that he pay the loan and get his motor vehicle but the plaintiff did not respond.

During re-examination, the defendant stated that he did not see or sign for any policy on commercial interest rates for staff loans of ex-employees when he was working for the plaintiff. He added that before his letter of termination he was not aware of such a policy.

He further stated that the purpose of his emails in exhibit HK5 was for the plaintiff to give him a loan at a commercial interest rate so that he could redeem the motor vehicle which was in the plaintiff's possession. He stated that he was making a proposal. He stated that he did not know if the plaintiff responded but he was told to wait since the plaintiff's credit committee was looking into the matter.

The defendant stated that exhibit JB3A and HK11 have some difference in details. For instance for the entry on 22nd December 2011 the plaintiff's account statement leaves out some details in the narrations as it only says cash deposited but the actual statement in exhibit HK11 says cash deposited at teller 4 by C. Madumba. Further, that the narration for the entry on 27th September 2011 in exhibit JB3A has been changed and says interest on staff loan but on his narrative in exhibit HK11 for the same entry there was no narrative. He added that the plaintiff's system only generates account statements and narratives are not automated.

The defendant stated that the account in exhibit JB3A is his but that the account in exhibit JB4 was not opened by him.

The defendant further stated that his account statement shows that on 22nd December 2011 there was a deposit. He stated that he was told by counsel that this represented proceeds of sale of his motor vehicle through Trust Auctioneers. He stated that he has not seen any document on the sale. Further, that he has not been communicated to of the intention to sale or after the sale. He further stated that he does not know the exact figure at which the motor vehicle was sold and that he was not told the same. Further, that all he knew was that K930, 000.00 was in the account. He added that he did not know how much the auctioneers fees were.

The defendant confirmed receiving exhibit JB7 but he said that he was not aware how the figure claimed by the plaintiff was arrived at and what that figure was all about.

He further stated that with regard to the narration for the entry on his account for 17th May 2012 he did not know the pension fund administrator but that all pension deductions went through the plaintiff to the fund administrator and that the administrator would remit back pension benefits to the plaintiff for disbursement. He added that he never got communication from the plaintiff that it received his pension benefits and he would not know if the entry in question represented the only amount of his pension benefits. He further stated that the plaintiff did not communicate to him how it arrived at the figure of benefits withdraw indicated in his account entry on 15th June 2012. He added that he is not sure about his benefits in the circumstances.

The defendant reiterated that he wrote the emails in exhibit HK5 to open communication and that he did not succeed in his attempt. He stated that the plaintiff was not willing to get back to him on the way forward.

Both the plaintiff and the defendant made submissions on the evidence and the law applicable in this matter. The issues for determination are as aptly put by the plaintiff, namely, whether the defendant had a loan with the plaintiff. Whether interest is payable at the Commercial lending rates. Whether the defendant owes the plaintiff the sum of K 1,309,871.90 as at the 1st of June, 2014. Lastly, Whether the plaintiffs are entitled to reimbursement of collection costs. The defendant framed the issues for determination somewhat differently in some respects but he addresses the same matters as raised by the plaintiff. This Court will deal with the submissions and determine the issues.

On the first issue whether the defendant had a loan with the plaintiff the plaintiff submitted as follows.

The plaintiff submitted that exhibit JB1 shows that the defendant had the aforesaid loans whose balance as at 15th of August, 2011 was K1,227,026.68. Further that the defendant never disputed the balance. The plaintiff further pointed out that by his own e-mail dated 28th November, 2011 particularly at 1:58 pm in exhibit HK5 the plaintiff conceded that as at the said 28th November, 2011 the balance outstanding had risen to K1,250,000.00.

There is no contention from the defendant disputing that at the date of termination of his services he had a loan outstanding. This Court therefore agrees with the plaintiff that the defendant owed a sum of K1, 227, 026.68 at the time his services were terminated.

This Court will now consider the submissions of the parties herein on the second issue for determination which is whether interest is payable at the Commercial lending rates on the loan sum of K1, 227, 026.68.

The plaintiff submitted that Ms Bisika stated that the bank had a policy that once an employee left the services of the plaintiff and had an outstanding loan the same would attract commercial interest rate. Further that Exhibit JB1 brought to the plaintiff's attention this fact. Further that the defendant never disputed this.

The plaintiff further contended that exhibit JB6A, which is a normal standard loan application form for the plaintiff, also demonstrates this fact. It further contended that it is the evidence of Ms Bisika that until exhibit JB6A was drafted as a written policy it was unwritten policy that after the employee leaves the company the interest payable would be at a commercial bank rates and not at the staff rate. Further that this came about as a result of the defaults from employees who left the plaintiff's services owing the plaintiff loans. Further that the plaintiff decided to devise exhibit JB6A where the policy was expressly provided. The plaintiff pointed out that the fact that exhibit JB1 was never disputed by the defendant is indicative enough that the policy was in place even before exhibit JB 6A was issued.

The plaintiff further submitted that defendant has made concessions to the effect that commercial interest rates were applicable in exhibit HK4, HK10 and HK5. Further that under exhibit HK10 the defendant has made such concession in e-mail dated November, 8 2011. That in exhibit HK5 he has made concessions in an e-mail dated 22nd November, 2011 and another concession appears in email of 7th December, 2011. The plaintiff contends that in all these e-mails the defendant agreed that the interest rate payable on his loan is not a staff rate but a commercial rate.

The plaintiff noted that exhibit HK4 was written by the defendant's lawyers. Further that in paragraph 3 of the same even his lawyers are pushing for the implementation of a commercial rate position. Consequently, that the fact that interest should be payable on his loan at a commercial rate cannot therefore be disputed at trial by the defendant.

The plaintiff then submitted that according to Ms Bisika the commercial rate payable is 10% above the base lending rate. It also submitted that there is overwhelming evidence therefore that the loan herein would attract interest at the commercial rate especially after the defendant had stopped employment. Further that the defendant could not have been entitled to a staff rate of 8%.

The plaintiff submitted that alternatively it is a common law position that where a party withholds money for the other in a commercial transaction the same attracts interest at the commercial lending rate. The plaintiff referred to the cases of

Kankhwangwa and others vs The Liquidator Import and Export (Malawi) Limited MSCA Civil Appeal Number 4 of 2003 and *Mkandawire vs Everglo* civil cause number 97 of 1988 (High Court)(unreported).

The plaintiff then noted that since the vehicle herein was surrendered by the defendant he did not make any effort to liquidate his loan. Further that the defendant alleges that he was making efforts to write the bank to come to an agreement on the issue of payment. The plaintiff submitted that there was nothing that could have prevented the defendant from making periodical deposits to the account to reduce the debt. Further that he knew whatever the case that he owed money to the Plaintiff. And that he has done nothing up to now.

The plaintiff noted further that when it engaged its lawyers they sent to the defendant a letter marked as exhibit JB7 in August, 2013. The plaintiff submitted that the defendant never attended to it. The plaintiff submitted that the defendant has therefore been withholding the defendant's money from the year 2011 up to now. And that it therefore makes commercial sense to order that the defendant pays interest at commercial rate of 10% above base lending rate.

The defendant submitted to the contrary. He asked the question whether there is any express agreement between the plaintiff and the defendant that in the event of termination of services, the defendant would pay interest on all loan balances on account number 00100 37000 108301 at the plaintiff's base lending rate.
The defendant pointed out that the plaintiff pleaded in paragraph 1 and 3 of their statement of claim that

1. The defendant was at all the material times a holder of account number 00100037000108301 holden at the plaintiff's head office in the City of Blantyre.

2. ……..

3. It was expressly agreed between the plaintiff and the defendant that in the event of termination of services, the defendant would pay interest on all loan balances on the aforesaid account at the Ecobank Malawi Limited at the base lending rate per annum which rate would be determined and published from time to time by the said plaintiff on all sums outstanding together with all charges levied on such account.

The defendant then pointed out that in his defence the defendant denies these allegations and states in his defence as follows

1. The defendant refers to paragraph 1 of the statement of claim and denies being the holder of account number 0010037000108301 and puts the plaintiff to strict proof thereof. The defendant states that he never opened such an account with the plaintiff and the defendant is not aware of the stated account number. The defendant's account number with the plaintiff is account number 0010147001082301.
2. ……

3. The defendant refers to paragraph 3 of the statement of claim and denies the contents thereof and puts the plaintiff to strict proof of the same. The defendant states that there is no such express agreement as stated by the plaintiff at all between the plaintiff and the defendant.

The defendant then submitted that the state of the pleadings has put as an issue the allegation of existence of the account number mentioned and the existence of an express agreement to pay interest on that account in the event of termination of services as pleaded by the plaintiff. The defendant emphasized that account number 0010037000108301 which was created by the plaintiff without the consent and mandate of the defendant is different from account number 0010147001082301 which is the account that the defendant is aware of.

The defendant then submitted on the law and stated that in actions on contract, the burden of proving the existence of the contract, performance or conditions precedent, breach and damages are all on the claimant. He referred to *Phipson on evidence* **(**2005), 16th ed., Sweet and Maxwell, par. 6-08 (a).

He further submitted that in so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. *Robins v National Trust Co.* 1927 AC 515, 520.

The defendant further submitted that if when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. *Pickup v Thames Insurance Co.* (1878) 3 QBD 594, 600. He added that this is an ancient rule founded on considerations of good sense and should not be departed from without strong and good reasons. *Constantine Line v Imperial Smelting Corporation* (1942) AC 154, 174. He further added that the true meaning of the rule is that where a given allegation, whether affirmative or negative forms an essential part of the party's case, the proof of such allegation rests on him. *Abrath v North Eastern Railway* (1883) 11 QBD 440, 457.

The defendant then submitted that, it is for the plaintiff to prove in this court that the defendant opened the account mentioned. Further that it is common knowledge that one can only open a bank account after filling the necessary account opening forms which are also signed by the opener of the account. Further that when the defendant had put the existence of account number in question, ie in dispute, it was up to the plaintiff to produce proof in terms of the documentation used by the defendant to open that particular account. And that it was also up to the plaintiff to show the court that they had the mandate from the defendant to open and operate that account in the name of the defendant. The defendant submitted that the plaintiff failed to show that mandate or authority or agreement. Further that the plaintiff failed to show the said express agreement between the plaintiff and the defendant to levy or charge commercial interest or any interest at all on the account number in question. And further that the plaintiff failed to show the court any express agreement on any rate of interest that is alleged to have been agreed upon by the parties on the disputed account.

The defendant submitted that the only agreement shown in this court during trial is a loan application form and the same is marked JB 6. He submitted further that this agreement shows that the plaintiff authorized a loan to be advanced to the defendant amounting to MK1, 300, 000. 00 which was to be repaid in 48 months at the rate of interest of 8%. Further that it was approved by the local credit committee and the agreement does not make reference to any other document as being part of this agreement. The defendant submitted that this document in exhibit JB6 does not make reference to any bank policy or any separate agreement

between the plaintiff and the defendant. And that no single document is incorporated to be part of this document.
The defendant pointed out that he pleaded in his defence in paragraph 5, and the same was not contradicted by any reply by the plaintiff, that "……..the defendant however pleads that the issue of loans between the plaintiff and the defendant was governed by written agreements/contracts between the plaintiff and the defendant and in the agreements aforesaid there is no mention of commercial interest rates being applicable in any event at all."

The defendant pointed out that it was in his evidence, in paragraph 4 of his witness statement, and the same was not disputed in evidence or cross examination, that "The terms of the loan as spelt out in the loan application form were that I would repay the loan in 48 monthly installments with 8% interest. The loan application form is attached hereto and exhibited marked "HK 1". I did not sign any other agreement with the plaintiff concerning this loan apart from the mentioned loan application form, nor does the application form refer to any other conditions or policy for the loan apart from the application form itself. I also took out an insurance loan, which was kind of automatic if you have a car loan, to cover insurance of the vehicle."

The defendant submitted that it is a well established law that if the contract is in writing, the courts have long insisted that the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement. That neither of them may adduce evidence to show that his intention has been misstated in the document. And that it has thus been held that it is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. *Jacobs v. Batavia and General Plantations Trust* (1924) 1 Ch. 287.

The defendant therefore submitted that the plaintiff's endeavours to incorporate the bank's alleged conditions or policy into the contract be rejected. The defendant pointed out that this court was not even shown the document containing these conditions or policy on commercial interest despite this being in issue in these proceedings and it was in evidence that the defendant has not seen such a policy. Further that it would be totally unfair to start introducing new terms to an

agreement that was already executed long ago. And that, in fact, the effect of introducing those new terms is to start agreeing on a totally new contract and if the same were to be effective, all the parties must agree to it. The defendant then submitted that there is no evidence that the defendant accepted this new arrangement and signed the alleged new loan application form which was shown to the court. Further that the old agreement and their terms thus still govern the relations between the parties herein.
The defendant then observed that in its submissions, the plaintiff makes reference to the dismissal letter and states that the defendant never disputed that. He observed that in fact he disputed the contents of that letter and it is the reason he appealed against the contents of that letter. Further that in fact it was in his evidence in paragraph 5 of his witness statement that "……I was written a dismissal letter on 15th August 2011. I protested against the contents of that letter and appealed to the bank's appeals committee. The appeals committee by their letter of 26th September 2011 upheld the decision of the disciplinary committee to summarily dismiss me. I was not satisfied with the reasons for the dismissal and the way my case was handled by management and in May 2013 I commenced legal proceedings in the Industrial relations court. I attach hereto IRC Form 1 and the same is exhibited marked "HK 2"."

The defendant then submitted as follows. That the plaintiff has thus failed to prove to this court the existence of any express agreement between the plaintiff and the defendant that in the event of termination of services, the defendant would pay commercial interest on all loan balances on account number 00100 37000 108301. That the plaintiff has failed to prove that account number 00100 37000 108301 was opened with the consent and mandate of the defendant. That the said account having been opened without the defendant's consent and authority, obviously there cannot be any talk of any agreement to charge interest on the said account at whatever rate. And finally that the plaintiff has therefore failed to prove what it pleaded.

The defendant also emphasized that first the plaintiff should establish that the defendant owes the plaintiff some money out of a commercial transaction. He stated that his position is that because the plaintiff has failed to account both to him and the Court as to how much the car was sold at, how much and what deductions,

if any, were made from the proceeds thereof, the plaintiff has no basis and is not justified for claiming more money from the defendant. Secondly that the relationship between the plaintiff and the defendant in these loan transactions were governed by express agreements as indicated by the defendant. And that in those agreements, one of which was shown in this court, there is no agreement for payment of interest at commercial bank lending rate in whatever circumstance. So that it was up to the plaintiff to show in this Court the agreement to pay commercial interest, which it has failed. He added that even at common law, the plaintiff ought to justify and prove that it is owed by the defendant first before any claim of interest is lodged and considered. He submitted that the plaintiff has failed to show this in the present case. Therefore that interest at the commercial bank lending rate is therefore not payable.

This Court notes that, as rightly submitted by the defendant, the plaintiff claimed that there was an express agreement between the plaintiff and the defendant that commercial interest would be charged on the outstanding staff loan herein once the defendant left the plaintiff's employment. The plaintiff has the burden of proving that indeed there was such an express agreement between itself and the defendant. The defendant rightly noted that the plaintiff was unable at trial to produce evidence of such an express agreement. The plaintiff instead tried to rely on its own alleged unwritten policy and then on a loan application form that the plaintiff amended and which was never signed by the defendant. What must be noted is that when an agreement is reduced in writing the parties shall indeed be bound by the same as correctly submitted by the defendant. The plaintiff has therefore failed to prove its claim that there was an express agreement that outstanding staff loans taken by the defendant during his employment would attract commercial interest once he left employment.

This Court notes that the plaintiff alluded to offers by the defendant and his lawyers which were made to the effect that the outstanding loan should be converted to a commercial loan. These offers come after the loan agreement was already signed. Those offers do not at all change the loan agreement herein since they were never accepted by the plaintiff at all. In fact, the mere fact that these offers were being made after the defendant left the plaintiff's employment go to show that there was no express agreement that the staff loan herein would

automatically be commercialized once the defendant left the plaintiff's employment as alleged by the plaintiff.

The plaintiff also submitted that the defendant never contested the contents of his letter of dismissal which brought to his attention that his outstanding loan would be commercialized. The defendant states that he appealed against his dismissal thereby protesting against the contents of the said letter of dismissal. What this Court can say is that the statement by the plaintiff in the letter of dismissal on the issue of interest is not evidence of an express agreement on the loan at all. It is simply a statement on the part of the plaintiff on the subject.

The plaintiff having based its claim on the alleged express agreement that it has failed to prove cannot seek to claim the commercial interest on the basis of the common law when the loan agreement itself had clear and express terms that governed the rate of interest that was to be applicable. The plaintiff's alternative argument of entitlement to interest on the common law basis is therefore unsustainable in the circumstances.

This Court therefore agrees with the defendant and finds that the rate of interest applicable to the loan herein is the one that was agreed in the loan agreement at the time the plaintiff advanced the loan herein to the defendant. It is not the commercial rate.

The next issue to be determine is whether the defendant owes the plaintiff the sum of K1, 309, 871.90 as at 1st June 2014.

The plaintiff submitted that exhibit JB5 demonstrates this fact. It submitted that exhibit JB1 shows that as at the 15th of August, the outstanding loan was K1,227,026.68. Then that by exhibit JB2 the plaintiff demanded that the defendant surrenders the vehicle to the plaintiff and that the same was duly complied with by the defendant. The plaintiff contends that there was no dispute on the amounts when one considers the voluntary surrendering of the vehicle. Further that the vehicle was finally sold to Mr. Chifundo Madumba.

The plaintiff pointed out that by his e-mail dated 22nd November, 2011 exhibit HK5 the defendant admitted that as at that date K1,250,000.00 was payable.

The defendant contends that exhibit JB5A therefore reflects the balances outstanding after the sale of the motor vehicle together with interest.

The plaintiff then submitted on proof of debts in banking transactions. It submitted that Section 3 of the Bankers Books Evidence provides as follows

> Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

The plaintiff then submitted that it is evident from the foregoing that the production of exhibits JB3A,JB4 and JB5A is prima facie evidence of any entry that may have been made on the account.

The plaintiff then submitted on what prima facie evidence of such entry mean. The plaintiff submitted that the case of *European Commission (CLECAT intervening) v Atlantic Container Line AB and others (European Community Shipowners' Associations ASBL intervening)* (Case C-149/95 P(R)) [1995] All ER (EC) 865 decided on what constitutes prima facie case. That it was held in that case that a prima facie case is one where the case cannot be dismissed at this stage in the proceedings without more detailed examination, and where it is clearly open to a judge to hold in the circumstances that such case provided prima facie proof of the claim. The plaintiff further submitted that Judge Rodríguez Iglesias stated as follows in the judgment

> In that regard, it must be noted that a number of different forms of wording have been used in the case law to define the condition relating to the establishment of a prima facie case, depending on the individual circumstances. The wording of the order under appeal, referring to pleas in law which are not, prima facie, entirely ungrounded, is identical or similar to that used on a number of occasions by this court or its President (see, inter alia, *Publishers Association v EC Commission Case* 56/89 R [1989] 2 All ER 1059 at 1064, [1989] ECR 1693 at 1700 (para 31), *EC Commission v United Kingdom Case* 246/89 R [1989] ECR 3125 at 3134 (para 33); *EC Commission v Germany Case* C-195/90 R [1990] ECR I-2715 at 2719 (para 19); *EC Commission v Italy Case* C-272/91 R [1992] ECR I-457 at 464 (para 24); and *Germany v EC Council Case* C-280/93 R [1993] ECR I-3667 at 3676 (para 21)). Such a form of wording shows that, in the opinion of the judge hearing the application, the arguments put

> forward by the applicant cannot be dismissed at that stage in the procedure without a more detailed examination.

The plaintiff then submitted that in view of the foregoing, prima facie evidence is such evidence that should not be rejected without a more detailed examination and is acceptable in the absence of any proof to the contrary.

The plaintiff then submitted that coming closer home, the practice of adducing a bank statement has been accepted in the case of *FINCOM Bank Mw Ltd v Mlombwa t/ a Maggie- Maki Company* Malawi Law Reports (Commercial Series) (2001-2007) 1. In that case the plaintiff claimed the sum of K212, 055.50 being sums of money due and payable by the defendant to the plaintiff in respect of an overdraft created by the defendant in his account held with the plaintiff. Just like in the instant case, the plaintiff also claimed interest on overdraft and costs of the action. It was the evidence of the plaintiff in that case that the account was conducted satisfactorily for a few months during which small unauthorized overdrafts were cleared in the normal flaw of subsequent deposits. In December 1996 the defendant deposited a cheque of K196, 541. These effects were not cleared. However through the defendants' cheques the plaintiff effected payments against the uncleared effects. This resulted in the account of the defendant to be overdrawn in the sum of K185, 778.00. This was not a loan to the defendant or authorized overdraft and as such there could not be any written agreement. This unauthorized overdraft remained outstanding and attracted interest at bank lending rate which had kept on fluctuating. On 28th February, 2001 the overdraft and interest had accumulated to K1, 490,038.24. The plaintiff produced a statement of account for the period December 1996 to 24th March, 2001. The statement was accepted as prima facie evidence of the sums outstanding.

It is the plaintiff's contention in the present matter that the debt herein has been amply proved to be payable by production of exhibit JB3A, JB4 and JB5A. Further there has been admissions by the defendant on the amounts owing as is evidenced by exhibited JB1 and exhibit HK5.

The plaintiff noted that it is the defendant's contention that he is not aware of exhibit JB4. He contends that he never opened account number

0010037001082301 which constitutes exhibit JB4. And that he is only aware of the account number 00100147001082301 which constitutes Exhibit JB3A.

The plaintiff observed that it is the evidence of Ms Bisika that when the defendant left employment his staff account number 00100147001082301 was closed and commercial rate account number 0010037001082301 was opened.

The plaintiff noted that exhibit JB3A is the account the defendant admits. It submitted that an examination of the same shows that his last entry was on 23rd October, 2012. That the balance at that date was K397,738.42. And that the account was closed on that date.

The plaintiff noted further that however on 24th November 2012 a commercial account number 0010037001082301 was opened with a debit balance of K397,738.42. The plaintiff pointed out that one notices that the closing balance on exhibit JB3A is the same as the opening balance on Exhibit JB4. And that the opening balance for JB4, the commercial account being disputed, was in fact a carryover from exhibit JB3A

The plaintiff submitted that it will be observed from exhibit JB3A that from 24th November, 2012 the account has attracted interest and other charges until the 31st of March, 2014 when the account balance was K771,891.66.

The plaintiff further submitted that exhibit JB5A continues from the said 31st March, 2014 with a balance of K771,891.66 to the 29th of May, 2015 where the balance is K1,309,879.90.

The plaintiff contended that it is therefore not a sustainable argument to allege that the commercial account exhibit JB4 is a different account from exhibit JB3A. It submitted that exhibit JB3A is in fact a continuation of exhibit JB4 and concludes in exhibit JB5A.

It is the plaintiff's contention therefore that it has sufficiently proved that as at 29th of May, 2015 the sum of K1, 309,879.90 stands payable.

The plaintiff observed that it is however the defendant's contention that the vehicle which the plaintiff confiscated could have been sold at a higher price and covered the loan at the time of the sale.

The plaintiff submitted that one may need to look at exhibit JB6 which is a loan application form. And that one notices that this vehicle was actually valued at K1, 300,000.00 in terms of the note from Human Resource and Audit appearing at the bottom of JB6. The plaintiff stated that it is also its evidence that the vehicle was sold to Mr. Madumba through Trust Auctioneers. But that the price at which the vehicle was sold is not clear.

The plaintiff contended that, however, the balance after deducting commissions and whatever charges were payable to Trust Auctioneers was K930,000.00. And that the same was credited to the defendant account on the 22nd of December, 2011 as appear on exhibit JB3A. The plaintiff submitted that in view of the foregoing it is of the view that the vehicle must have been sold at a price above K1,000,000.00 and that this could not have been a sale at gross undervalue.

The plaintiff further submitted that it has to be noted that the sale herein took place two years after the vehicle was bought. That the same was bought in 2010 in terms of exhibit JB6 and it was sold in 2012. That it was therefore used for two years. The plaintiff pointed out that it has been conceded by the defendant in cross examination that vehicles do not ordinarily appreciate in value. That they usually depreciate. The plaintiff then submitted that a vehicle valued at K1,300,000.00 in 2010 cannot be said to have been sold at gross under value if the same is sold above a million kwacha two years later. Further that even if it was sold at K930,000.00 that could not have been a sale at a gross under value.

The plaintiff observed that the defendant has exhibited prices of new vehicles from the internet as contained in exhibit HK3 which he relies on. It submitted that the same cannot offer any good guide line as to prices of the motor vehicle in 2012. Further that there is no way a vehicle bought at K1,300,000.00 in 2010 could sale at K4,000,000.000 in 2012. The plaintiff contends that the suggestion is at best preposterous and of no merit.

The defendant responded on whether he owes the plaintiff the sum of K1, 309, 871.90 as at 1st June 2014. He responded by first submitting on the law of hearsay

evidence and its application in the present matter. The defendant started by referring to *Phipson on Evidence* par. 28-12 and Gleeson C.J who said the following in *Lee v The Queen* (1998) 72 A.L.J.R 1484 (32)

> the concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.

The plaintiff then pointed out that Ms Bisika's testimony in court was that she joined the plaintiff's Bank in March 2012. However that the defendant was dismissed from the plaintiff's organisation in August 2011. He further pointed out that the defendant and the said witness therefore never met at the plaintiff's Bank. That however the said Ms Bisika strangely states in her statement that she knows the defendant. The defendant submitted that Ms Bisika also purports to be a "witness" of facts or issues ranging from loan applications that the defendant made as far back as the year 2010, the date of dismissal and loans that were outstanding then, the surrendering of the defendant's vehicle in August 2011 to the sale of the motor vehicle in December 2011. The defendant pointed out that all these things happened before she joined the Bank and she admitted this in cross examination. The defendant questioned how credible is her evidence on these issues? The defendant contended that he failed to cross examine the witness on some of these issues because the witness was not there when these things were happening. Further that the witness had no documentary evidence to prove some of her allegations such as the price at which the vehicle was sold and the pension benefits that the plaintiff got on behalf of the defendant. The defendant submitted that all this is no more than hearsay as she did not "witness" the same. Further that this was confirmed even in cross examination when Ms Bisika stated that she was only told of what had happened by a "certain lady". The defendant further stated that when pressed to say the name of the lady, Ms Bisika could not tell the court the name of the said lady. The defendant then prayed that her evidence on these issues be treated with caution and be disregarded.

The defendant then submitted on whether the sale of the repossessed vehicle was handled professionally, in good faith and without negligence on the part of the plaintiff. The plaintiff further submitted on whether the plaintiff, after failing to account for the proceeds of sale of the vehicle is justified to claim more money from the defendant. He contended that he does not owe the money claimed.

The defendant initially submitted on the law of negligence and its relevance in this matter. He submitted that negligence is a specific tort and in any given circumstances it is the failure to exercise that care which the circumstances demand. *Glasgow Corporation v Muir* (1943) 2 ALL ER 44 at 486. He further submitted that what amounts to negligence depends on the facts of each particular case. He referred to *Hay (or Bourhill) v Young* (1942) 2 ALL ER 396 at 404 where Lord Wright said that in order to succeed in negligence the complainant must prove on the balance of probabilities that it is a reasonable inference to be drawn from the evidence that the respondent was negligent and that the respondent's negligence caused the harm. The defendant also referred to *Bonnington Castings Ltd v Warldlaw* (1956) 1 ALLER 615 and *Wilsher v Essex Area Health Authority* (1988) 1 ALLER 87.

The defendant further submitted that, to succeed in an action for the tort of negligence, a plaintiff must show that a defendant owed him a duty of care and that that duty has been breached and as a result thereof the plaintiff suffered loss and damage.

He further submitted that in the case of *Makala v Attorney General* [1998] MLR 187 (HC**)** at 190 it was stated as follows

> It has been held, and this is the law, that for an action in tort to succeed, the plaintiff must show that:-
>
> - There is a duty of care owed to him;
> - That duty has been breached; and
> - That as a result of that breach he has suffered loss and damage.

He added that in *Kalolo v National Bank of Malawi* [1997] 1 MLR 421 (HC) at 429, Chimasula Phiri J. as he then was, had this to say

> To maintain an action for negligence it must be shown that there was a duty on the part of the defendant towards the person injured, Donoghue v. Stevenson [1932] AC 562; Hedley Byrne and Company Ltd v. Gellerd and Partners Ltd [1964] AC 465 and that the defendant negligently performed or omitted to perform his duty, and that such negligence was the effective cause of the injury or damage to the plaintiff, McDowall v. Great Western Railway [1903] 2 KB 338.

The defendant further submitted that the test for the existence of duty of care is one of foreseeability and it is an objective test. It is whether a reasonable man would have foreseen that the defendant's action or omission would cause injury to a plaintiff.

The defendant then referred to the case of *Kadawire v. Ziligone and Another* [1997] 2 MLR 139 HC at page 145 where Ndovi, J. said

> the question of duty remains one of law for the judge. It is objective: Caparo Industrial PLC v. Dickman [1990] 1 All ER 668 (CA) is the authority, especially on the question of foreseeability. Foreseeability should be the guiding line when considering duty of care and injury caused in running down cases. Whether the injury to the plaintiff was a reasonably foreseeable consequence of the defendant's acts or omissions is what is meant when, it is asked whether a duty was "owed to" the plaintiff. Neighbours therefore are:
>
> > "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation".

The defendant submitted that he pleaded negligence on the part of the plaintiff in paragraph 11 of his own defence. He pointed out that the plaintiff never replied to deny the pleaded negligence. He then submitted that by the state of the pleadings, the plaintiff therefore admits the pleading of negligence and whether the plaintiff was negligent or not is not an issue according to the pleadings as the same was admitted by failure to plead back.

The defendant further submitted that however by his evidence, just to emphasize the issue, the defendant stated in paragraph 16 of his witness statement that "……

the plaintiff had a duty to set a reserve price for the vehicle and get the best price for the vehicle on the market considering that the sale of the vehicle was not normal but was intended to settle a loan. The plaintiff also had a duty to account to me on the proceeds of the sale because it directly affected my loan".

The defendant submitted that, from the totality of the evidence in this matter, it is apparent that the plaintiff had a duty of care owed to the defendant in handling the issue at hand, particularly the sale of the vehicle and opening and operation of accounts purported to be the defendant's, because the plaintiff ought to have known or indeed knew that the defendant would so closely and directly be affected by the plaintiff's acts or omissions so as they ought to have him in contemplation. Further, that that duty of care was breached by the plaintiff by opening and operating an account on behalf of the defendant without informing or getting mandate from him. The defendant was of the view that the plaintiff was under a duty to sell the vehicle at the best market price available for the vehicle. Further, that the plaintiff was also under a duty to inform the defendant of what was happening in the circumstances. He submitted further that the duty of care was thus breached by the plaintiff secretively selling the vehicle and not disclosing that fact and the process followed to dispose of the same or how much proceeds were realized from that sale. The defendant pointed out that up to date, the plaintiff has not disclosed how much it realized out of that sale of the motor vehicle herein.

The defendant submitted further that the sale of a vehicle should have some documentation relating to the price at which it was sold or bought. Further, that the plaintiff brought no documentary evidence to show for the sale of the vehicle. He further stated that the plaintiff grabbed the vehicle with the intention to recover the money with which the vehicle was bought and they should be in a position to say how much they realized out of the sale. The defendant submitted that the plaintiff has in the present case thus failed to account for the proceeds**.** The defendant pointed out that actually the plaintiff failed to show to the court at how much the vehicle was sold and stated in its final submissions in this case that it does not know how much was realized from the sale. The defendant pointed out further that it its submissions the plaintiff makes reference to deduction of auctioneers commissions and charges on the sale herein but it does not state how much commission it is talking about. The defendant asked whether he is not entitled to

know this information? He further pointed out that the allegation of auctioneer's charges or commission is not even supported by any evidence from Trust Auctioneers. He wondered if this court really believe this? The defendant further asked as to who would know about the figures if not the one who effected the sale?

The defendant then submitted that it is evident that on the evidence available, the plaintiff's handling of the defendant's case was unprofessional and totally unfair in all respects. Further that the plaintiff has failed to account for the proceeds of the sale. The defendant then question whether the plaintiff having failed to account for the proceeds of the sale herein is really justified to claim more money from the defendant? He asked what would be its basis for the claim? The defendant further stated that if the vehicle was repossessed to recover the money for which it was bought with, is it not negligence on the part of the plaintiff to sell the same below the balance of the loan that the vehicle represented? He submitted that it obviously is negligence.

The defendant submitted further that to entertain the plaintiff's claim for more money herein would be a mockery of not only the duty to account and the duty of care owed to the defendant but also a mockery of the whole justice system. He further submitted that on this account alone the plaintiff's claims must fail.

The defendant further submitted that the above observations also justify the defendant's concerns that the plaintiff had stayed quiet from the time they got back the vehicle and sold it in 2011 until August 2013 when the plaintiff had received the defendant's summons from the Industrial Relations Court for unfair dismissal. He contended that the plaintiff then decided to retaliate and cooked up this case against the defendant simply to silence him. He pointed out that the plaintiff stayed put from 2011 to 2013 because it had got all the lawful money it wanted from the defendant otherwise it would have started demanding the balance immediately after the sale of the vehicle in 2011. The defendant wondered why the plaintiff waited for 2 years without telling him that it had sold the vehicle and there was a balance to be settled? And why the plaintiff did not reply to the defendant's e-mails on the subject matter? Further, why the plaintiff did not inform him that it had received his pension benefits and how much it was? Further, why the plaintiff did not tell him that it had opened another account for him? And indeed why the

plaintiff is concealing the real price at which the vehicle was sold? The defendant submitted that all these questions point to the plaintiff's negligence, unprofessionalism and bad faith. The defendant submitted that the plaintiff has failed to prove its case against the defendant.

The defendant also made the following observations and submissions on the plaintiff's submissions. He observed that it is shocking that the plaintiff up to date can not disclose the price at which the vehicle was sold and how much deductions were made. He submitted that if the plaintiff can not disclose or it does not know the exact figure at which it sold the car, what is its basis for and why is it claiming more money from the defendant? He asked that the plaintiff's claims against the defendant must fail on this account among others.

He further submitted that the plaintiff deliberately and erroneously stated that the vehicle herein was sold two years after the vehicle was bought. He stated that the vehicle herein was actually bought end of the year 2010 and sold end of year 2011. And that this period cannot be two years. The defendant added that it is also in the defendant's evidence that the defendant serviced the loan for this car for one year before it was surrendered to the plaintiff. He submitted that the plaintiff would therefore like to create the impression that the vehicle herein had been used for a long time, which is wrong.

The defendant further observed that in its submissions the plaintiff makes reference to the price indications for the vehicle in question put forward by the defendant in his evidence in court. He submitted that it is important for this Court to take note that in the defendant's evidence the defendant had testified, and this was not contradicted, that actually the price for this particular vehicle was negotiated from MK1, 500, 000.00 to MK1,300,000.00 because of his entitlement at that time. The defendant then submitted that as prices of cars are pegged in US Dollars on the internet and international market, with the fall of the kwacha, it is quite possible that a vehicle bought at MK1.3 Million, and this being a discounted price, would be sold at a much higher price a year down the line.

The defendant submitted that the question as to whether the defendant owes the plaintiff the sum of MK1,309,871.90 as of 1st June 2014 would be answered in the

negative for the reasons advanced above as the same lacks basis and justification for failure to account for the proceeds of sale and for applying a rate which was never agreed.

On proof of debts in banking transactions as appears in the plaintiff's submission, the plaintiff stated that it has to be noted by the Court that the plaintiff can only rely on that if it has correct entries and has justified its entries into the bankers books. He added that in the present case he is disputing how and where the figures which were entered came from as there is no documentary proof to support the same. Further that the plaintiff cannot seek to rely on the Bankers books evidence to escape its duty to account to the defendant and its duty to open and operate the defendant account in good faith and with proper mandates.

This Court notes that the mode of proof of entry of bank account details or transactions is as correctly submitted by the plaintiff. The entries are prima facie evidence. As such they are open to scrutiny or further examination. This Court therefore agrees with the defendant that the plaintiff can only rely on the entry of bank account transactions if it has correct entries and has justified its entries into the bankers books. The question at hand is whether the plaintiff has justification for the entries in the defendant's account that it has produced before this Court.

This Court will start by agreeing with the defendant's submission that some of the evidence of the plaintiff's witness was not reliable. She could not show at all that the sale of the motor vehicle herein was indeed carried out by Trust Auctioneers. Crucially, she could not tell this Court at what price the motor vehicle was sold. It is therefore hard for this Court to believe that the plaintiff indeed failed to recover the full amount owing at the time the defendant's vehicle was sold as is claimed by the plaintiff who indicated that a debit balance of K368, 066.91 was outstanding after the sale herein. This Court cannot be convinced that the plaintiff realized from the sale herein a sum of money that fell short of the outstanding loan by K368, 066.91 when the plaintiff cannot prove to this Court at what price it sold the motor vehicle. The plaintiff ought to have brought proof of the sale price. As the circumstances stand this Court is compelled to agree with the defendant that the plaintiff's handling of this matter is tainted with negligence and bad faith.

This Court had a occasion to look at the case of *Indefund Ltd v Ngwalamba Boat Services* [2001-2007] MLR (Com) 98 in which the defendant had defaulted on a loan agreement and the plaintiff sold the subject matter of the loan which were boats to recover the outstanding loan as per the loan agreement. There was inordinate delay in the sale of the boats and the plaintiff did not advise the defendant of the progress on the said sale. The Court found that the plaintiff acted as an agent of the defendant on sale of the boats. Further that the plaintiff breached its duty as an agent in that the delay in the sale caused the value of the boats to deteriorate. The Court further found that the defendant was not liable for the deterioration in the value of the boats. The deterioration of the value of the boats was passed on to the plaintiff and the plaintiff's claim was adjusted accordingly to reflect that it bore the value of the deterioration in the value of the boats.

The view of this Court is similarly that the defendant in the present case is right in submitting that the plaintiff ought to have exercised care in the sale of the motor vehicle herein. The plaintiff acted as an agent of the defendant in recovering the outstanding loan by selling the motor vehicle. It is however not clear if the loan agreement provided that the plaintiff could seize the vehicle on the plaintiff's default as that is an issue that has not been argued herein. Whatever the case, the plaintiff breached its duty by not properly carrying out the sale to obtain the best price on the market. The plaintiff has not proved that it sold the vehicle by public auction and has also not proved the price at which the said vehicle was sold. This is all evidence pointing to the fact that the plaintiff acted unprofessionally and negligently. The plaintiff should have had all this information to justify its bank account entries that it sought to rely on herein.

In view of the foregoing this Court finds that the plaintiff has failed to proved its case and this Court is persuaded by the defendant's argument that the plaintiff acted unprofessionally and negligently in this matter and is not entitled to the claim it is making now. The sale of the motor vehicle is held to have extinguished the defendant's liability herein.

The last issue for determination is whether the defendant is liable to reimburse the plaintiff collection costs. The parties' respective submissions will not be considered, except to the extent in the next paragraph, since they would only have

been relevant if the plaintiff had succeeded on its claims herein. Since the plaintiff has failed on its claims herein the costs of these proceedings shall be for the defendant.

This Court will only observe that the defendant submitted that in terms of Table 6 of the Legal Practitioners (Scale and Minimum Charges) Rules three types of costs are payable to a legal practitioner, namely, Solicitor and own clients costs on sliding scale provided there under, 15% collection costs as well as Party and party costs. The plaintiff submitted that Table 6 provides as follows

> Collection of Monies, Solicitor and own client charge on collecting monies to be charged on receipt of monies
>
> If the amount collected—
>
> | | | |
> |---|---|---|
> | (a) | does not exceed K1,000 | K200 |
> | (b) | exceeds K1,000 but does not exceed K5,000 | K300 |
> | (c) | exceeds K5,000 but does not exceed K10,000 | K500 |
> | (d) | exceeds K10,000 but does not exceed K20,000 | K2,000 |
> | (e) | exceeds K20,000 but does not exceed K50,000 | K3,500 |
> | (f) | exceeds K50,000 but does not exceed K100,000 | K5,000 |
> | (g) | exceeds K100,000 but does not exceed K500,000 | 15 per cent on the collected |

(h)	exceeds K500,000	15 per cent on the first K500,000, then 10 per cent on the next K1,000,000, and 3per cent on the balance collected.

Where proceedings are commenced, there shall be additional charge for party and party costs:

Provided that the 15 per cent costs shall also be recoverable from the debtor whether proceedings are commenced or not and where proceedings are commenced, it shall be recoverable as part of the judgment debt.

The plaintiff submitted that it will be observed from the foregoing that solicitor and own clients costs are payable on receipt of monies. That the same are payable to the Legal Practitioner by the client himself. That is why they are called solicitor own client costs. That the same are on a sliding scale.

The plaintiff further submitted that proviso to Table 6 states that the 15% collection costs are recoverable from the debtor whether proceedings are commenced or not. Where proceedings are commenced they shall be recoverable as part of judgment debt.

The plaintiff further submitted that it was held in the case of *Shire Limited v City Building Limited* Civil Cause Number 437 of 2012 (High Court) (unreported) that 15% collection costs are payable over and above the solicitor's own client costs and the party and party costs. It correctly submitted that this Court stated as follows in the said case at page 5 and 6 of that decision

> It is hard to understand why the defendant contends that the proviso on the 15% collection costs is in reference to the 15% as appears in the solicitor and own client costs scale in item (g) and (h). It is as if the 15% is the last rate applicable. It will be noted that in item (h), for sums beyond which the 15% applies there are also applicable addition rates of 10% and 3%. So, the defendant cannot be right that the 15% in the proviso is in reference to the 15% in the item (g) and (h) in table 6. If the same were the case, then the proviso should not have read that the 15% costs are also recoverable where proceedings are not commenced as that is already covered by the item (g) and (h) in table 6.
>
> The proviso therefore refers to a separate 15% that shall be collected on recovery of money from a debtor whether proceedings are commenced or not. It is a separate category of costs as rightly submitted by the plaintiff

> and as held by the High Court in the cases cited by the parties. It should be noted that the proviso was also similarly construed when it appeared in its exact terms when the table 6 was initially amended as can be seen in the decision of the High Court in the case of *Preferential Trade Bank –vs- Electricity Supply Commission of Malawi and others* (2002 – 2003) MLR 204 where Mwaungulu J, as he then was, found that a flat rate of 15% is payable as per the proviso.

The plaintiff submitted that it is clear from the foregoing that 15% collection costs are recoverable from the defendant.

The plaintiff further submitted that after reading the table aforesaid in the case of *BP v Riaz Muhammed t/a Ninkawa Bulk Logistics* Honorouble Justice Katsala stated as follows on page 3 of his judgment

> Clearly there is no doubt on whether or not collection charges are recoverable from the debtor when legal proceedings are instituted. The proviso states that these costs are recoverable in addition to the party and party costs. As things are it was not necessary for the parties herein to specifically agree that the defendant would pay collection costs in the event that the plaintiff institutes legal proceedings for the recovery of the debt herein. Obviously, as already stated the agreement was entered into because the parties had in mind the provisions of table 6 before it was amended into its current form and the decisions in the *Kankhwangwa and Mchenga cases supra*.

The plaintiff then submitted that it is clear from the foregoing that the three types of costs namely Solicitor and own client's costs, the 15% costs as well as the party and party costs are recoverable from the defendant.

The plaintiff further submitted that the solicitor's own client costs are chargeable to his client, the party and party costs are chargeable to the defendant. Further that the Party and party costs are aimed at reimbursing the plaintiff for the solicitor's own client costs incurred. And that if the solicitor and own client's costs are more than the party and party costs the same can be recoverable form the defendant as well.

The plaintiff submitted that Justice Katsala emphasized this point when he stated as follows in the case of *BP v Riaz Muhammed t/a Ninkawa Bulk Logistics*

> All the plaintiff is looking for is reimbursement of all costs it had incurred in prosecuting its claim for the recovery of the debt owed by the defendant. Party and party costs aim at indemnifying a successful party against the expense he has been put to in prosecuting his claim or defence. On the other hand Solicitor and own client costs are all expenses reasonably incurred on behalf of a client, Nakanga and Company v Lihoma 12 MRL 25. Without doubt the solicitor and own client costs will include some if not all the items billed in the party and party costs. So if the defendant is been called upon to refund the plaintiff both types of costs there is obviously the danger of the plaintiff being over reimbursed. In my view, and subject to what I will say later, an order that the defendant should pay the plaintiff the difference between the party and party costs and solicitor own client costs in the event that the former are less than the later could minimize and avoid the double refund.

The plaintiff then submitted that it is clear from the foregoing that solicitor and own client costs on sliding scale can be recovered from the defendant when the party and party costs cannot satisfy the said solicitor and own clients costs. Further that what the Court is saying above is that solicitor own client's costs are recoverable from the defendant through the party and party costs. However, that where party and party costs do not sufficiently indemnify the difference can be recovered from the defendant.

The plaintiff then submitted that this position principal is in conformity with the principal of *restitutio in integrum* which requires that in the event of breach of contract the defendant will be deemed to be adequately compensated if he is placed in the same position as if the contract were not breached.

In this case the plaintiff had submitted that there is clear breach of contract arising from the defendant failure to pay for its services. The defendant would not be put in the same position as if the contract had been performed if he went away with his damages, less solicitor own client's costs. Therefore if the solicitor and own client's costs are less than party and party costs the plaintiff should have recourse to the defendant to recover the balance.

In view of the foregoing the plaintiff submitted that it is entitled to recover from the defendant the 15% recoverable costs together with the party and party costs. However, that in the event that the party and party costs do not satisfy the solicitor

and own client's costs the plaintiff is entitled to resort to the defendant for payment of the balance.

This Court wishes to observe that since it made the decision referred to by the plaintiff in the case of *Shire Limited v City Building Limited* Civil Cause Number 437 of 2012 (High Court)(unreported) it has discovered on good authority that the Table 6 in the First Schedule to the Legal Practitioners (Scale and Minimum charges) Rules which this Court construed and which was also construed in the case of *BP v Riaz Muhammed t/a Ninkawa Bulk Logistics* is not the correct Table 6 since the same was replaced by another Table 6 made by Government Notice number 6 of 2002 of 13th March 2002. When one looks at the margin to the First Schedule to the Legal Education and Legal Practitioners Act it is clear that the last Government Notice is that one number 6 of 2002. And this Government Notice is not reflected on the Statute book as revised in 2010. The unfortunate part is that when the current Table 6 was introduced by the Government Notice number 6 of 2002 the responsible authorities for law revision at the Ministry of Justice and Constitutional Affairs did not do their job to reflect the change. The decisions referred to by the plaintiff are therefore not a correct statement of the law, in so far as they refer to the wrong Table 6 that provides for 15 percent costs, as they were made on the misleading Table 6 that does not reflect the correct and current position at law.

The correct, current and applicable Table 6 as represented in Government Notice Number 6 of 2002 provides as follows

> In exercise of the powers conferred by Section 44 of the Legal Education and Legal Practitioners Act , I Peter Hapana Fatchi, SC, Minister of Justice in consultation with the Chief Justice, make the following Rules-
>
> 1. These Rules may be cited as the Legal Practitioners (Scale and Minimum charges) (Amendment) Rules, 2002.
> 2. The First Schedule to the Legal Practitioners (Scale and Minimum charges) Rules is amended by deleting Table 6 and substituting therefor the following new Table 6-
>
> Collection of Monies,
>
> Solicitor and own client

charge on collecting monies to be charged on receipt of monies……	If the amount collected—	
Provided that where proceedings are commenced the percentage may only be charged on the amount up to the date of commencement of such proceedings. Where proceedings are commenced Solicitor may charge Solicitor and own client charges in addition to party and party but, subject to any special agreement between Solicitor and Client not on a percentage basis	(a) does not exceed K1000……K200	
	(b) exceeds K1, 000 but does not exceed K5, 000……K300	
	(c) exceeds K5, 000 but does not exceed K10, 000…….K500	
	(d) exceeds K10, 000 but does not exceed K20, 000…….K2,000	
	(e) exceeds K20, 000 but does not exceed K50, 000…….K3, 500	
	(f) exceeds K50,000 but does not exceed K100, 000……...K5, 000	
	(g) exceeds K100, 000 but does not exceed K500, 000	15 per cent on the collected
	(h) exceeds K500, 000	15 per cent on the first K500, 000, then 10 per cent on the next K1, 000, 000, and 3 per cent on the balance collected.

From the foregoing it can be seen that the law only provides two types of costs on collection of money namely Solicitor and own client costs and party and party

costs where proceedings are commenced. The 15 per cent charge was removed. This explains why this Court actually noted with respect to the 15 percent costs in the case of *Shire Limited v City Building Limited* that

> The proviso therefore refers to a separate 15 percent that shall be collected on recovery of money from a debtor whether proceedings are commenced or not. It is a separate category of costs as rightly submitted by the plaintiff and as held by the High Court in the cases cited by the parties. It should be noted that the proviso was also similarly construed when it appeared in its exact terms when the Table 6 was initially amended as can be seen in the decision of the High Court in the case of *The Preferential Trade Area Bank v Electricity Supply Commission of Malawi and others* [2002-2003] MLR 304 where Mwaungulu J., as he then was, found that a flat rate of 15 per cent is payable as per the proviso. It is worth noting the criticism that the Judge, as he then was, directed at this flat rate which becomes grave especially when huge sums stand to be collected as was the case in the matter in which the Judge decided.

It appears that the current law Table 6, which ought to have been put on the statute book after law revision, addressed the issue of the 15 percent at which this Court's criticism was justifiably directed.

Made in open Court at Blantyre this 25th February 2015.

M.A. Tembo

JUDGE