IN THE HIGH COURT OF ZAMBIA **2009/HPC/0460**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

BETWEEN:

STANBIC BANK ZAMBIA LIMITED **PLAINTIFF**

AND

TRADE KINGS LIMITED **DEFENDANT**

Before the Hon. Mr. Justice A.M. Wood in Open Court at Lusaka this 9th day of May 2011

For the Plaintiff:	**Mr. M. Mundashi, SC assisted by Ms. L. Kasonde of Messrs. Mulenga Mundashi & Company** **Mr. M. Sakala of Messrs Corpus Legal Practitioners**
For the Defendant:	**Mr. V. Malambo, SC Assisted by Ms. M. Kalyabantu of Messrs Malambo & Company**

JUDGMENT

Cases referred to:

1. ***Davies Contractors Ltd. v. Fareham UDC (1956) A.C. 696 at 729, (1956) 2 ALL ER 145 at 160.***
2. ***Carlill v Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, 490**
3. ***Bhagwandas Parasram v Burjori Ruttonji Bamanji AIR 1917 PC 101***
4. ***Ismail Lebbe Marikar Ebrahim Ebrahim Lebbe Marikar v Barleet and Company AIR (29) 1942 Privy Council 19***
5. ***Gherulal Parakh v Mahadeodas Maiya MANU/SC/0024/1959***
6. ***Kasengele V. Zambia National Commercial Bank Limited (2000) ZR 72***
7. **Match Corporation Limited v. Development of Zambia (1999) ZR 13**

Works referred to:

1. ***John C. Hull's "Introduction to Futures and Options markets", 2nd edition, 1995, Prentice Hall, Upper Saddle river University of Toronto***

2. ***Bennion's Statutory Interpretation, 3rd edition, Butterworths, London 1997***

3. ***Halsbury's Laws of England, Vol. 9 (1) paragraphs 606, 733, 728, 904, 994 and 996***

4. ***Legal Status of Derivative Contracts by Kriti Pasahar***

5. ***Order 36 rule 8 of the High Court Rules Cap 27***

Legislation referred to:

1. ***The Banking and Financial Services Act Cap 387***
2. ***The Interpretation and General Provisions Act Cap 2***
3. ***Statutory Instrument No. 57 of 1996 - The Banking and Financial (Foreign Exchange Risk Management and Exposure) Regulations, 1996***
4. ***The Judgments Act, Cap 81***

By an amended writ of summons filed on 4th March, 2010, the Plaintiff is claiming the following from the Defendant:

(i) Damages for breach of the forward exchange contracts.

SPECIAL DAMAGES

(a) An order that the Defendant pays to the Plaintiff the sum of K12,277,086.19 being the total loss suffered on the forward exchange contracts;

(b) Or, in the alternative, an order that the Defendant pays to the Plaintiff the sum of K12,277,086,885.19 being the amount due on the overdraft, and

GENERAL DAMAGES for breach of contract interest and costs.

The Plaintiff is a bank and its claim arises out of what is commonly known as derivatives. According to its statement of claim, the Plaintiff and the Defendant entered into a number of foreign exchange transactions between the months of August 2008 and January 2009. The Plaintiff and Defendant entered into a number of foreign transactions which required the Defendant to sell United States Dollars to the Plaintiff in consideration of Zambian Kwacha and vice versa at a future date and at an agreed exchange rate (the forward exchange contracts").

The Plaintiff and Defendant entered into five sets of forward exchange contracts prior to the "April Contracts" and the "October Contracts".

The particulars of these antecedent contracts are:

(i) one contract dated 16th September, 2008 performed on 7th October, 2008 by the sale by the Defendant and purchase by the Plaintiff of USD1,500,000.00 at the rate of K3,515.00 per US Dollar (total K5,272,500,000.00);

(ii) a set of three transactions by contract dated 26th August, 2008, performed on divers dates in October and November 2008, by the sale by the Defendant and purchase by the Plaintiff of a total sum of USD4,800,000.00 at the respective rates of K3,543.00, K3,544.00 and K3,549.00 per US Dollar (total K17,017,600,000.00);

(iii) one contract dated 6 October, 2008 performed on 23 January, 2009 by the sale by the Defendant and purchase by the Plaintiff of USD1,000,000.00 at the rate of K3,685.00 per US Dollar (total K3,685,000,000.00);

(iv) a set of three transactions by contract dated 23 October, 2008, performed on divers dates in October and November 2008 by the sale by the Plaintiff and purchase by the Defendant of a total sum of USD4,800,000.00 at the respective rates of K3,543.00, K3,544.00 and K3,549.00 per US Dollar (total K17,017,600,000.00);

(v) one contract dated 14th January, 2009, performed on 23 January, 2009 by the sale by the Plaintiff and purchase by the Defendant of USD1,000,000.00 at the rate of K3,685.00 (total K3,685,000,000.00).

During the month of October 2008, the Defendant requested that the respective performance dates of the antecedent contract dated 26th August, 2008 be extended to future dates. Pursuant to this request, representatives of the Plaintiff met with representatives of the Defendant to discuss the most favourable forward exchange rates for both parties. As a result, the Plaintiff extended the performance dates of the antecedent forward exchange contracts of 26th August, 2008 by settling this set of contracts with the Defendant on 23rd October, 2008 and executing a new set also on 23rd October, 2008, with performance dates in April 2009 (the "April Contracts"). The same process was used to secure the extension of the antecedent forward exchange contract dated 14th January, 2009. The extension for this particular contract was signed on 16th January, 2009, for the performance date of 20th October, 2009 (the "October Contract"). All the forward contracts entered into between the Plaintiff and Defendant (both antecedent and current) contained the same standard terms. The Plaintiff and Defendant entered into the April contacts with the Defendant through a letter dated 23rd October, 2008 from the Plaintiff to the Defendant, the terms of which were confirmed by the Defendant in an undated letter to the Plaintiff. The April contracts were a result of negotiations entered into between the Plaintiff and Defendant during October 2008 for the extension of the 26th August, 2008 set of antecedent forward contracts. Under the terms of the April Contracts, the Defendant would sell the Plaintiff a total of USD4, 800,000.00 at specified exchange rates on three dates being:

a. 7th April 2009 – USD1,600,000.00 at ZMK3,562.00 per US Dollar
b. 14th April, 2009 – USD1,600,000.00 at ZMK3,562.00 per US Dollar
c. 21st April 2009 – USD1,600,000.00 at ZMK3,565.00 per US Dollar

Through a letter dated 16th January, 2009 from the Plaintiff to the Defendant, the terms of which were confirmed by the Defendant in an undated letter to the Plaintiff, the Defendant agreed to sell to the Plaintiff USD1, 000,000.00 at the exchange rate of ZMK3, 930.00 per US Dollar on 20th October, 2009. Both antecedent current contracts were expressly stipulated as being irrevocable.

The April and October forward exchange contracts were complete in and of themselves in the absence of the "Master Agreement" specified in the confirmation letters for each set of forward exchange contracts.

In the alternative, the course of dealings between the Plaintiff and Defendant and the Defendant's apparent knowledge of the forward exchange market and the Defendant's written/signed acceptance of having executed "the enclosed Master Agreement", the "Master Agreement" was known to both parties as the 2002 International Swaps and Derivatives Inc Master Agreement and was properly incorporated into the April and October forward exchange contracts.

By two letters dated 10th March, 2009 written by the Defendant to the Plaintiff, and in breach of the forward exchange contracts, the Defendant purported to withdraw from both the April and the October contracts.

The Plaintiff wrote to the Defendant on 31st March, 2009 reminding the Defendant of its obligations under the forward exchange contracts and that the Defendant had failed, refused and/or neglected to honour its obligations under the forward exchange contracts by maintaining that it had withdrawn from the contracts.

On 1st April, 2009, the Defendant responded to the Plaintiff by maintaining that it had withdrawn from the forward exchange contracts due to the Defendant's repudiatory breach of the forward contracts. The Plaintiff invoked clause 6 of the respective confirmation letters from the Defendant to the Plaintiff for both the April and the October forward exchange contracts that entitled the Plaintiff to proceed as below in the event of non compliance by the Defendant:

(a) Calculate the difference between the exchange rates stipulated in the forward exchange contracts (the "forward exchange rates") and the prevailing forward exchange rate at the date the Plaintiff accepted the Defendant's default. This difference was then to be calculated on each unfilled portion of the forward contracts; and

(b) Debit the Defendant's account held with the Plaintiff with the sum of K12, 291,735,534.28 being the amount calculated as the total loss on the forward exchange contracts less K168, 064,465.72.

The sum of K12, 291,735,534.28 was in respect of the Plaintiff's loss on the April and October contracts and was calculated as follows:

Contract	**Agreed Forward Exchange Rate**	**Forward exchange rate as at 2-3 April 2009**	**Rates difference**	**Loss per contract**	**Prevailing value of loss calculated over the amount of days from termination to Contractual maturity Date**
7 April 2009	K3, 562.00	K5, 690.00	K2, 128.00	K3, 404,800,000.00	K3, 404,800,000.00
14 April 2009	K3, 562.00	K5, 708.00	K2, 146.00	K3, 433,600,000.00	K3, 421,433,610.92
21 April 2009	K3, 565.00	K5, 719.00	K2, 154.00	K3, 446,400,000.00	K3, 426,439,685.45
20 October 2009	K3, 930.00	K6, 105.00	K2, 175.00	K2, 175,000,000.00	K2, 039,062,237.90
TOTALS				**K12, 459,800,000.00**	**K12, 291,735,534.28**

The difference of K168, 064,465.72 was an allowance for the difference between the prevailing value of the loss on the forward exchange contracts as at the dates the Plaintiff calculated its losses and the total value of the loss that would have been suffered on the performance dates of the forward exchange contracts being K12, 495,800,000.00.

By its actions, the Plaintiff accepted the Defendant's repudiatory breach of the April and October contracts and accordingly proceeded to mitigate its losses in accordance with clause 6 of the respective confirmation letters from the Defendant to the Plaintiff for both the April and October forward exchange contracts. The Plaintiff was in any event entitled to mitigate its losses as soon as possible after the Defendant's communication of its breach of the April and October contracts in the letters of 10th March, 2009. By a letter dated 6th April, 2009, the Plaintiff evidenced its acceptance of the breach and duly notified the Defendant of the debit of the K12, 291,735,534.28.

The Defendant in its defence denied that there was any binding contract with the Plaintiff. The arrangement to sell its earned foreign exchange to the Plaintiff was made gratuitously and the Plaintiff gave no consideration therefore. Under the gratuitous arrangements, the Defendant sold the Plaintiff the sum of USD1, 500,000.00 at the rate and for the sum stated in paragraph 4.1 (i) of the amended statement of claim. There was no binding or valid contract compelling the Defendant to sell its earned United States Dollars.

The Defendant denied that it sold any further sums of hard currency or United States Dollars to the Plaintiff on the dates and at the rates alleged in paragraphs 4.1 (ii); 4.1(iii), 4.1(iv) and 4.1(v) of the statement of claim or at all. The Plaintiff made its own book entries in purported performance of the "contracts". The Defendant denied that there was any valid or binding contract and/or any established course of dealings in its relationship with the Plaintiff. The purported contracts were signed by the Defendants only at the instance of the Plaintiff and on the understanding that that would validate the book entries the Plaintiff intended to effect. The Defendant denied that there was any actual sale of United States Dollars by the Defendant to the Plaintiff.

The Defendant denied all the allegations in paragraph 4 of the amended statement of claim and said that if any discussions took place as alleged, they did not create any binding contract.

The Plaintiff's offer to roll over the purported contracts was based on the Plaintiff's own hope that the Defendant would eventually have the United States Dollars to sell to the Plaintiff and that there was no or no valuable consideration to support the alleged contracts by virtue of which the alleged contracts were void for the reasons that:

(i) The Plaintiff did not advance nor the Defendant draw the sum of K17,017,600,000.00 under the alleged "April Contracts" or any sum at all; and

(ii) The Plaintiff did not advance nor the Defendant draw the sum of K3, 685,000,000.00 under the alleged "October Contract" or any sum at all.

(iii) Further or in the alternative, the Plaintiff pleaded that not all the terms of the intended contract were agreed.

The Defendant denied paragraph 8 of the statement of claim and said it was incorrect and misleading. There had never been a "course of dealings" between the parties as alleged in paragraph 4.1 and 8 of the Statement of claim. It could not therefore be imputed that the Defendant had knowledge of the forward exchange contracts or that the purported "Master Agreement" was known to the Defendant as being the 2002 International Swaps and Derivatives Inc Master Agreement. The Defendant denied knowledge of such Master Agreement and stated that the same was never incorporated in the purported April and October contracts or any contracts at all.

In the event that it was held that all the terms of the Agreement were agreed, the Defendant further averred that the contract alleged by the Plaintiff was a contract by way of gaming or wagering within the meaning of Section 18 of the Gaming Act 1845 and was null and void. In the alternative and in the event that it was held that there was a binding contract between the Plaintiff and Defendant, the Defendant pleaded that the contract was discharged by frustration in that the parties did not and could not reasonably have anticipated a precipitous fall in the value of the Kwacha by reason of which performance of the contract became impossible and the Defendant was discharged from further performance of the contract.

The Defendant further stated that the debiting of its account in the sum of K12,291,735,534.28 was both unilateral and illegal as the Defendant did not apply for nor authorize any such overdraft nor did the Plaintiff suffer any loss in the said sum or at all.

Nicholas Macdonald Chalmers filed a witness statement on behalf of the Plaintiff. According to his witness statement, the Defendant was a longstanding client of the Plaintiff and had traded numerous foreign exchange transactions with the Plaintiff. Although most of the Defendant's foreign exchange transactions with the Plaintiff were for "spot" settlement, that is, within two business days, the Defendant traded in a number of "forward" exchange contracts ("forward contracts") with the Plaintiff prior to the antecedent forward contracts. Forward contracts differed from spot transactions only in duration. A forward contract was thus also for the purchase or sale of foreign exchange at an exchange rate agreed upon at the time of concluding the agreement, but for settlement at a date later than two business dates after the date of the agreement. Forward contracts were contained in counterpart letters collectively termed "confirmations". These confirmations consisted of a letter from the Plaintiff setting out some of the terms of the forward contract; and a letter from the Defendant setting out the rest of the terms of the forward contract. The two letters therefore formed one forward contract.

The antecedent contracts spanned from September 2008 to January 2009 and were as outlined in paragraph 4.1 of the amended statement of claim.

Some of the antecedent contracts had the same US Dollar/Zambian Kwacha exchange rates and performance dates. This was because the Defendant had requested extensions of some of the forward contracts after the contracts had been executed.

The antecedent contracts referred to in the paragraph above span from September 2008 to January 2009. The specifics of these contracts were:

(i) One contract dated 16th September, 2008, performed on 7th October, 2008 by the sale by the Defendant and purchase by the Plaintiff of USD1,500,000.00 at the rate of K3,515.00 per US Dollar (total K 5,272,500,000.00);

(ii) A set of three contracts dated 26 August 2008, performed on divers dates in October and November 2008 by the sale by the Defendant and purchase by the Plaintiff of a total sum of USD4,800,000.00 at the respective rates of K3,543.00, K3,544.00 and K3,549.00 per US Dollar (total K17,017,600,000.00);

(iii) One contract dated 6 October, 2008 performed on 23 January, 2009 by the sale by the Defendant and purchase by the Plaintiff of USD1,000,000.00 at the rate of K3,685.00 per US Dollar (total K 3,685,000,000.00);

(iv) A set of three contracts dated 23 October 2008 and November 2008 by the sale by the Plaintiff and purchase by the Defendant of a total sum of USD4,800.00.00 at the respective rates of K3,543, K3,544.00 and K3,549.00 per US Dollar (total K17,017,600,000.00); and

(v) One contract dated 14 January, 2009, performed on 23 January, 2009 by the sale by the Plaintiff and purchase by the Defendant of USD1,000,000.00 at the rate of K3,685.00 (total K3,685,000,000.00).

The forward contracts showed that an "extension" was in practice only granted by negating the exchange rate risk of the initial forward contract with an equal but opposite forward contract. Only then could a new contract be executed with a new performance date. Thus, "extension" of forward contracts was a two-staged process which required "settlement" of the first contract before executing the second contract.

"Settlement" of the initial forward contract was by physically debiting the customer's account in the amount of the currency the customer was selling to the bank, and thereafter crediting the customer's account with the equivalent amount in the sought currency and vice versa for the opposite contract.

The settlement procedure involved a physical movement of cash in real terms in both the client's Kwacha and US Dollar accounts. For the 26 August, 2008 and 23 October, 2008 antecedent contracts, that physical movement of cash was shown on pages 84 to 89 (26 August, 2008) and 99 to 104 (23 October, 2008) of the Plaintiff's Bundle of Documents. The 26 August, 2008 contract was therefore the initial contract, and the 23 October, 2008 contract was the opposite contract used to negate the foreign exchange rate risk incurred by the Plaintiff on the 26th August, 2008 forward contract.

Any difference in the settlement amount of the initial contract and the settlement amount of the equal but opposite contract used to negate the exchange rate risk of the initial contract would be realized in the client's Kwacha settlement account on the settlement date. That meant that:

(a) where the initial contract and opposite contract used in the first stage of the extension to negate the exposure of the initial contract had the same exchange rate and therefore the same Kwacha value, the resultant net cash flow into the client's account would be zero;

on the other hand,

(b) where the initial contract and the opposite contract used in the first stage of the extension to negate the exposure of the initial contract had different exchange rates and therefore different Kwacha values, the resultant net cash flow in the client's account would either be a loss or a gain, depending upon whether the opposite contract's exchange rate was

> higher or lower than the forward rate in the initial contract. If the rate in the opposite contract was higher, the client's account had a gain. Similarly, if the rate in the opposite contract was lower, the client's account had a loss.

That was the case with the extension of the Defendant's forward contracts. The Plaintiff agreed to extend the Defendant's antecedent forward contracts in such a way that the Defendant would not have any negative cash flow or loss in its account on the settlement date of the initial contract and of the opposite contract that was used to negate the exchange rate risk of the initial contract. The Plaintiff agreed with the Defendant that rather than permit a loss in the Defendant's account from the settlement of the opposite contract, the exchange rate used in the second stage of the extension (i.e. the new contract to be executed) would be adjusted to reflect the difference in the exchange rate of the first stage of the extension. That adjustment would effectively compensate the Plaintiff for the difference in the exchange rate of the first stage of the extension, between the initial and opposite contracts.

Regardless of whether the antecedent contracts were executed and duly completed, as the one dated 16th September, 2008, or executed and subsequently "extended", as the ones dated 26th August, 2008, all the antecedent contracts (consisting of the confirmations from both parties) with the Defendant contained the same standard terms as the particular forward contracts the Plaintiff is claiming damages for in this action.

During October 2008, the Plaintiff and the Defendant entered into the April Contracts. By those contracts, the Defendant agreed to sell and the Plaintiff agreed to purchase USD4, 800,000.00 in consideration for Zambian Kwacha as follows:

(a) USD1, 600,000.00 at the rate of K3,562.00 per US Dollar, for settlement date 7th April, 2009 (total K5,699,200,000.00);

(b) USD1,600,000.00 at the rate of K3,562.00 per US Dollar, for settlement date 24th April, 2009 (total K5,699,200,000.00); and

(c) USD1, 600,000.00 at the rate of K3, 565.00 per US Dollar, for settlement date 21 April, 2009 (total K5, 704,000,000.00).

The April contracts were in fact an extension of the antecedent contracts of 26th August, 2008; but were, as stated above, exclusive of them due to the settlement of the 26th August, 2008 antecedent contracts by the 23rd October, 2008 antecedent contracts.

The negotiations for the April Contracts were aimed at extending the 26th August, 2008 contracts as follows:

On 23 October, 2008, Mr. K.S. Sandira, the Financial Controller of the Trade Kings Group of Companies, and Mr. Zunaid Patel, Director of the Defendant, went to the Plaintiff's offices to personally negotiate a better price for the extension of the 26th August, 2008 antecedent forward contracts. At the meeting on that date, Mr. Andrew Muyaba, the then Global Markets Corporate Foreign Exchange Sales Manager, and PW1 on behalf of the Plaintiff, Mr. Sandira and Mr. Patel on behalf of the Defendant, discussed the pricing for the extension of the three antecedent forward contracts of 26th August, 2008.
According to PW1, he showed the Defendant's representatives how he arrived at his suggested pricing through a diagrammatic presentation. Mr. Sandira, on the hand, had his own laptop computer with him and had his own foreign exchange forward pricing calculator on the computer. Mr. Sandira compared pricing that he claimed he had received from another bank in Lusaka for the same forward cover and that the pricing they were showing was very expensive in comparison. Admittedly, PW1's initial pricing was expensive. That was intended to offset a reduced rate on the opposite contract to negate the risk of the 26th August, 2008 initial contract (i.e. the first stage of the extension

process) through a higher rate on the second stage of the extension process (i.e. the execution of a new forward contract). This higher pricing was necessitated by the Defendant's representative's request that the opposite contract to negate the exchange rate on the initial contract be at the same exchange rate as the initial contract.

However, the Plaintiff was willing to negotiate with the Defendant as it appeared to be financially sound and was an important client of the bank. Thus, PW1 and Mr. Muyaba were able to improve their prices to the point that the Defendant agreed that they were reflective of what would be a reasonable forward exchange rate under prevailing market conditions. The Defendant's representatives then agreed to the quotes that they had shown them and at the same time agreed that they would extend the 26th August, 2008 antecedent contracts to the future April 2009 dates. Thus, as a result of the aforementioned negotiations, the 23rd October, 2008 antecedent forward contract was executed to settle the 26th August, 2008 antecedent contract; and a confirmation of the new forward transactions were sent by the Plaintiff to the Defendant for each contract that was extended. The Defendant in turn sent a signed confirmation to the Plaintiff confirming the same transactions with the Plaintiff. The 23rd October, 2008 antecedent contract and the April Contracts therefore bore the same date.

The October Contract dated 16th January, 2009 was also the result of a request by the Defendant for the extension of an antecedent contract. The particular antecedent contract in that regard was stated at paragraph 6 (v) above, being a contract dated 14th January, 2009, for the sale by the Plaintiff and purchase by the Defendant of USD1,000,000.00, to be performed on 23rd January, 2009. On the same date, that is, 14th January, 2009, the Defendant sent a letter to the Plaintiff requesting that that particular antecedent contract be extended to 20th October, 2009.

On that basis, the Plaintiff sent a letter dated 16th January, 2009 to the Defendant confirming the change of performance date, and the Defendant accordingly sent its own (undated) letter confirming the transaction. The new due date for performance was 20th October, 2009, and the new exchange rate for the transaction was K3, 930.00 per US Dollar (total K3, 930,000,000.00). The Plaintiff also "settled" the 14th January, 2009 antecedent contract by debiting the Defendant's US Dollar account with USD1, 000,000.00 and crediting the Defendant's Kwacha account with K3, 930,000,000.00 but with a net cash flow of nil.

The standard financial market practice with regard to derivatives transactions is to use the International Swaps and Derivatives Association Inc (ISDA) Master Agreement. Derivatives are financial instruments that create rights and obligations that have the effect of transferring between the parties to the instrument one or more of the financial risks inherent in an underlying financial instrument. A derivative is therefore a secondary contract that transfers rights or obligations in an underlying primary contract.

In the case of forward exchange contracts, the primary contract was the actual transfer of currency from one party to another; whereas the secondary contract, or derivative contract, was based on the transfer of the risk in fluctuations in the exchange rate. One of the main purposes of the Master Agreement is to provide a standard framework for recompense in the event of termination of a derivatives contract prior to full performance of the contract, for example, by frustration or by default of one or both of the parties. There were two versions of the ISDA Master Agreement: one issued in 1992 and another issued in 2002. The choice between which version to use is solely on the parties to each derivative transaction. Additionally, the ISDA Master Agreements only provide a template of standard terms for derivative transactions. The parties to derivatives transactions are thus free to decide on which terms of the Master Agreement will apply to their particular contract, or whether they want to use the Master Agreement at all. The choice of terms is stipulated in the Schedule to the Agreement. Unlike the main Agreement, which is in standard terms, the Schedule is manually produced by the parties to the transaction.

In cases where the Plaintiff was transacting with fellow financial institutions, it would normally accede to the other party's choice of version of Master Agreement (that is, 1992 or 2002). On the other hand, in cases where the Plaintiff was transacting with other types of businesses, it preferred the 2002 Master Agreement over the 1992 Master Agreement. There is not much difference between the two versions, save in respect of termination provisions. The preference of Master Agreement in the Plaintiff's financial transactions is therefore based more on course of dealings between the particular parties to the respective transactions than on anything else.

However, as already stated, even the use of either Master Agreement would require the parties to the transaction to decide on the contents of the Schedule to the Agreement. Thus, the Agreement is incomplete until the contents of the Schedule are agreed upon.

All the confirmations exchanged by the Plaintiff and Defendant in their forward exchange transactions (both antecedent and current) contained a reference to the Master Agreement. The exact version of Master Agreement, was, however, not specified. Additionally, the parties never actually exchanged copies of the Master Agreement when executing the antecedent and forward contracts. Nonetheless, PW1 was not aware of any time when the Defendant requested a copy of "the Master Agreement" from the Plaintiff, notwithstanding the Agreement being mentioned in each and every confirmation passing between the Plaintiff and Defendant from the antecedent contract of 16th September, 2008 to the April and October Contracts. The Defendant did, however, as seen from the undated confirmation letters sent from it to the Plaintiff in respect of each forward contract, "confirm executing the enclosed Master Agreement". That was no less true of the April and October contracts, which contained that "confirmation of executing the Master Agreement" at clause 5 of both confirmation letters from the Defendant.

The confirmation letters constituting the April and October contracts respectively contained all the essential terms of forward exchange contracts. These terms were:

(a) Statements of the name and address of the customer;
(b) The date on which the transaction was agreed;
(c) The currency and amount agreed to be purchased by the bank from the customer;
(d) The date of settlement of the transaction;
(e) The rate of exchange applicable to the transaction;
(f) The foreign currency and amount agreed to be sold by the bank to the customer;
(g) The bank account to which the customer would transfer the currency to be delivered by it to the bank; and
(h) The bank account to which the bank would transfer the currency to be delivered by it to the customer.

The confirmation letters contained three additional terms:

(i) the delivery dates of the currency were to be fixed and irrevocable (clause 3 of each respective letter from the Plaintiff and from the Defendant).
(ii) the confirmation from the Defendant was "irrevocable" (clause 9 of the confirmation letters from the Defendant); and
(iii) A close-out netting provision at clause 6 of the confirmation letters from the Defendant, which would take effect in the event the Defendant failed to fulfill its obligations under the forward exchange contracts.

As stated above one of the main purposes of the Master Agreement was to provide a framework for compensating the losses of one or both parties to a derivatives transaction in the event of early termination or default. That provision was however contained in the confirmation letters themselves, specifically in clause 6 of the confirmation letter from the Defendant to the Plaintiff in each and every antecedent contract, and in the April and October contracts. Through clause 6, the Defendant agreed:

"in the event of our failing our obligations on the transaction due date, we agree that we will be held liable to you for the difference in exchange between the aforementioned effective forward rates and the bank's selling rate for Telegraphic Transfers or the selling rate on the appropriate foreign centres in respect of other currencies ruling on the delivery date stated above, such difference being calculated on the unfilled portion of the contract. We irrevocably authorise you in such event to debit our account referred to above held at your Branch with the amount of the prescribed difference without further reference to us."

There was therefore no need for the Plaintiff to refer to the Master Agreement in the event of the Defendant's default. Indeed, the Plaintiff did not do so, as it considered clause 6 to contain the necessary close-out netting procedure to mitigate its losses resulting from the Defendant's breach of the April and October contracts.

Between the months of January 2009 and March 2009, PW1 on behalf of the Plaintiff dealt with a Mr. Pascal Tameem and a Mr. Zunaid Patel of the Defendant. One such dealing was at a meeting on 17th February, 2009 at the Plaintiff's premises, on which day the said individuals indicated to him, Mr. Anton Marais (Head of Corporate and Investment Banking) and Mr. Eddie Banda (Account Executive) that the Defendant required another extension of their foreign exchange commitments to the Plaintiff under the April and

October 2009 forward contracts. This extension request was apparently necessitated by internal liquidity constraints. PW1 informed Mr. Tameem and Mr. Patel that the Plaintiff was willing to consider restructuring and extending possibly only two of the April contracts but not the October contract as it still had eight months left before its maturity date; and there was still sufficient time for the Defendant to provide for and to prepare its finances in order to be able to perform the October contract.

Additionally, PW1 stated that in order to reduce the Plaintiff's exposure to the Defendant on the already existing April and October contracts, the Plaintiff would expect the Defendant to perform on at least one of the April contracts. He told the Defendant that the Defendant would also be required to make a formal application to the Plaintiff, in writing for the restructuring of its forward exchange contracts and provide some sort of collateral in support of the exposure to fluctuations in exchange rates that the Plaintiff had incurred in performance of its obligations under the forward contracts.

Although the Plaintiff had not required collateral for the earlier extensions of the antecedent forward contracts, the Plaintiff required collateral for these further extensions because of the greater foreign exchange rate exposure risk the Plaintiff would face that time. The Defendant again requested for the first stage of the extensions, i.e. settlement of the initial contracts with opposite contracts, be at an equal or similar rate. This meant that the Plaintiff would have had to adjust the rate for the second stage of the extension (i.e. the new contracts) to such an extent to cover the difference as to put the Plaintiff at risk of a large financial loss if the Defendant failed to perform the extended contracts. Thus, the Plaintiff required collateral to protect itself against the possibility of the Defendant reneging on the extended contracts.

At a follow up meeting PW1 had at the Defendant's premises on 19th February, 2009, Mr. Taneem and Mr. Patel changed their position and stated that the

Defendant would not require the postponement of completion of the forward contracts, and therefore would not apply for, or furnish any security for the same. PW1 notified the senior managers of the Plaintiff of that development upon his return to his office from the meeting at the Defendant's premises.

On 27th March, 2009, the Plaintiff received two letters from the Defendant dated 10th March, 2009. The letters informed the Plaintiff that the Defendant was revoking both the April contract and the October contract with the Plaintiff. PW1 attempted to make an appointment with Mr. Patel to discuss the contents of the Defendant's letters of 10th March 2009, but he was never available to meet with him. He therefore sent an e-mail to Mr. Patel on 31st March, 2009, which outlined the Plaintiff's suggested restructuring of the April contract in order to accommodate the Defendant's earlier request for an extension of the same. He attached a letter and a spreadsheet to the e-mail. The letter was a direct response to the Defendant's letters of 10th March, 2009. The spreadsheet also outlined possible options for restructuring the forward contracts.

In his letter of 31st March 2009 that he had attached to his e-mail, PW1 reminded Mr. Patel of the Defendant's obligation to complete performance on the forward contracts, which were expressly stated as being irrevocable. He included in that letter the Plaintiff's offer to "Without Prejudice" restructure the existing contracts which would allow for the Defendant to settle its obligations to the Plaintiff over a longer period of time. That restructuring was more favourable than the one PW1 had initially proposed to at the meeting he had with Mr. Tameem and Mr. Patel on 19th February, 2009 at the Defendant's premises.

Neither PW1 nor anyone else from the Plaintiff ever delivered a hard copy of that letter to the Defendant. It was only sent to the Defendant as an attachment to PW1's e-mail of 31st March 2009. The Defendant responded to his letter of 31st march, 2009 on 1st April, 2009. The gist of the response was that the Defendant had not changed its position and that any further correspondence on the matter should be directed to its legal counsel.

Since the Defendant had unequivocally shown that it was reneging on its obligation under the April and October contracts, the Plaintiff invoked clause 6 of the confirmation letters from the Defendant in respect of both contracts. PW1 therefore proceeded to do the following in line with clause 6:

(a) Calculate the difference between the exchange rates stipulated in the forward exchange contracts (the forward exchange rates) and the prevailing forward exchange rate at the date the Plaintiff accepted the Defendant's default. This difference was then to be calculated on each unfilled portion of the forward exchange contracts; and

(b) Debit the Defendant's account held with the Plaintiff with the sum total of the amounts calculated on the formula explained above.

He proceeded as follows:

Contract	**Agreed Forward Exchange Rate**	**Forward exchange rate as at 2-3 April 2009**	**Rates difference**	**Loss per contract**	**Prevailing value of loss calculated over the amount of days from termination to Contractual maturity Date**
7 April 2009	K3, 562.00	K5,690.00	K2,128.00	K3,404,800,000.00	K3,404,800,000.00
14 April 2009	K3, 562.00	K5,708.00	K2,146.00	K3,433,600,000.00	K3,421,433,610.92
21 April 2009	K3, 565.00	K5,719.00	K2,154.00	K3,446,400,000.00	K3,426,439,685.45
20 October 2009	K3, 930.00	K6,105.00	K2,175.00	K2,175,000,000.00	K2,039,062,237.90
TOTALS				**K12, 459,800,000.00**	**K12, 291,735,534.28**

The Plaintiff thus calculated the difference between the respective forward exchange rates of the original April Contracts and October contract that were cancelled by the Defendant and the prevailing forward exchange rate. The Plaintiff used the prevailing rate rather than the rate stipulated in clause 6. that is, the rate "ruling on the delivery date", because it had opted to mitigate its losses with immediate netting off rather than wait for the delivery date to close off the contracts and risk further losses. As a final step, PW1 authorized the debit of the Defendant's account number 0140 0500 93000 by a sum equal to the loss calculated through the procedure above, and credited the Plaintiff's account with that sum. The sum debited from the Defendant's account was K12, 291,735,534.28 being the amount calculated as the total present value of the loss on the forward exchange contracts.

The difference of K168,064,465.72 was an allowance for the difference between the present value of the loss on the forward exchange contracts as at the dates the Plaintiff calculated its losses (3rd April 2009) and the future value of the loss that would have been suffered on the performance dates of the forward exchange contracts, being K12,495,800,000.00. The present valuing of those cash flows was normal banking practice and was, as seen from the reduction in sum due, in the Defendant's favour.

The Defendant's account number 0140 0500 93000 did not have sufficient funds at the time of the debit and therefore became overdrawn by the amount of K12,277,086,885.19 on 3rd April, 2009.

By a letter dated 6th April, 2009, the Plaintiff duly notified the Defendant of the debit of the K12, 291,735,534.28 and by a letter dated 15 April, 2009, the Plaintiff through its lawyers made a formal demand for this sum as damages for breach of the forward contracts. The Plaintiff issued an additional letter of demand on 1st July, 2009 in respect of the overdraft of K12, 277,086,885.19 and the interest that accrued thereon at the Plaintiff's prevailing Kwacha base rate, to which the Defendant did not respond. Therefore the Plaintiff commenced this action to recover the loss it sustained from the Defendant's breach of the forward contracts and the subsequent overdraft on the Defendant's account with the Plaintiff.

During cross-examination he admitted that that the Plaintiff stood to gain and that the Defendant faced inherent risks with future exchange contracts. The Defendant was advised of the risk. The risk depended on how well the Defendant was hedged. He however confirmed that the Plaintiff did not satisfy itself that the Defendant had obtained independent legal advice. The Plaintiff drafted the documents which were in turn executed by the Defendant and returned to the Plaintiff. He explained that the Defendant's business had taken a turn which resulted in no Dollar inflows and it therefore requested the Plaintiff to extend the foreign exchange exposure to a later date. That was why the Plaintiff debited and credited the account in the manner it did. He also explained that the Master Agreement was included in the bundle of documents because it was referred to in clause 4 of the letters to the Defendant. The contents of the Master Agreement were never brought to the attention of the Defendant. The Master Agreement was important but important parts were already listed in the Plaintiff's letters to the Defendant. The Defendant did not agree to any version of the Master Agreement. The money the Plaintiff was claiming was the cost that it incurred in the trading book in the treasury of the Plaintiff. This was the cost of purchasing the same Dollars at a market related rate at the same forward dates on the date the Defendant reneged on its contract.

When he was re-examined, he told the court that the Defendant entered into forward exchange contracts in order to have a certain determined exchange rate for its US Dollars regardless of any changes in the exchange rate. The Plaintiff would then hedge itself against the risk of any possible change in the exchange rate. Forward contracts were regulated by Bank of Zambia and the Plaintiff reported to the central bank on any transactions whether spot or forward. The Defendant was aware of the nature of forward contracts as it compared prices with other banks.

Zunaid Patel was the Defendant's only witness. According to his witness statement he was the Director of Finance in the Defendant company. He stated that the Defendant was a company that dealt in the manufacturing of various detergents, soaps, candies and beverages for sale within and outside Zambia. The Defendant thus regularly received foreign income from its sales proceeds from abroad, which income was usually in United States Dollar currency.

DW1 stated that the business relationship between the parties begun in the normal course of banker and client banking relationship established in 1995 when the Defendant opened its bank accounts with the Plaintiff. During this business relationship, the parties entered into a gratuitous arrangement whereby the Defendant would sell US Dollar currency to the Plaintiff bank who would in turn provide the Defendant with the Kwacha equivalent. These currency exchange transactions were performed on the basis of 'on-the-spot-market' which meant selling at the prevailing Dollar-Kwacha exchange rate on the date when the Defendant's dollar account held at the Plaintiff had funds.

Sometime in July 2008, the Defendant was expecting to receive some money in US Dollar currency coming from various exports of its goods abroad and was desirous of converting the same into Kwacha. It was in the Defendant's interest that they earned as much Kwacha as they could from their hard currency earnings in order to meet their local operational needs. To that end, DW1 approached the Plaintiff as the Defendant's bankers to advise how they could achieve that goal. They advised that they should enter into forward exchange contracts. That was the basis of the purported exchange contracts that the Plaintiff subsequently structured for the Defendant.

Under that new agreement on the basis of forward exchange rates, the parties executed their first currency exchange contract on the 16th of September, 2008 which contract was prepared by the Plaintiff. All the documents including the letter of confirmation signed by DW1 were drafted by the Plaintiff. The forward exchange rates reflected in all the documents were suggested by the Plaintiff contending that they would give the Defendant the best value for their hard currency. That was followed by a movement of actual money and value between the parties on the 7th of October, 2008, such that the Defendant received the Kwacha amount of K5, 272,500,000.00 from the Plaintiff and the Plaintiff deducted the Dollar equivalent of USD1, 500,000.00 from the Defendant's account at the forward exchange rate of K3, 515.00.

On 26th August 2008, and also on the basis of forward exchange rates, the parties herein entered into another US Dollar – Kwacha currency exchange transaction for the exchange of USD4,800,000.00 for its Kwacha equivalent of K17,017,600,000.00 to be performed in 3 equal instalments on future dates of the 27th October, 2008, the 30th October, 2008 and the 7th November, 2008 at the forward exchange rates of K3,543.00, K3,544.00 and K3,549.00 to the Dollar respectively. That contract and confirmation letter was drafted and prepared by the Plaintiff and handed to the Defendant for its endorsement.

However, sometime after the 20th of October, 2008, the Defendant's business was adversely affected by the economic and political instability stemming from the global financial recession and the death of the Republican President Dr. L.P Mwanawasa, SC. As a result, the Defendant's business in the export market was ground to a halt such that the money expected from its export earnings stopped coming in. Equally, the foreign earnings expected from abroad purchases did not come in as the Defendant's foreign market substantially reduced its demand for the Defendant's goods in the wake of the economic recession.

During the same period, the foreign exchange rate of the Kwacha to Dollar also depreciated such that it was virtually impossible for the Defendant (with its substantially reduced foreign earnings) to sell its earned Dollar currency at the forward exchange rate indicated in the contract dated 26th August, 2008 as aforestated or at all, as it did not have any dollars available. DW1 then went to the Plaintiff bank and explained the Defendant's predicament that the Defendant could not sell any Dollars at the stated exchange rates as it did not even have the anticipated dollars.

The Plaintiff then offered and suggested that it would 'roll-over' the performance of the 26th August, 2008 transaction to April 2009, in the hope that by that time the exchange rates would have improved and the Defendant's business would have picked up. To effect the 'roll-over' of the August transaction, the Plaintiff on the 23rd October, 2008, performed a paper transaction whereby the Defendant's Dollar account was credited with a total of USD4,800,000.00 and debited the Defendant's Kwacha account with the Kwacha equivalent and immediately debited the same account by a total of USD4,800,000.00 and credited the Defendant's Kwacha account with the Kwacha equivalent (i.e. 3 entries of USD1,600,000.00 each) to have the appearance that an actual value exchange transaction had taken place between the parties herein when in fact not.

The Plaintiff's book entries were merely technical paper transactions with no bearing on the prevailing exchange rate of the day and intended merely to close the contract of the 26th August, 2008. The Plaintiff also required the Defendant to fill out 3 Forex Inter Account Transfer Request Forms (FIATRF) each reflecting the Debit amount of USD1,600,000.00 and the credit amount of its Kwacha equivalent at the exchange rates indicated in the contract of the 26th August, 2008.

The above process opened the way for the 'roll-over' of the 26th of August, 2008 transaction to be reflected as the purported contract of the 23rd October, 2008. The purported contract bears the same dollar amount of USD4,800,000.00 and for value/performance dates of 7th April, 2009, 14th April, 2009 and 21st April, 2009 at higher exchange rates of K3,562.00, K3,562.00 and K3,565.00 to the Dollar respectively.

The 26th August, 2008 transaction thus became the purported contract of 23rd October, 2008 for performance dates of the 7th, 14th and 21st April, 2009, that is, the purported April 2009 Contracts. The Defendant signed the purported "April Contracts" (which documents were prepared by the Plaintiff) at the request of the Plaintiff which intimated that this would assist the Plaintiff in its 'roll-over' procedure of the 26th August, 2008 transaction, as it was hoped that the global market would improve and move out of the recession.

Thereafter, on the 6th of October, 2008 the parties entered into another transaction for the exchange of USD1,000,000.00 for ZMK3,685,000,000.00 based on a new exchange rate of K3,685.00 to the Dollar and performance date of 23rd January, 2009.

Unfortunately, the same economic problems facing the Defendant's export market persisted. DW1 thus approached the Plaintiff on the 14th January, 2009 to inform it that due to the reduction in demand for its goods and consequent reduction in its sales proceeds precipitated by the global economic recession, the Defendant would be unable to pay the Plaintiff any Dollars on the 23rd of January, 2009. The Plaintiff again offered to forward the performance of the 6th October, 20008 transaction and thus proceeded to yet again perform their book entries in exactly the same manner they had done with the 26th August, 2008 transaction. However, no actual value was in fact actually exchanged between the parties that is, the Plaintiff did not actually provide Kwacha for the Defendant's Dollars. Again those were mere paper transactions to reflect the roll-over of the 6th October, 2008 transaction to a later date.

The roll-over process of the 6th October, 2006 transaction was performed by the Plaintiff as follows: to close the transaction of the 6th of October, 2008, the Plaintiff credited the Defendant's Dollar account with USD1,000,000.00 and later debited the same account by a total of USD1,000,000.00. The purported transactions which were prepared by the Plaintiff were signed by the Defendant at the request of the Plaintiff to assist the Plaintiff effect its 'paper' transactions and the same did not form separate and binding contracts between the parties.

The Plaintiff also required the Defendant, in addition to signing the 'paper transactions' to fill out 1 Forex Inter Account Transfer Request Form (FIATRF) reflecting the Debit amount of USD1,000,000.00 and the credit amount of its Kwacha equivalent at the exchange rate indicated in the transaction of the 6th October, 2008. That whole process of forwarding the transaction of the 6th October, 2008 culminated into the purported contract dated 16th January, 2009 reflecting the same amount of USD1,000,000.00 but at a rolled-over performance date of the 20th October, 2009 and at a higher exchange rate of K3,930.00 to the Dollar. By that roll-over process, the transaction of 6th October, 2008 became the purported contract dated 16th January, 2009 with a performance date of 20th October, 2009, that is, the purported "October 2009 contracts".

At all times that they signed the above mentioned purported contracts, the Defendant had no idea what the 'Master Agreement' referred to actually was, nor had they ever been given a copy of such Agreement by the Plaintiff. The Plaintiff drafted the purported contracts. According to DW1, his understanding at the time of signing the purported contracts was that the reference to a 'Master Agreement' only meant that the Plaintiff would proceed to reduce the contents of the letters they had signed into a special format. DW1 had since had the opportunity to look at the 'Master Agreement' as a result of these proceedings. There were provisions in there that were important and would have given them a totally different perspective of those transactions had the

Defendant had an opportunity to look at them. For example, they were required to provide an independent legal opinion to the Plaintiff as a condition precedent to the effecting of the arrangement they were getting into. They obtained no such legal advice and no such legal opinion was ever transmitted to the Plaintiff. At no time before or during their signing of all documents prepared by the Plaintiff did the Plaintiff ever explain to them what the contents of the documents were or the implications of the same, if any.

The Defendant through DW1 and others had been dealing with the Plaintiff for a number of years and had performed many transactions with the bank such that they had developed a relationship of trust and confidence in the Plaintiff bank to advise them on all issues that affected their interest. DW1 stated that he was only told by the people he dealt with at the Plaintiff bank being among others, Mr. Anton Marrey and PW1, that all he had to do to help the Plaintiff 'roll-over' the 26th August 2008 and the 6th October, 2008 transactions was to sign the documents at pages 13-18 and pages 7-12 of the Defendant's Bundle of Documents as that would help the Plaintiff bank to close their books.

The implied understanding/agreement between the parties was that the "August 2008" and "October 2008" transactions would continue to be forwarded until the economic situation improved and that at no point in time would the amounts reflected in those purported contracts be referred to as a debt nor was any party expected to suffer any loss.

Sometime in February 2009, the Plaintiff requested a meeting with the Defendant at its office. DW1 and one Mr. Pascal Tameem proceeded to the Plaintiff's offices where they were told that the Plaintiff would be requiring that the Defendant furnish the Plaintiff some form of security/collateral, to enable the Plaintiff to crystallize the rate they had charged the Plaintiff on the April 2009 and the October 2009 purported contracts. At that time, the exchange rate between the Kwacha and US Dollar was escalating and was in the range of

K5,000.00 to K5,500.00 to the dollar, and the Plaintiff wanted to crystallize the said April and October purported contracts as a loan or debt and also wanted security against them.

That request by the Plaintiff was unacceptable to the Defendant as it seemed to it that the Plaintiff was attempting to secure itself more favourable conditions outside the provisions of the said purported contracts to the detriment of the Defendant, and when it sought legal advice, it was advised that the 'roll-overs' were mere notional transactions which could not be said to crystallize into a loan or a debt to the Plaintiff. There being a failure to agree on the issue of the Plaintiff's requirement for security, on the 10th of March, 2009 DW1 and Mr. Hussein Patel wrote two letters to the Plaintiff informing them that the Defendant was revoking the forward exchange transactions of April, 2009 and October 2009.

He agreed in cross-examination that the Defendant signed the letters from the bank and it in turn requested the bank to buy US Dollars from it. He referred to the contracts as purported in his witness statement because the purported contracts were not explained to the Defendant in terms of the repercussions in case they were not fulfilled. He admitted that the Defendant had previously been dealing with the plaintiff on the basis of spot transactions. The Defendant entered into the various contracts with the plaintiff because it was supposed to receive foreign exchange from the sale of its goods outside Zambia. It would then sell the Dollars to the plaintiff at a negotiated rate. However the economic situation in the world changed in October 2008 and it changed the whole scenario of the transactions. He confirmed that the Defendant's primary reason for reneging on the agreements was as a result of the recession and the insistence by the plaintiff on security. The Defendant had wanted to be given more time within which to fulfill the contract from its export earnings. He denied that when the Defendant was negotiating the postponement of the settlement of forward exchange contracts it compared the rate with other banks.

In re-examination he said the documents were prepared by the Plaintiff. There was no mention by the Plaintiff that the Defendant would have to get Dollars from the open market. The Defendant was only requested to provide security in February. The Plaintiff did not ask the Defendant to seek legal advice. The entries made by the Plaintiff were paper transactions because no physical money was exchanged. The accounts were simply debited and credited.

I am grateful to Counsel for their submissions.

The nature of the alleged contracts appears to fall in the class of agreements known as "forward contracts." Forward Contracts have been explained by John C. Hull in his book "***Introduction to Futures and Options markets"***, ***(1)*** at page 38 as:

> "***Forward contracts are…agreements to buy or sell an asset at a certain time in the future for a certain price. However, unlike futures contracts, they are not traded on an exchange [market]. They are private agreements between two financial institutions or between two financial institutions or between a financial institution and one of its corporate clients."***

The said author further explains that:

> "***one of the parties to a forward contract assumes a long position to buy the asset at a certain specified date for a certain price. The other party assumes a short position and agrees to sell the asset on the same date for the same price. Forward contracts do not have to conform to the standards of a particular exchange. The***

> ***delivery date in the contract can be a date mutually convenient to the two parties."***

Some useful terminology in understanding the nature of forward contracts has been defined in the ***Banking and Financial (Foreign Exchange Risk Management and Exposure) Regulations, 1996*** ***(1)***. The relevant ones to this case as defined by the said Regulations are:

> **"fixed forward contract" means a foreign exchange bought or sold forward in advance for a delivery on a fixed value date longer than spot, at a predetermined specified rate of exchange,;**
> **"long position" means the excess of assets over liabilities in a particular currency;**
> **"short position" means the excess of liabilities over assets in a particular currency;**
> **"spot exchange rate" means the latest market price for a currency".**

The said Regulations are made in exercise of the powers in section one hundred and twenty four of the ***Banking and Financial Services Act, 1994*** ***("the Act") (2)*** under Statutory Instrument No. 57 of 1996 and by paragraph 3 of the said Statutory Instrument apply to all banks and financial institutions licensed under the Act.

Section 124 of the Act provides that:

> ***"The Minister on the recommendation of the Bank of Zambia may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed by regulation or that is necessary or convenient to be so prescribed for carrying out or giving effect to this Act."***

The Defendant has challenged the force of law of this Statutory Instrument as read with the Act. I shall deal with this challenge before dealing with the merits of the parties contractual arguments.

The Defendant has argued that a Statutory Instrument cannot be said to cause the amendment of an Act of Parliament.

Francis Bennion's text on ***Statutory Interpretation*, (2)**, is an authoritative text on the subject of statutory interpretation, and offers useful insights on the subject of delegated legislation which is in contention in this case. To start with the Defendant's proposition of the law that a Statutory Instrument cannot be said to cause the amendment of an Act of Parliament, Section 18 of Bennion's text at page 215 states that:

> ***"Section 81. Amendment by delegated legislation***
> ***An Act may confer power for the amendment of itself or another Act by delegated legislation. An amendment made by use of such a power is as effective as if made directly by the Act."***

Further, section 20 (6) of the Interpretation and General Provisions Act Cap 2, deems any act done under or by virtue of or in pursuance of a statutory instrument as having been done under or by virtue of or in pursuance of the written law conferring power to make the instrument. Section 20(7) goes further and states that:

> ***"Every Statutory Instrument shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of a particular power or particular powers."***

According to Section 20 (2), *"Terms and expressions used in a statutory instrument shall have the same meaning as in the written law under which the instrument was made."*

With regard to the ***Banking and Financial Services Act***, this power is contained in Section 124 of the Act. The commentary on section 81 referred to above states that provided it is not *ultra vires*, an amendment made by delegated legislation has the same effect as one made directly by the Act, and that the practice of amending Acts by delegated legislation began in the second half of the 19^{th} Century. The rationale for the practice is expounded elsewhere in Bennion's text (see section 50) which explains that an item of delegated legislation is an instrument made by a person or body (the delegate) under legislative powers conferred by an Act (the enabling Act). The commentary to section 50 referred to explains that the delegation of legislative power by means of an enabling Act is an aspect of the grant of executive power upon the recognition inter alia that:

(1) modern legislation requires far more detail than Parliament itself has time or inclination for;
(2) to bring a complex legislative scheme into full working operation, consultation with affected interests is required – this can best be done after Parliament has passed the outline legislation;
(3) some details of the overall legislative scheme may need to be tentative or experimental – delegated legislation affords an easy means of adjusting the scheme without further recourse to Parliament.

It should be noted that the essential function of delegated legislation is to carry out the purpose of the enabling Act. Apart from noting that the Defendant has itself quoted Article 80 (1) of the Constitution – which states that "Nothing in Article 62 shall prevent Parliament from conferring on any person or authority power to make statutory instruments", I do not see the relevance of the rest of the Defendant's arguments concerning violation of Constitutional Articles or anything *ultra vires* the Constitution caused by the regulations under Statutory

Instrument No. 57 of 1996 in contention. Even if the regulations were to be given a very restrictive interpretation, they are a creature of section 124 of the Act and cover forward contracts which are within the definition of banking under the Act which defines Banking business as "Any custom, practice or activity prescribed by the Bank of Zambia as banking business". Forward contracts cannot therefore be said to be gaming or indeed wagering contracts as defined by the Gaming Act, 1845. Forward Contracts have been recognized by the Act and apply in our jurisdiction and are accordingly excluded in the Gaming Act, 1845. For these reasons, I hold that the Banking and Financial Services (Foreign Exchange Risk Management and Exposure) Regulations, 1996 have the force of law in Zambia.

Common law supports the view that the contract entered into by the parties to this action was not a wager.

In ***Carlill v. Carbolic Smoke Ball Co*. (1)** Hawkins J., defined a wager as follows:

"A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum or money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

Although the Plaintiff's cause of action is relatively new in our jurisdiction and there is therefore a dearth of authorities, there are a number of decided authorities on derivatives in India particularly on the question of whether or not they are prohibited under the Gaming Act, 1845 which support the view that derivatives are not wagering contracts. In ***Bhagwandas Parasram v***

Burjori Ruttonji Bomanji (***2)*** it was held that a speculation does not necessarily involve a contract by way of wager and that to constitute a wagering contract, a common intention to wager is essential. It was further held that in a wagering contract, there has to be mutuality in the sense that the gain of one party would be the loss of the other on the happening of the uncertain event which is the subject matter of the wager.

In ***Ismail Lebbe Marikar Ebrahim Lebbe Marikar v Bartleet and Company*** ***(3)*** a firm of share and produce brokers entered into an arrangement with the grower of rubber in Ceylon. Under the arrangement, the broker was to buy rubber for the Defendant in the London market, but there was to be no delivery. The arrangement was that the defendant should pay the differences when the market was against him and that he should be paid the differences, when the market was in his favour. Holding such a contract not to be a wager, the Privy Council held as follows:

> ***"The essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest. The transaction may be cloaked behind the forms of genuine commercial transactions; but to establish the bet, it is necessary to prove that the documents are but a cloak and that neither party intended them to have any effective legal operation. Where the documents show an ordinary commercial transaction, and, in conformity with them, one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value."***

In ***Gherulal Parakh v Mahadeodas Maiya*** ***(4)*** a question arose as to whether a partnership formed for the purpose of entering into forward contracts for the purchase and sale of wheat so as to speculate in the rise and fall of the price of wheat in future, was a wager and whether it was hit by Section 30 of the Contract Act. The Supreme Court held that such a partnership was not illegal, although the business, for which the partnership was formed, was held to involve wagering.

From the evidence in this matter, it cannot be said that there was an intention on the part of the Plaintiff or Defendant to speculate. DW1 was very candid when in cross-examination he told the court that they would have fulfilled the contracts but for the fall in the exchange rate and the unavailability of US Dollars from the Defendant's foreign exchange earnings. The evidence also shows that the Defendant was at some point a beneficiary of the forward exchange contracts. It only breached the contract when the exchange rate and Dollar earnings were not in its favour. The Defendant cannot now avoid the contract on the ground that it was wager. The Defendant's argument must therefore fail.

For convenience, I shall address paragraphs 1, 4 and 5 of the Defendant's defence as one as all the arguments therein touch on the issue of formation of contracts.

From the record and evidence it is clear that in the context of contractual formation there was 'offer' and 'acceptance' concerning the April and October contracts wherein the parties exchanged promises for the purchase by the Plaintiff of United States Dollars from the Defendant at an agreed price (i.e., on the dates the agreements were made) on a future date. Both parties being aware of the possibility of making a loss should the value of the Dollar be low. At law (see **paragraph 606 of Halsbury's Laws**), if the consideration required from the offerree is a promise, the giving of the promise is said to result in a bilateral or synallgamatic contract under which both sides initially exchange promises, but if the requested consideration is an act other than a promise, its performance is said to make a unilateral contract, whereupon the offeror becomes bound by his offer.

Paragraph 4.11 in ***The Law of Contract by Lawrence Koffman & Elizabeth Macdonald*** states at page 59 that:

> ***"An exchange of promises by parties known as 'executory' consideration, will also amount to an enforceable agreement. For example, X promises to deliver a new car to Y in three week's time, and Y promises to pay for the vehicle on delivery. Despite the fact that no performance of the undertakings has yet taken place, the obligations are still in the future – there is good consideration. Both parties are getting what they requested in return for their promises. For commercial reasons it is important that the law recognized the validity of such agreements, as this facilitates forward planning by the parties."***

Paragraph 733 of Halsbury's Laws states:

> ***"Executory and executed consideration. Consideration is said to be 'executory' when it consists of a promise to do or to forebear from doing some act in future; and it is said to be 'executed' when it consists in some act or forbearance completed at earliest when the promise becomes binding. Thus valuable consideration may be provided by either the following (1) mutual promises, which will give rise to a bilateral contract, or (2) a promise in return for an act, in which case there will be unilateral contract."***

Furthermore, paragraph 728 of Halsbury's Laws of England Vol. 9 (1) states that:

> ***"…valuable consideration has been defined as some right, interest, profit, or benefit accruing to one party, or some forbearance,***

> ***detriment, loss or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration."***

Similarly, in the present case, the parties exchanged promises (amounting to valuable consideration) in the present (i.e. on the dates of the April and October contracts were made) for a possible benefit or indeed loss at a future date.

The Defendant has pleaded that the terms of the contract were not complete by reason that the Master Agreement was not forwarded by the Plaintiff to the Defendant for its signature. This alleged failure by the Plaintiff to deliver to the Defendant must be considered in the light of breach by one party to a contract to determine whether the breach went to the root of the agreement entitling the innocent party to be discharged from further performance of the agreement.

At the outset, I find that the Plaintiff was in breach of this part of Agreement, but the question is whether the breach was so serious or fundamental as going to the root of the contract so as to entitle the Defendant to being discharged from further performance of the contract.

Paragraph 996 of Halsbury's Laws Volume 9 (1) states that:

> ***"it has been said that a fundamental term is no more than a condition that is a term which the parties have agreed either expressly or impliedly goes to the root of the contract, so that any breach of that term, without reference to the circumstances, will allow the innocent party to treat himself as discharged. Similarly, there will be a fundamental breach in this sense, entitling the innocent party to be discharged, if the breach has produced a situation fundamentally different from anything which the parties as reasonable persons have contemplated when the contract was made."***

The modern law (see paragraph 994 of Halsbury's Laws vol. 9(1) recognizes that contractual obligations are not all of equal importance, there are some which go so directly to the substance of the contract or in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract.

The surrounding circumstances of this case disclose that in both cases when the Plaintiff wrote to the Defendant letters dated 23rd October, 2008 for the April contract and the other dated 16th January, 2009 for the October contract, the Defendant responded in both cases by undated letters to confirm both the contracts indicating that it was in agreement with the contents of the said letters. The Defendant's confirmation letters, in my view, formed the "acceptance" at law of the Plaintiff's "offer" of agreement so that the Master Agreement was a document of further detail of the rules of the agreement the non-forwarding to the Defendant of which did not go to the substance of the agreement between the parties.

The causes of frustration of contract are numerous. However, paragraph 904 on a contract becoming onerous states that:

> ***"Whatever the alleged source of frustration, a contract is not discharged under the doctrine of subsequent impossibility and frustration merely because it turns out difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of ordinary risks of business, such as rises and falls in prices, depreciation of currency or unexpected obstacles to the execution of the contract. In particular, a party's insolvency or inability to get finance will not discharge him, unless of course the parties have agreed otherwise."***

As Lord Radcliffe held in ***<u>Davies Contractors Ltd v Fareham UDC</u> (5)***:

> ***"It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play."***

The Supreme Court held in ***<u>Kasengele V. Zambia National Commercial Bank Limited</u> (6)*** that:

> ***"Inability to pay has never been and is not a defence to a claim. It is not a bar to entering judgment in favour of a successful litigant."***

The Supreme Court also held in ***<u>Match Corporation Limited v. Development of Zambia</u> (7)*** that:

> ***"In the vein that we take, it was inappropriate to invoke the doctrine of frustration in this case where it could not properly be alleged the contract had become impossible of performance and the parties therefore discharged from performance."***

The Defendant cannot in the light of the above authorities and the circumstances of this case plead that the contract was frustrated.

The Defendant has also stated in its defence that the action taken by the Plaintiff in debiting the Defendant's account was unilateral and illegal. A perusal of clause 6 of the Confirmation letters shows that in fact the Defendant had authorized the Plaintiff to debit the Defendant's account in the manner it did without reference to the Defendant. The Defendant's argument is therefore not valid.

Having taken into account all the evidence and authorities, I have come to the inescapable conclusion that the Plaintiff has proved its case on a balance of probabilities. I therefore enter judgment in favour of the Plaintiff against the Defendant for the sum of K12, 277,086,885.19 together with interest in accordance with ***<u>Order 36 rule 8 of the High Court Rules</u>*** from 3rd July, 2009 up to date of judgment and thereafter in accordance with the ***Judgments Act Cap 81*** until full payment. I have indicated in my judgment that this is essentially a novel claim. I therefore do not think that awarding costs to the Plaintiff would be appropriate in the circumstances. I therefore order that each party shall bear its own costs.

DELIVERED IN OPEN COURT THIS 9TH DAY OF MAY, 2011

A.M. WOOD
JUDGE