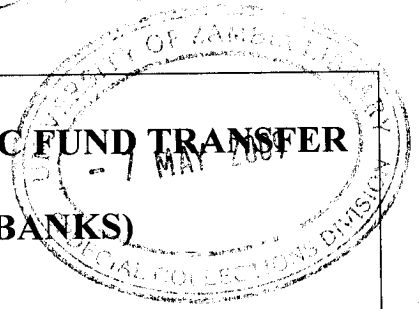


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**THE LIABILITY OF BANKS IN ELECTRONIC FUND TRANSFER  
TRANSACTIONS  
(A CASE STUDY ON ZAMBIAN BANKS)**



**By**

**Ronald Sinkala**

**A Dissertation submitted to the University of Zambia in partial  
fulfillment of the requirements of the Bachelor Degree of Laws (LLB)**


**UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW  
LUSAKA ZAMBIA**

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**APPROVAL OF DISSERTATION**

This dissertation of Ronald Sinkala (computer number 25053442) is approved as fulfilling partial requirements for the award of the Bachelor Degree of Laws (LLB) by the University of Zambia.

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**DATE (2008)**

## **ABSTRACT**

The liability of banks in electronic fund transfer (EFT) transactions is discussed in this directed research under the Zambian Laws which includes the national payment systems Act No. 1 of 2007. The research doesn't covers banks' liability in electronic credit and debit transfers. It covers banks' liability in Electronic Fund Transfer at the Point Of Sale (EFTPOS), Automatic Teller Machines (ATM) and office banking. Liability of banks in credit card transactions and cheque transactions falls outside the scope of this research. In the absence of Zambian legislation in this area, an analogy is made with the traditional methods of payment. An attempt is also made to extract the applicable rules from the general principles of law and the banking practice in Zambia. The thesis starts by analyzing the legal nature of payment orders in chapter two particular, whether a payment order is a negotiable instrument, a creation of trust funds, or merely a mandate from a customer to his bank. Secondly in chapter three there is an analysis of banks' liability for failure to make an EFT transaction. This encompasses banks' liability for complete failure to effect an EFT transaction and for improper implementation of such a transaction. Thirdly in Chapter four an analysis of the right to stop payment, completion of payment, irrevocability and banks' liability for failure to stop payment is made. There is also an analysis of the banks' liability for erroneous EFT transactions. This includes allocation of losses resulting from errors in payment orders and errors committed by banks during the execution process of such orders. There is also a review and detailed analysis of banks' liability for unauthorized EFT transactions. Issues such as authentication of payment orders, security measures adopted by banks and allocation of losses resulting from unauthorized transactions are analyzed. The research will also look

at the recoverability of damages for banks' failure to implement customers' instructions properly. It will discuss what measures of damages are applicable in certain situations such as banks' complete failure to make an EFT transaction, failure to transfer funds on time etc. The research is completed by a summary, conclusion and recommendations in chapter five. The recommendations will focus more on the effectiveness of the Zambian law in electronic funds transfer transactions.

## **ACKNOWLEDGEMENTS**

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Thanks are also due to the other bank officials for their invaluable assistance on my research visits to the Zambia commercial banks which included, Zambia National commercial bank, Barclays Bank, Investrust, Intermarket and Bank of Zambia.

I am indebted to my wife Beatrice, my son Temwananji and my twine daughters Suwilanji and Salifyanji for their support and their tolerance of my prolonged absence from home.

## **DEDICATION**

**Mrs. Nelly Nakaundi Sinkala**

My dear beloved mother, this research work is dedicated to you, for all the financial, spiritual and material support I have received from you from my childhood up to date.

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## **LIST OF ABBREVIATIONS**

ATM	Automated Teller Machines
CPSS	Committee on the payment and settlement systems
DDACC	Direct Debit and Credit Clearing
EFT	Electronic Funds Transfer
EFTPOS	Electronic Funds transfer at the point of sale
PIC	Physical Inter-Bank Clearing
RTGS	Real Time Gross Settlement
SIPS	Systematically important payments
V-NNSS	Visa-National Net Settlement service

## **1.0 CHAPTER ONE:**

### **1.1 INTROCTION**

This study examines the new law (The National Payment Systems Act No. 1 of 2007) in the national payment system in relation to the Electronic Fund Transfer transactions. The study includes related statutes in this area which are; the Bank of Zambia Act, No. 43 of 1996, the Banking and financial services Act cap 387 of the Laws of Zambia and the Bills of Exchange Act of 1882. The study also include policy documents and the Bank of Zambia reports.

The study discusses the liability of banks in electronic funds transfer transactions, the remedies to the consumers and the rights of the consumers` in this area.

Finally, the effectiveness of the Law is examined and recommendations are made about future prospects.

### **1.2 BACKGROUND TO THE STUDY**

In Zambia there are two payment systems recognized by Bank of Zambia; the physical inter-bank clearing (PIC) system and the real time payment and settlement system, otherwise known as the Zambian inter-bank payment and settlement system.

Cash remains the predominant form of effecting payments in the economy, particularly for small value transactions. However, with the stringent measures put in place by the banks to instill confidence in cheque payments coupled with the rapid growth in the use of electronic payment instruments, there's a decrease in the usage of cash, as a payment instrument in Zambia. Therefore in June 2004 the central bank (Bank of Zambia) implemented the Real time gross settlement RTGS)<sup>1</sup> system, the national payment system

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<sup>1</sup> Bank of Zambia; National payment vision and strategy 2007 - 2007

has also witnessed the launch of the ZAMLINK, which is a system that allow member banks to share their Automated teller machines. The VISA international has launched the Visa-National Net Settlement Service (V-NNSS) to allow visa card issuing banks in Zambia share their ATMS and settle their kwacha transactions, locally; with the bank acting as settlement Agent. These developments have increased the usage of electronic (banking) payment instruments, such as debit and credit cards. In order for Bank of Zambia to regulate these new developments in the payment system, a new law was enacted in 2007; the National payment Systems (No 1 of 2007) Act of 2007.

Therefore this study was done to determine the effectiveness of this new law in terms of protecting clients subjected to electronic funds transfer transactions and most importantly the liability of banks for problems arising from Electronic Funds Transfer transactions.

### **1.3 RATIONALE FOR SELECTING THE STUDY:**

The rationale for selecting this study is:

That electronic funds transfer system as a form of payment in Zambia is new compared to the traditional methods of cash and cheque payments. This system has created problems which include;

- i. Banks failure to effect customers' instructions on time, and complete failure to carry out customers' orders.
- ii. Point of sale and Automated Teller Machines malfunctioning
- iii. Lack of information and knowledge on the part of the customers of their rights to damages and remedies.

- iv. The effectiveness and adequacy of the new legislation introduced in 2007 (The National payment Systems Act No: 1 of 2007) is not well known. Therefore there's a knowledge gap, and it is the intention of this research to fill up the gap.
- v. This writer has worked in Zambia for ten years as Accountant and Finance Manager and during this time has developed interest in the development of a legal system that will effectively regulate the payment systems in Zambia especially the electronic funds transfer transactions.

#### **1.4 PURPOSE OF THE STUDY**

The general objective to the study is;

To identify the liability of commercial banks in Electronic funds transfer transaction

##### **1.4.1 SPECIFIC OBJECTIVES**

- i. To review the current legal frame work (regulatory frame) in the Zambian payment system with focus on electronic fund transfer transactions (EFTs).
- ii. To critically analyze the effectiveness of the New Law (National Payment systems Act No. 1 of 2007) in terms of electronic fund transfer transactions.
- iii. To review the operations of the Zambia Electronic Clearing House in terms of electronic funds transfers.
- iv. To determine whether there's any legal protection to the clients exposed to the Electronic funds transfer transactions in Zambia, what remedies are available to consumers and whether consumers know their rights in this area.
- v. To determine the liability of Zambian banks in electronic fund transfer transactions and make recommendation for improvement of the identified gaps in the law.

It is the intention of this study to answer the following five questions;

- i. What is the Legal frame (Regulatory frame work) work of the National payment system in Zambia?
- ii. How effective is the Zambian law on electronic fund transfer transactions compared to the traditional methods like the cheque payment system?
- iii. What is the liability of Banks in EFT transactions and what are the remedies available to the consumers?
- iv. How does Zambia Electronic Clearing House operate in terms of electronic funds transfers?
- v. Are there other regulations put in place to protect consumers exposed to the electronic funds transfer transactions in Zambia apart from statutory regulations?

## **1.5 RESEARCH METHODOLOGY**

Research for the study took place in 2008 between June and December. There were unstructured interviews and discussions with bankers and professionals from the following institutions:

Barclays Bank, Cavmont-capital bank, Zambia National Commercial Bank, Zambia Institute of Chartered Accountants (ZICA), the Bankers Association of Zambia and the Zambia Electronic Clearing House. A structured questionnaire was distributed in the same institutions. The most recent publications on the national payment system were collected from Bank of Zambia and the electronic clearing house. That visit also provided an opportunity to speak with friends in the accounting professional to determine popular reaction to the effects of the new law (National payment systems act no; 1 of 2007) on the regulation of electronic fund transfer transactions (EFTs)

Secondary research was carried out using the internet, various Zambian statutes regulating banking and financial institutions and Bank of Zambia policy documents and reports on the national payment system.

## **1.6 SOURCES OF DATA**

- i. The major source of data for the study was the Bank of Zambia as the custodian of the national payment systems regulations.
- ii. Barclays Bank, Cavmont-capital bank, Zambia National Commercial Bank.
- iii. The Zambia Institute of Chartered Accountants (ZICA), the Bankers Association of Zambia and the Zambia Electronic Clearing House.
- iv. Current publications on the subject matter for example the Bank of Zambia reports on the national payment system performance.

## **1.7 METHODS OF DATA COLLECTION**

Data collection was based on the various trips to Bank of Zambia, Barclays bank, Zambia National Commercial Bank, and Cavmont capital bank, the Zambia Institute of Chartered Accountants, Bankers Association of Zambia and the Zambia Electronic Clearing house. Unstructured interviews and discussions were held with professionals in these institutions who are experts working directly or doing work related to the National payment system and electronic banking. A structured questionnaire was also distributed to these institutions.

## **1.8 SUMMARY OF CHAPTER ONE**

In this chapter an introduction to the study has been made with an emphasis on the rationale of the study and the study objectives. An analysis of the methods of data collection and the sources of data are also made in this chapter. Basically the study is on

the effectiveness of the new law (The National payment Systems Act No: 1 of 2007) on the regulation of electronic fund transfer transactions in Zambia and the main objective is to determine what liability arises to the banks for failure to effect an EFT transaction according to the customer's instructions and the remedies available to the clients.

In chapter two a discussion of the Law (legal frame work) regulating electronic fund transfer transactions in Zambia is made. In the absence of Zambian legislation in this area, an analogy is made with the traditional methods of payment and the British legislation. An attempt is also made to extract the applicable rules from the general principles of law and the banking practice in Zambia.

A study of the legal nature of payment orders is also made in chapter two. In particular, an analysis of a payment order is made to establish whether a payment order is a negotiable instrument, or merely a mandate from a customer to his bank.

In chapter three an analysis of banks' liability for failure to make an EFT transaction is made. This encompasses banks' liability for complete failure to effect an EFT transaction and for improper implementation of such a transaction. An analysis of the right to stop payment, completion of payment, irrevocability and banks' liability for failure to stop payment is made. A study of the banks' liability for erroneous EFT transactions is done. This includes allocation of losses resulting from errors in payment orders and errors committed by banks during the execution process of such orders. There is also a review and detailed analysis of banks' liability for unauthorized EFT transactions. Issues such as authentication of payment orders, security measures adopted by banks and allocation of losses resulting from unauthorized transactions are analyzed.

The research looks at the recoverability of damages for banks' failure to implement customers' instructions properly in chapter four. It discusses what measures of damages are applicable in certain situations such as banks' complete failure to make an EFT transaction, failure to transfer funds on time etc.

The research is completed by a summary, conclusion and recommendations in chapter five. The recommendations are focused more on the effectiveness of the Zambian law in regulating electronic funds transfer transactions in Zambia.

## **2.0 CHAPTER TWO: THE LEGAL FRAMEWORK**

### **2.1 INTRODUCTION**

The previous chapter discussed the purpose and objectives of this study that is to determine the liability of banks in electronic funds transfer transactions. In order to understand how the banks carry out electronic funds transfer transactions it is important to first understand where the banks draws authority to carryout these transactions. Therefore this chapter discusses the legal frame work in which banks operate. In the absence of Zambian legislation in this area, an analogy is made with the traditional methods of payment and the British legislation. An attempt is also made to extract the applicable rules from the general principles of law and the banking practice in Zambia.

A study of the legal nature of payment orders is also made in this chapter. In particular, an analysis of a payment order is made to establish whether a payment order is a negotiable instrument, or merely a mandate from a customer to his bank.

### **2.2 BACK GROUND TO THE LEGAL FRAME WORK**

Before 2007, there was no law in Zambia that governed the payment systems per se,<sup>1</sup> but the payment system drew its legal banking from various legislations such as: Bank of

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<sup>1</sup> National payments vision and strategy 2007 – 2011 page 15

Zambia Act 1996; Banking and Financial Services Act 1994 (BFSA); Bills of exchange Act 1882 and Cheque Act 1989. Certain aspects and developments in the payment system were not protected such as the electronic funds transfer, truncation, finality and revocability of payments in liquidation. These and other matters needed to be provided for in the law. Therefore in 2007 a new law was enacted called the national payments systems Act (No: 1 of 2007) to regulate other forms of payment.

## **2.3 TYPES OF ELECTRONIC PAYMENT SYSTEMS AVAILABLE IN ZAMBIA**

The following are the current forms of electronic payment systems available in Zambia:

### **2.3.1 M-BANKING SOLUTIONS**

Are mobile phone based payment systems. These solutions have emerged in Zambia and are being utilized by various business houses in remote areas. “Quick Pay Zoona” is one such m-banking solution used in Zambian cotton industry in the Katete and Choma areas since July 2007. Zoona allows companies to make payments cost effectively to any cell phone owner in Zambia, without the need for the individual to hold a bank account. These payments are made over any mobile phone network and customers can then transact via their mobile phone or collect their payments from an authorized cash dealer. In addition to relationships with the formal banking sector for larger payments, Zoona uses a mass market retail outlet as a branch network.

### **2.3.2 AUTOMATED TELLER MACHINES (ATM)**

This is a computerized telecommunications device that provides customers of a financial institution with access to financial transaction in a public space without the need for a human **clerk** or **bank teller**. On most modern ATMs, the customer is identified by

inserting a plastic ATM card with a magnetic stripe or a plastic smartcard number with a chip that contains a unique number and some security information, such as an expiration date or **Card Verification Code (CVC)**. **Security** is provided by the customer entering a personal identification number (PIN).

### **2.3.3 SMS BANKING PLATFORM**

Local banks are providing SMS / GSM cellular Banking facilities which enables one to coordinate and control their account inquiry activities from one cellular phone. The common facilities provided include: Online Balance inquiry on the customer's Bank accounts within the bank, online inquiry of exchange rates of the Zambian kwacha in relation to major foreign currencies, online checking of last three transactions, online inquiry of interest rates and online inquiry of loan outstanding balance.

SMS banking is as easy as sending text messages on ones mobile phone. For every transaction, there is a pre-defined Keyword. For Example, for balance inquiry the keyword maybe bal.

### **2.3.4 E-MAIL BANKING**

A service that ensures the account holders receives secure and accurate bank statement at mutually agreed intervals. The customer is required to have a valid e-mail address with any Internet Service provider. Bank statements are encrypted and e-mailed to the account holder as an attachment. An account holder is then required to enter his /her unique username and password in order to open and read their statement, thereby ensuring they are the only ones that have access to the attached bank statement.

### **2.3.5 INTERNET BANKING**

Internet Banking sometimes called online banking, provides a customer a delivery channel that presents the customer with immediate, worldwide access to his account balance and transaction information, and also allows the customer to initiate transactions information, and also allows the customer to initiate transactions from anywhere in the world. This allows you to be more efficient, more flexible and more in control of your banking transaction. An Internet banking customer accesses his or her accounts from browser software that runs Internet banking programs resident on the bank's World Wide Web server, not on the user's PC. Internet banks are also known as virtual, cyber or net banks. Security is provided by the customer entering a personal identification number (PIN)

### **2.3.6 DIRECT DEBIT AND CREDIT CLEARING (DDACC)**

DDACC is a simple, safe and speedy way to pay or receive regular bills and subscriptions electronically from or to a customer's bank account. It is an Electronic Funds Transfer payment service hosted by the Zambia Electronic Clearing House (ZECH). It has two streams – Direct debits and Direct credits. The direct debit (DD) stream is an efficient way for organizations to collect regular occurring payments from large numbers of customers. The direct credit (DC) enables the customers to make payment by electronic transfer directly into bank account.

## **2.4.0 THE LAW REGULATING ELECTRONIC FUND**

### **TRANSFER TRANSACTIONS IN ZAMBIA**

#### **2.4.1 INTRODUCTION.**

Currently there's no specific legislation that governs the Electronic Funds Transfer Transaction Payment Systems in Zambia. The Electronic Funds Transfer Transactions as a form of payment system draws it's legal backing from various legislations such as the National Payment Systems Act No.1 of 2007, Bank of Zambia Act of 1996; Banking and Financial services Act of 1994 (BFSA); Bills of Exchange Act 1882 and Cheques Act 1989; Various statutory instruments; Zambia clearing house rules and agreements between payment service providers and customers<sup>2</sup>.

#### **2.4.2 NATIONAL PAYMENTS SYSTEMS ACT. NO 1 OF 2007**

There's no specific legislation dealing with electronic funds transfer transactions in Zambia. Legislation is drawn up from various pieces of legislation from the banking sector as indicated in the introduction above. Reliance is also on banking practice following basic banking principles. In this regard Bank of Zambia has a statutory responsibility under the <sup>3</sup>National payments systems act to regulate the banks and other players in conducting electronic funds transfer transactions through issuing guidelines, directives and regulations. These regulations once issued become binding and enforceable in the courts of law<sup>4</sup>. Although there's no specific mention of the electronic funds transfer transaction as one of the payment systems in the National Payments

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<sup>2</sup> Bank of Zambia: Report on Payment systems in Zambia page 225

<sup>3</sup> The National payment Systems Act. No. 1 of 2007 sections 42 and 43

<sup>4</sup> The National payment Systems Act. No. 1 of 2007 section 43 subsection 4

Systems Act; it is presumed from the preamble of the Act that all recognized payment systems in Zambia are covered. The Act is defined *as an Act to provide for the management, administration, operation, supervision and regulation of payment, clearing and settlement systems; to empower the Bank of Zambia to develop, and implement payment, clearing and settlement systems policy so as to promote efficiency, stability and safety of the Zambian financial system; and to provide for matters connected with or incidental to the foregoing.* Therefore, the National payments systems Act No. 1 of 2007 can be regarded as a major source of the law regulating Electronic Funds Transfer Transactions in Zambia.

#### **2.4.3 OTHER PIECES OF LEGISLATION AND AGREEMENTS**

Section 3 of the Evidence (Bankers' Books) Act, Chapter 44 of the laws provides that "any entry in a banker's book shall be received in all legal proceedings as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded."

The same Act defines a banker's book so as to include a record that is electronically or magnetically generated and stored in the ordinary business of a bank <sup>5</sup>. This legal framework can therefore be regarded as supporting electronic processing although it is restrictive in that it specifically applies to banker's books in the ordinary course of business. Section 4 of the Bank of Zambia Act prescribes functions of the bank to include the formulation and implementation of bank supervisory policies that will ensure maintenance of financial systems stability and the promotion of efficient payment

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<sup>5</sup> Bank of Zambia: Report January 2006 to February 2006 [The National payment systems Self assessment workshop on the observance of the CPSS-Core Principles for Systematically Important Payment systems]

mechanisms. Section 44 of the Bank of Zambia Act states that “the Bank may, in conjunction with other financial institutions, organize facilities for the clearing of their cheques and other instruments for effecting payments; and for this purpose organize clearing systems in Lusaka and elsewhere’. With respect to the Banking and Financial services Act, although there’s no express provision regarding the participation of banks and financial institutions in the payment system, section 129A carries an implicit recognition of their participation in a clearing house or other payment system, which operates on terms and conditions approved by the Bank of Zambia.

In addition, significant reliance is placed on framework legislation, common law and a series of rules and agreements drawn up between the banks. <sup>6</sup>Agreements and contracts drawn up between the participants and Bank of Zambia in electronic payment processing are enforceable at law.

In summary it has been noticed that there’s no one specific Act that governs the electronic payment systems in Zambia. <sup>7</sup>The law covering the electronic payment systems is currently fragmented and spread over a large number of Acts, Bank of Zambia rules, regulations, agreements and common law principles.

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<sup>6</sup> Bank of Zambia: Report January 2006 to February 2006 [The National payment systems Self assessment workshop on the observance of the CPSS-Core Principles for Systematically Important Payment systems] page 10

<sup>7</sup> Interview: Face to face oral interview held on 30/10/2008 with T Kundulaki operation Manager of Invest Trust Bank Ltd

## **2.5.0 THE LEGAL NATURE OF ELECTRONIC FUNDS TRANSFER**

### **TRANSACTIONS (PAYMENT ORDERS)**

#### **2.5.1 INTRODUCTION**

After identifying the various types of electronic funds transfer transactions currently available in Zambia and also identifying the law that regulates electronic payment processing, it is important to now analyze the legal nature of the electronic fund transfer transactions. The main objective in this section is to identify the legal relationship among the parties involved in an EFT transaction.

#### **2.5.2 DEFINITION OF PAYMENT ORDERS**

(1) Payment order: <sup>8</sup>means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

- (i) The instruction does not state a condition to payment to the beneficiary other than time of payment,
- (ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
- (iii) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

#### **2.5.3 FUNDS TRANSFER - DEFINITIONS.**

Funds transfer: <sup>9</sup>means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term

includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

#### **2.5.4 THE LEGAL RELATIONSHIP**

It is clear from the two definitions above that there's a legal relationship created amongst the parties involved in funds transfer transactions. In the absence of a specific Zambia law on this matter, the principles found in the English bills of exchange Act of 1882 section 96 (2) helps to identify the legal relationship that can be likened to a customer and banker relationship, that's a debtor and creditor<sup>10</sup>. Therefore both parties have responsibilities to ensure that the EFT transaction is finalized in good faith. A banker has a responsibility to ensure that payment orders are executed according to customer instructions and the customer has a responsibility to ensure that payment orders are drawn properly following the required procedures these are responsibilities and duties of both the Banker and the Customer.<sup>11</sup>

#### **2.6 SUMMARY OF CHAPTER TWO**

In this chapter a discussion of the legal frame work has been done. Various electronic funds transfer transactions available in Zambia have been identified and the legal Nature

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<sup>8</sup> U.C.C. - Article 4a - Funds Transfer

<sup>9</sup> U.C.C. - Article 4a - Funds Transfer

<sup>10</sup> English bills of exchange Act of 1882 Section 96 (2)

<sup>11</sup> Mumba Malila; Commercial Law in Zambia Cases and Materials UNZA 2006 page 410 - 420

of electronic fund transfer transactions has been determined. Therefore in Chapter 3 a discussion of the Banks liability will be made under the following circumstances:

Bank's liability for failure to make an EFT transaction; The bank's right to stop payment orders; The Bank's liability for failure to stop an EFT transaction; The banks liability for erroneous EFT transactions and The bank's liability for unauthorized EFT transactions.

### **3.0 CHAPTER THREE - THE LIABILITY OF BANKS IN ELECTRONIC FUNDS TRANSFER TRANSACTIONS.**

#### **3.1 INTRODUCTION**

Although the National Payment Systems Act No: 1 of 2007 is the supreme law regulating the payment systems in Zambia, it does not specifically cover the electronic funds transfer transactions.<sup>12</sup> This law does not specifically outline the duties and responsibilities of each party in the electronic payment system. There are rules which are developed by the payment systems provider or participants. The payment system developed has to be designated by Bank of Zambia<sup>13</sup> Once a payment system has been designated it becomes recognized (Approved) by bank of Zambia. Therefore, the system will be regulated according to the provisions of the National payment systems Act<sup>14</sup>. This means that we have different rules regulating each type of electronic payment systems.

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<sup>12</sup> National payment systems Act No: 1 of 2007 Section 3

<sup>13</sup> National payment systems Act No: 1 of 2007 Section 5 (1).

<sup>14</sup> Interview: Face to face oral interview held on 29/12/2008 with Mr. W. Chishimba Director National payment Systems at Bank of Zambia

<sup>16</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator Bankers Association of Zambia.

Examples of electronic payment systems currently available and recognized by the law are: The point of sale as an electronic form of payment system which is regulated by the VISA, MasterCard and American express rules. The other example is the Direct Debit and Credit system (DDAC), this is regulated by the DDAC rules and the Zambia National Clearing House rules and the ZAMLINK provides rules for Zambian banks providing Automated Teller Machines services which are members of ZAMLINK. Currently ZAMLINK members are Finance bank, Investrust and Zambia National Commercial Bank. The other most important source of regulation for both the banker and the customer is the code of banking practice in Zambia this creates a contractual relationship between the bank and the customer<sup>15</sup>.

### **3.2 BANK'S LIABILITY FOR FAILURE TO MAKE AN ELECTRONIC FUND TRANSFER TRANSACTION**

For the purpose of this study electronic fund transfer transactions has been restricted to the following: DDAC, Point of Sale (POS), Real time gross settlement (RTGS) and Automated Teller Machines as a form of electronic funds transaction. These are the most popular forms of electronic funds transactions in Zambia. The duties and responsibilities of each party to an electronic fund transaction are determined by the rules set by each particular payment system and also by the code of banking practice in Zambia.<sup>16</sup>

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<sup>15</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator Bankers Association of Zambia.

<sup>16</sup> Interview: Face to face oral interview held on 29/12/2008 with Mr. W. Chishimba Director National payment Systems at Bank of Zambia

<sup>18</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator Bankers Association of Zambia.

Therefore the liability of Banks for failure to make an EFT transaction is outlined in the rules of the payment system being applied to effect a transaction. For example if there's need to determine the liability of the bank for failure to effect a DDAC transfer, one need to use the DDAC rules, the Zambia Clearing House rules and also the DDAC guarantees which are outlined on the DDAC form. The DDAC instruction will have the date of effecting a transaction, the amount, the payer and the payee. In this way there's a contractual relationship which is created amongst the parties to the transaction. This means apart from relying on the payment systems (DDAC Rules) rules, there's also a possibility of using contract law and common law principles to arrive at the Liability of the bank.<sup>17</sup> The other example is when there's a failure to effect a point of sale transaction. In a situation where a client get goods from the supermarket and pays using a VISA card, however the bank delays to debit the client's account or does not debit the client's account until the client withdraws all the money from his or her account. In this case there's a contract between the Supermarket and the Bank, the Bank has assured the supermarket that the client has money in the account. Therefore the VISA, MASTER CARD and American Express rules including the Code of Banking practice will be used to determine, the Liability of the Bank to the Supermarket and the Liability of the Client to the Bank.

### 3.3 THE BANK'S LIABILITY FOR FAILURE TO STOP AN ELECTRONIC FUNDS TRANSFER TRANSACTION

There are circumstances when it becomes necessary to stop an EFT transaction for example, a DDAC agreement comes to an end when the contractual period has expired. The best example is a loan repayment deduction which must come to an end when the loan is fully paid. What happens if the bank continues deducting the loan repayment amount from the client's account? What law does one apply to determine the Liability of the bank? Another example is when an ATM card is stolen and the bank is fully informed backed by a police report. However, the bank does not change parameters to the clients account so that the card cannot be used. If the card continues to be used by the thief and the client money is stolen. Another example is when a client wants to cancel the payment order and informs the bank in writing that the order must be cancelled or must not be effected. However the bank does not stop the order as per client instruction. In all these circumstances, the code of banking practice under chapter six provides guidelines of how to determine the liability and what a client must do as a safeguard<sup>18</sup>. In addition the DDAC rules and the Guarantees stated on the DDAC forms outlines the liabilities of each party to the transaction in case of failure to stop the transaction. Contract law and common law principles are applied since EFT transactions are drawn up as contractual agreements amongst the parties involved<sup>19</sup>. Failure to stop a transaction in this case means breach of contract on one party. It is important to note at this point that EFT orders

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<sup>18</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 pages 26 - 29

<sup>19</sup> Interview: Oral interview held on 29/12/2008 with Mr. W. Chishimba Director of payment systems Bank of Zambia.

to the bank are like cheque transactions, the same process is followed except that in EFT transactions there's minimal paper work involved. Therefore the same contractual principles are followed to stop the payment orders as requested by the client<sup>20</sup>. In the case of Mellon Bank N.A. v Securities Settlement corporation.<sup>21</sup> The court held that a bank which executed a payment order in a funds transfer and made payment to the beneficiary's bank could not recover the payment from it's customer because the bank failed to exercise ordinary care to cancel the payment order when instructed to so by the customer. The current law (National Payment Systems Act) does not regulate these issues; they are however dealt with using common banking practice.

### **3.4 THE BANKS LIABILITY FOR ERRONEOUS EFT TRANSACTIONS**

Sometimes banks make errors while effecting clients EFT transactions. Common errors are over payment, paying to a wrong payee, overcharging clients accounts with bank charges especially when dealing with foreign transactions and bulk electronic transfer transactions (example salaries). In this situation the client will rely on the order sent to the bank to effect the EFT transaction. If an error is through the ATM one needs to be aware of the notice requirement provided for in chapter six of the code of banking practice<sup>22</sup>. In case there's a loss due to the error committed by the bank, then chapter six of the code of banking practice can be applied. Chapter 6.5 outlines what the client must do when there's a loss and chapter 6.6 specifies the responsibilities for losses. In the case

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<sup>20</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator Bankers Association of Zambia.

<sup>20</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 27

<sup>21</sup> Mellon Bank N.A. v Securities Settlement Corporation 710 F.Supp. 991 (D.N.J. 1989)

of Real time gross settlement system, the rules of the participants will apply. RTGS are urgent and large value transactions that are transacted between banks, if there's an error in executing the RTGS, this might cause a huge loss to the client, therefore banks have set specific time frames in executing these large volume transactions, therefore it is from these rules and contractual obligations that must determine the liability of the bank<sup>23</sup>. For the DDAC it is easier to determine the liability since the agreement is very specific, for example if a client has authorized the bank to deduct K250,000.00 per month for electricity payable to ZESCO and the bank deducts K150,000 and ZESCO cuts power. The agreement which is the binding contract with the bank will help to establish the liability, in addition contract law will apply since there's breach of contract. The delay in effecting a DDAC to ZESCO resulting in ZESCO cutting power from the client's home will be treated as a breach of contract and the bank may be liable to pay damages arising from its delay to effect a DDAC transaction.

### **3.5 THE BANK'S LIABILITY FOR UNAUTHORIZED EFT TRANSACTIONS.**

Unauthorized EFT transactions are similar to erroneous transactions in the sense that the bank has carried out an electronic fund transfer transaction which is not allowed by the client. This involves the bank paying more than what it has been authorized to do or paying less than what it has been authorized. It may also involve paying to a wrong payee. In terms of ATM cards, this might involve the bank allowing a non-card holder

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<sup>23</sup> Interview: Oral interview held on 29/12/2008 with Mr. W. Chishimba Director of payment systems Bank of Zambia.

(thief) using a card to withdraw money from the client's account. For example unnamed husband got an ATM card from the wife's hand bag and withdrew cash from a joint bank account in the night without her wife's consent. The following day the wife noticed that the balance had reduced and accused the bank of getting her money. After making a lot of noise on several occasions, the bank carried out an investigation with the help of the police and it was determined that the husband had been withdrawing cash in the night without her consent. She was shown a video of the husband getting cash on the ATM in the night. The bank directed the wife to read the code of banking practice and also the ATM rules in order help her understand the responsibilities of the bank and herself as a client<sup>24</sup>. This example illustrates the principle that for an authorized EFT transaction, it is difficult to determine the liability of the bank, since in most cases it involves fraud. It is difficult for the bank to carryout a transaction on behalf of the client without instructions or an order to the bank. Chapter five and six of the code of banking practice outlines the guidelines of determining the liability<sup>25</sup>. In addition the principles used under erroneous transactions are also applied here. In the case of Bank of Zambia v Attorney General,<sup>26</sup> it was held that the basis of a bank's liability where it has paid on a forged instrument is not negligence but because money has been paid away without the authority of the customer, the bank is held responsible for the loss. In this case the Bank paid on forged cheques and claimed that the client was negligent.

### **3.6 CHAPTER SUMMARY**

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<sup>24</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator

Bankers Association of Zambia

<sup>25</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 17-29

<sup>26</sup> Bank of Zambia v Attorney General (1974) ZR 24

In this chapter a discussion of the Banks liability is made under the following circumstances: Bank's liability for failure to make an EFT transaction; The Bank's liability for failure to stop an EFT transaction; the banks liability for erroneous EFT transactions and the bank's liability for unauthorized EFT transactions. It is noticed from the discussion in this chapter that the liability of banks in most of the EFT transactions are determined from the rules of each payment systems put in place by participants and recognized by bank of Zambia. It is also noticed that contract law plays a major role in the execution of EFT transactions and finally the code of banking practice is a source document in determining liability of each party to an EFT transaction in Zambia. Therefore in the next chapter (Chapter four) a discussion of consumer rights in electronic funds transfer transactions will be made, an analysis of damages for bank's failure to make an EFT transaction, erroneous transactions, failure to stop an EFT and determination of damages for unauthorized EFT transaction will be made and an analysis of how damages are awarded.

## **4.0 CHAPTER FOUR**

### **CONSUMER RIGHTS AND REMEDIES IN EFT TRANSACTIONS**

#### **4.1 INTRODUCTION**

In the previous chapter a discussion of the Banks' liability has been made, therefore in relation to the banks' liability a discussion of how consumers are protected and the remedies available is important. In this chapter a discussion of consumer rights in electronic funds transfer transactions is made, an analysis of damages for bank's failure

to make an EFT transaction, erroneous transactions, failure to stop an EFT and determination of damages for unauthorized EFT transaction is made.

#### **4.2 PROTECTION OF CONSUMER RIGHTS IN ELECTRONIC FUNDS TRANSFER TRANSACTIONS**

Consumer rights in electronic funds transfer transactions are protected in a number of ways depending on the type of the payment system being used. The source of this protection is Bank of Zambia as the regulating authority which derives its regulatory authority from the National Payment Systems Act chapter of 1 of 2007<sup>27</sup>. Under section 5 the Bank of Zambia is empowered to regulate all payment systems in Zambia. Bank of Zambia issues regulations and orders so that the integrity of the payment is maintained.

The Bankers Association of Zambia has developed standard operating guidelines for all member banks in Zambia. These guidelines have been approved by Bank of Zambia as a regulating authority and they have been adopted by all commercial banks in Zambia who are members of the Bankers Association of Zambia as binding best practice operating guidelines. These guidelines are called the Code of Banking Practice in Zambia. The Code of Banking Practice in Zambia offers a contractual relation between the bank and the consumer. Banks follow the provisions in the Code when serving clients any departure from the operating guiding lines provided in the Code will be breach of the Code. In this way customers are protected. Other consumer protection is derived from the

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<sup>27</sup> Preamble of the National payment systems Act No: 1 of 2007. An Act to provide for the management, administration, operation, supervision, regulation of payment clearing and settlement systems; to empower the Bank of Zambia develop and implement payment, clearing and settlement systems policy so as to promote efficiency, stability and safety of the Zambian Financial System; and to provide for matters connected with or incidental to the for going.

providers of the payment system for example the Zambia Interbank and settlement system (ZIPSS) is managed and operated by Bank of Zambia as a settlement provider. Bank of Zambia has developed rules and procedures which all member banks follow in order to protect the (client) consumer. The ZIPSS operates in sessions called windows, there's a window which is open from 08: 15 to 10:30 hours, and the other one is from 10:30 to 14:30 hours and finally from 14:30 to 15:15 hours. The other rules put in place are the control of service charges which are determined according to the Bank of Zambia policy on charges. In this way consumer rights in terms of using the ZIPSS are protected by the system provider which is Bank of Zambia<sup>28</sup>. What are the consumer rights that are protected in electronic funds transfer transactions?

#### **4.2.1 CONFIDENTIALITY**

Banks treat personal information as private and confidential even when a client is longer bank customer. Nothing about the client account nor name and address can be disclosed to anyone, including other companies, other than in four exceptional cases permitted by law. These are: where the bank is legally compelled to do so, where it is in the public interest to do so, where the bank interest requires disclosure and finally where the client has requested and consented in writing<sup>29</sup>. Since there no law which allows banks to disclose account details to the credit beaurea, banks require new clients to consent by way of

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<sup>28</sup> Bank of Zambia website: [www.boz.zm/paymentsystems\\_zipss.htm](http://www.boz.zm/paymentsystems_zipss.htm) dated 29/12/2008

<sup>29</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 25

signing on a bank form, agreeing in advance for the bank to disclose the clients details to the credit beaurea<sup>30</sup>.

#### **4.2.2 PROTECTING CLIENT BANK ACCOUNT**

Banks requires a client to produce a valid identity card when making cash withdraws. Banks provides an electronic card with a unique (PIN number) personal identification number which works like a password. The PIN is only known by the client. Further more banks provide safeguarding measures by providing information to clients on how to keep their electronic cards, how to keep the PIN secrete without others knowing it. For example clients are advised by banks never to write down or record PIN, password without disguising it. Clients are also advised to be alert to the risk of muggings and card swapping when using an ATM to do their transactions. It is essential that clients report to the bank if they suspect or discover that their electronic purse or card has been stolen or lost or someone knows the PIN or password. In a decided Zambian case involving a young girl aged 8 years. It was held that the mother of the little girl was negligent<sup>31</sup>. The brief facts of the case are as follows; the girl was watching her mother withdrawing cash on a number of occasions. On the material date the girl stole her mother's electronic card and went with her cousins to the ATM and got cash exactly the way her mother used to do<sup>32</sup>. The security guard could not stop her because the girl was so precise and confident

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<sup>30</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator  
Bankers Association of Zambia

<sup>31</sup> Interview: A. C. Kalulu 29/12/2008 (Names of the parties to the case and year withheld due to the confidentiality requirements in Banking profession).

<sup>32</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator  
Bankers Association of Zambia

in the manner she used the Card on the ATM machine. The mother reported the matter to the bank and accused the bank of stealing her money. After carrying out an investigation the bank discovered that it was her little daughter who was stealing the money. This was confirmed through a video which was recorded while the girl was withdrawing the money. Banks has put up ATMs with monitoring devices which record all what is happening while people are withdrawing funds. The importance of this case is that once a client reports that his PIN or password has been lost or stolen or that someone else knows the client's PIN, the bank will take immediate steps to prevent the card from being used to access the client's account<sup>33</sup>.

#### **4.2.3 PROTECTING AGAINST LOSSES**

Based on the Code of Banking Practice, the bank will refund the client the amount of any transaction together with any interest and charges in the following circumstances:

- i. Where the client have not received the electronic card and it is misused by someone else, for all unauthorized electronic transfer transactions,
- ii. Electronic transfer transactions effected by the bank after the stop order by the client has been issued and acknowledged by the bank,
- iii. If additional money is transferred from a client account to the payee by error or mistake of the bank and the client has informed the bank and the bank has acknowledged it and finally where faults have occurred in the ATMs, or associated systems used, which were not obvious or subject to a warning message or notice at the time of use<sup>34</sup>.

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<sup>33</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 27

<sup>34</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 27 - 28

In all these instances the bank will expect the client to report all incidents of stolen cards or fraudulent transactions to the police for investigation. A copy of the police report should be made available to the bank. A case example of reporting to the police and the bank in time was illustrated by Ms. Annie Kalaulu in unreported case in which a Zambian businessman's lost money from his bank account. The businessman's son discovered his father's PIN; therefore the son started stealing money from his bank account. The boy used to wake up around 01:00 hours when his father is sleeping. He would go to the ATM and withdraw huge sums of money for drinking with his friends. It took his father sometime to discover that funds were missing from his bank account. The father accused the bank of negligence and demanded the arrest of the culprit. The bank with the help of the police carried out an investigation and apprehended the son while he was trying to withdraw money in the night. The boy was locked up in the police cells and the father was called to come and see the thief. The father was very excited; however upon seeing that it was his son who was behind the bars, he became very disappointed<sup>35</sup>. The significance of this case story is that clients are protected by the banks through use of PIN and putting monitoring devices at ATMs, however the client has the responsibility of safeguarding the electronic card and ensuring that the PIN is not known to any one else.

#### **4.3 DISPUTE RESOLUTION AND DETERMINATION OF DAMAGES**

According to the code of banking practice in Zambia, when a client has a dispute or complaint about the service of the bank, for example failure to effect a DDAC on time, errors on electronic fund transfer transactions, non-compliance to client instructions, a

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<sup>35</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator

client must follow the internal procedures which the bank has. If a client is not satisfied then the matter must be reported to the Chief Executive of the bank. If for some reason the client is still in dispute with the bank even after reporting to the Chief Executive of the bank, then the client has a right to write to the Chairman of the Bankers Association of Zambia enclosing copies of all correspondences<sup>36</sup>. The Chairman of the Bankers Association of Zambia shall consider the dispute and will then place the matter before a Banking Adjudicator and advise the client of the action taken by the Adjudicator. The composition of the Adjudicator appointed by the Bankers Association of Zambia is a team of three independent persons. These are appointed from the banking and legal industry with relevant experience. The Banking Adjudicator is available to the client at no cost to rule or recommend on any complaint which the client and the bank may not have been able to resolve. The banking Adjudicator is entitled to make recommendations or ruling based on the law and the Zambia Electronic Clearing House rules where the law is reasonably certain or a recommendation based on the code of banking practice in Zambia where the law is uncertain. If the bank declines to accept any recommendation, which the banking Adjudicator makes, then the Banking Adjudicator may by discretion publish the fact that a recommendation was made and the bank refused to accept it. It is at this point that the client may be advised to seek court redress. Therefore, the Banking Adjudicator has the responsibility of dispute resolution and also making sure that the correct remedies or damages are awarded to the client. All banks in Zambia who are members of the Bankers Association of Zambia are automatically subjected to the jurisdiction of the Banking Adjudicator. Ms. Kalulu gives an example of a dispute

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<sup>36</sup> The Code of banking practice in Zambia by the bankers' Association of Zambia edition 1 page 31

between a teacher and National Savings and Credit Bank (NATSAVE) where a teacher was transferred from a rural area to Lusaka. The teacher's original pay point before the transfer was Zambia National Commercial Bank. However due to the transfer, the point was changed to National Savings and Credit Bank (NATSAVE). At NATSAVE, there was a client with same details as the Teacher, i.e. same first name and last name and this client was also a teacher. Funds were transferred from Zambia National Commercial Bank to NATSAVE and this other teacher kept on withdrawing the money. The owner of the money was being told that there's no money in his account. This problem was caused by the cashier who was paying based on the names, she never confirmed the identify card whether it was matching with what is on the bank account. This was an error by NATSAVE. After NATSAVE and the true owner of the money failed to resolve the dispute the matter was taken to the Bankers Association of Zambia and the Adjudicator ruled that NATSAVE must give the true owner his money because there was negligent on the part of their cashier who never confirmed details on the identity cards.<sup>37</sup> Courts also play a very big role in dispute resolution and awarding damages to clients. In the Zambian case of Graphic Africa limited v Barclays bank of Zambia limited & RDS Investments Limited & Ronald Penza<sup>38</sup>

#### **4.4 SUMMARY OF CHAPTER FOUR**

In this chapter a discussion of consumer rights in electronic funds transfer transactions has been made, an analysis of damages for bank's failure to make an EFT transaction,

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<sup>37</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator

Bankers Association of Zambia

<sup>38</sup> Graphic Africa limited v Barclays bank of Zambia limited & RDS Investments Limited & Ronald Penza (1995) SCZ Judgment No. 17

erroneous transactions, failure to stop an EFT, determination of damages, dispute resolution and how the Bankers Association of Zambia assist in resolving disputes. In the next chapter (chapter five) an analysis of the effectiveness of the current law is made in relation to the determination of Banks liability in electronic funds transfer transactions and protection of consumer rights. Conclusions and recommendations are made for future developments.

## **5.0 CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 INTRODUCTION**

This chapter wraps up the research findings by spreading out the main issues and subjecting them to a critique and also comparison with other jurisdictions with similar National payment systems. The chapter is completed by recommendations for future improvements to the current legal framework. The research paper has laid out the research as it was empirically observed and understood.

### **5.2 CONCLUSIONS OF RESEARCH FINDINGS**

This section of the research paper attempts to lay down the findings of the research in a manner as objective as possible. The findings in this research and the conclusions as they follow were personally investigated and researched by the author. In most errands to the targeted commercial banks and regulating bodies, the author discovered that the people interviewed were hostile not willing to share their experience, disclose information and even to fill in the questionnaire. This is due to the banking profession ethics. But with the help of few staff from Bank of Zambia, Bankers Association of Zambia, Zambia Electronic Clearing House and Investtrust Bank, who have always been involved in setting up the National payment systems in Zambia, understood my research objectives

and were very helpful and made this research smooth and interesting. In setting out the conclusions and recommendations, the author wished to state that all the sentiments presented in this research paper and the analysis of issues was and still is according to the happenings and particular situation at the time of the research.

### **5.2.1 AN ANALYSIS OF THE CURRENT LAW IN EFTS**

In Zambia the law regulating electronic funds transfer transaction is derived from the National payment systems Act No: 1 of 2007. The Act under section 5 empowers bank of Zambia to monitor and provide oversight to the electronic payment systems providers. Bank of Zambia analyses and approves various payment systems in the country. This function is provided for in section 5 and 7 of the Act. Bank of Zambia also gives directions and orders of how to operate the payment system under section 6. However, there are no specific provisions in the Act in relation to the various payment systems. Each payment system has developed its own rules and regulations. For example the point of sale type of payment system has its own rules, the direct debit and credit (DDAC) has its own rules, ZAMLINK has its own rules developed by the member banks. Bank of Zambia as the provider of the ZIPSS has developed rules and procedures for the participants. Participants also rely on the contract law principles, case law and general principles of banking practice. In conclusion, the law regulating electronic payment system in Zambia is fragmented in various rules and procedures that have been developed by the electronic payment systems providers and designated by Bank of Zambia<sup>39</sup>. In

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<sup>39</sup> Interview: Oral interview held on 29/12/2008 with Mr. W. Chishimba Director of payment systems Bank of Zambia.

addition the Bankers Association of Zambia has developed the Banking code which is followed by all the banks in the country. The Bankers Association of Zambia has put in place the Banking Adjudicator to adjudicate over disputes which arise between Banks and their clients. The Adjudicator is composed of three members chosen from the banking industry and the law industry. The team meets two times in a month to look at reported cases. The committee uses the law and also applies the principles of banking practice and the Banking code in Zambia.

### **5.2.2 THE WEAKNESSES OF THE LAW REGULATING ELETRONIC FUNDS TRANSFER TRANSACTIONS IN ZAMBIA**

Although there's a National Payment Systems Act as the law put in place to regulate the payment systems in the country. It is evident from the research that there are no specific provisions in the Act to deal with the various electronic fund transfer payment systems. The effect of this gap in the law being that we have uncoordinated pieces of legislation and guiding principles being used to regulate the electronic funds transfer transactions. In comparison to other jurisdictions like the United Kingdom, Australia and the United States of America. It is noted that in the United Kingdom for example; the National Payment System has clear provisions to deal with Electronic payment systems like the Debit cards, Point of sale cards, Direct Debit cards and postal instruments<sup>40</sup>. In Australia there's a specific Banking code to deal with the electronic funds transfer Transactions called the Electronic Funds Transfer Code of Conduct<sup>41</sup>. In this regard the the Central Bank of Australia and Australian Securities and Exchange Commission is able to regulate

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<sup>40</sup> The British Association of Bankers: Code of Banking Practice 2008 edition

<sup>41</sup> AIS: Electronic Funds Transfer Code of Conduct 2008 edition

the conduct of banks in conducting the Electronic Funds Transfer business; this is a great consumer protection. The Codes are formulated by the Australian Securities and Exchange Commission for the purpose of regulating the banks' operations and the codes are administered by the Central Bank of Australia. In the United States of America there's a specific Banking Code called the Uniform commercial code article 4 "Funds Transfers". Article 4 governs funds transfers made through the banking system and allocates the risk of losses between the parties<sup>42</sup>.

From this analysis it is concluded that Zambia lacks a comprehensive statute to establish rules for funds transfer transactions. More over Zambian case law does not address the issue of electronic funds transfer transactions.

### **5.2.2 THE LIABILITY OF BANKS AND PROTECTION OF CONSUMER RIGHTS IN ELECTRONIC FUNDS TRANSFER TRANSACTIONS**

It has been discovered in the research that Zambia lacks a comprehensive statute to establish rules for funds transfer transactions; therefore the liability of banks is derived from the contractual relationship between the bank and the client. The other way is through the rules developed by the payment system provider for example the direct debit and credit system (DDACC) provides guarantees to the customer as follows<sup>43</sup>:

- i. The customer expect the value to be credited or debited to his account within 24 hours

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<sup>42</sup> New Jersey Law Revision Commission: 1989 Report and Recommendations Relating to Article 4A of the uniform commercial code

<sup>43</sup> Bank of Zambia website: [www.boz.zm/paymentsystems\\_directdebit.htm](http://www.boz.zm/paymentsystems_directdebit.htm)

- ii. The client is expected to be refunded in case of error
- iii. Claim settlement within 14 days
- iv. The payer may cancel or stop the payment 4 days before payment date.

If the bank fails to satisfy the client needs or breaches one of the guarantees then the client can rely on these rules to determine the liability of the bank. Consumer rights are provided for in the same manner, each payment systems provider has rules to protect consumer rights, and for example the ZAMLINK provides that an electronic card holder of any member bank of ZAMLINK can access cash using any ATM of the ZAMLINK member bank. Each member bank to ZAMLINK has provided information to their clients on how to safeguard their electronic cards and every client has a unique personal identification number (PIN). The bankers Association of Zambia has developed the Banking code in Zambia which is a standard practice accepted by all the member banks. The code has provisions outlining liabilities of banks and how consumers are protected. The weakness of the current systems of determining banks liability and consumer protection in electronic funds transfer transaction has been found to be lack of coordination. As the research shows each system provider has its own rules, some of the rules may not suit the Zambian setup for example the point of sale payment system which uses the VISA and American express rules. They may be difficult to implement in Zambia. The rules are not legally binding on members or payment systems providers, they are standard operating principles, and therefore they have to be interpreted by the courts in line with the National payment systems act. This makes the electronic funds transfer transaction system legally complicated in Zambia<sup>44</sup>. The law is fragmented in various rules, standard practice procedures and the banking principles. The Adjudicator

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<sup>44</sup> Interview: Oral interview held on 4/11/2008 with T Kudluck operations Manager Investrust Bank.

put in place by the Banker Association of Zambia to adjudicator on disputes between banks and clients may not be very effective in enforcing banks liability in the sense that this is not a legally constituted body like the courts tribunal e.g. the Lands Tribunal or the tax tribunal. Some of the players in the electronic funds transfer transactions are not members of the Bankers Association of Zambia like the participants in the point of sale transactions which include supermarkets, Bars and Hotels; therefore regulation in this matter is difficult. In conclusion to establish the liability of the bank in electronic funds transfer, one need to understand the payment system being used or followed, the banking code in Zambia and the contractual relation created between the bank and the client.

### **5.3.0 RECOMMENDATIONS**

Having highlighted various problems facing the national payments systems in Zambia to regulate electronic fund transfer transactions, it is the wish of the author of this research paper to recommend a few key things that are seen to be relaxed and should be strengthened to enhance the law dealing with electronic funds transfer transactions in Zambia, so that both consumers and banks are legally protected. The law must be coordinated and easy to understand by users.

#### **5.3.1 THE NATIONAL PAYMENT SYSTEMS ACT NO: 1 OF 2007**

Technological advances, especially in the areas of electronics and computers, have revolutionized the banking industry. These improvements in technology have permitted banks to automate operations and reduce the volume of paper necessary for transactions. One system affected by the technology revolution is the National Payment system in Zambia. Traditionally cheques have been used to make payments. Today, however, electronic fund transfers satisfy a substantial volume of commercial obligation without

the issuance of a cheque. However, the development of legal principles has not kept pace with technological change in the banking industry. Consequently, the current Zambian law (national payments systems Act No: 1 of 2007) on electronic payments does not reflect actual commercial practices in the country. Therefore it is recommended that amendments to the National Payments Systems Act be made so that specific provisions dealing with electronic funds transfer transactions are put in the Act. This will make the law clear on the regulation of the Electronic Funds Transfer transactions in Zambia. In the United states for example, there's a specific Law dealing with the electronic funds transfer transactions called the Federal Electronic Funds Transfer Act of 1978 (EFTA)<sup>45</sup>.

### **5.3.2 BANKING CODE IN ZAMBIA**

The current Banking Code in Zambia is too general and does not cover most of the consumer rights and liabilities of the banks in electronic funds transfer transactions. For example liabilities for ATM failure are not clearly covered and in most cases the provisions do not state how much or the value of remedies available to either a customer or the bank in the event of breach of the code. For example if the bank fails to carry out a DDACC what is the penalty? The code is not specific in some areas like this and one will not find the answer to the question posed. Therefore it is recommended that the current code be revised and a comprehensive Electronic Funds Transfer Code of Conduct in Zambia be put in place which will cover more issues to do with electronic funds transfer transactions. This must be a separate code from the general code. Zambia can learn from Australia, the Australian Securities and Investment commission have developed a comprehensive Electronic Funds Transfer Transactions Code of Conduct, which is more detailed and specific to the Electronic Funds Transfer Transactions.

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<sup>45</sup> Federal Electronic Funds Transfer Act of 1978 (EFTA) regulation No: E

### 5.3.3 THE BANKERS ASSOCIATION OF ZAMBIA ADJUDICATOR

The Adjudicator appointed by the Bankers Association of Zambia is legally toothless since it has no legal backing. It is simply a corporate governance issue put in place by the Association to monitor the standard of performance by member banks. Some banks like the National Savings Bank (NATSAVE) are not members of the Bankers Association of Zambia, therefore, the functions of the Adjudicator doesn't cover it. There are other institutions involved in the Electronic Funds transfer transactions which are not members of the Association like the Hotels and Supermarkets. This makes the scope of the Adjudicator limited to the member banks<sup>46</sup>. Therefore it is recommended that a legally constituted adjudicating body be put in place, which will function like a court tribunal. This will make its decisions legally binding on the parties involved, its scope will be widened and dispute resolution will be enhanced. The proposed banking tribunal must be appointed by the government through the recommendation from Bank of Zambia, the Bankers Association of Zambia, the Law Association of Zambia and other professional bodies.

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<sup>46</sup> Interview: Face to face oral interview held on 29/12/2008 with Mrs. A. C. Kalulu Administrator

## **BIOGRAPHY**

### **a) ORAL INTERVIEWS:**

- i. Interview: A. C. Kalulu 29/12/2008  
Professional and work experience
- ii. Interview: Interview: T Kudluck 4/11/2008  
Professional and work experience
- iii. Interview: W Chishimba 29/12/2008  
Professional and work experience

### **b) COURT CASES:**

- i. Bank of Zambia v Attorney General (1974) ZR 24
- ii. Graphic Africa limited v Barclays Bank of Zambia limited & RDS Investments Limited & Ronald Penza (1995) SCZ Judgment No. 17
- iii. Mellon Bank N.A. v Securities Settlement Corporation 710 F.Supp. 991 (D.N.J. 1989)

### **c) STATUTORY MATERIALS:**

- i. The Banking and Financial Services, Act Cap. 387 of the laws of Zambia
- ii. The Bank of Zambia, Act No. 43 of 1996
- iii. The National payment systems, Act No. 1 of 2007

### **d) TEXT BOOKS**

- i. Mumba, Commercial Law in Zambia Cases and Materials (University of Zambia: At the UNZA press 2006)

**e) REPORTS**

- ii. Bank of Zambia (February 2006): National payment systems Self assessment workshop on the observance of the CPSS-Core Principles for Systematically Important Payment systems.
- iii. Bank of Zambia ( February 2007); 2007 – 2011 National payment system Vision & Strategy
- iv. Minister of Finance and National Planning: May 2004 [2004 – 2009 Financial Sector Development Plan]
- v. New Jersey Law Revision Commission: Report and Recommendations Relating to Article 4A of the uniform commercial code 1989

**f) CODES OF BANKING PRACTICE:**

- vi. Australian Securities and Investment commission: Electronic Funds Transfer Code of Conduct 2008 edition
- vii. BAZ: Code of Banking Practice in Zambia first edition 2008
- viii. The British Bankers Association: Banking Code 2008

**g) WEBSITES:**

- i. Bank of Zambia website: [www.boz.zm/paymentsystems\\_zipss.htm](http://www.boz.zm/paymentsystems_zipss.htm)