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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.104/2013**
HOLDEN AT LUSAKA

BETWEEN:

IN THE MATTER OF:	**SECTION 10 OF THE BANKING AND FINANCIAL SERVICES ACT, CAP 387 OF THE LAWS OF ZAMBIA**
AND	
IN THE MATTER OF:	**ACCESS FINANCIAL SERVICES LIMITED**
AND	
IN THE MATTER OF:	**ACCESS LEASING LIMITED**
AND	
IN THE MATTER OF:	**THE IMPLEMENTATION OF THE LIQUIDATION SCHEDULE**

CORAM: **MAMBILIMA, CJ, HAMAUNDU AND KAOMA, JJS;**
On the 1st October, 2015 and 3rd February, 2016.

For the Appellant:	**Mr. Nchima NCHITO, SC of Messrs. Nchito and Nchito.**
For the Respondent:	**Mr. John P. SANGWA, SC and Mr. K. CHENDA of Messrs. Simeza Sangwa and Associates.**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO-

1. **ATTORNEY-GENERAL (NT) V. KEARNEY (1985) HCA 60;**
2. **ROSEMARY CHIBWE V. AUSTIN CHIBWE (2001) ZR 1;**
3. **WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172;**
4. **O'ROURKE V. DARBISHINE (1920) AC 581;**
5. **BUTTES GAS AND OIL CO. V. HAMMER (NO. 3) (1980) 3 ALL ER 475;**
6. **DERBY & CO. LTD V. WELDON (NO. 7) (1990) 3 ALL ER 161;**
7. **WILLIAMS V. QUEBRADA RAILWAY LAND AND COPPER CO. (1895) 2 CH 751;**
8. **FINERS (A FIRM) AND OTHERS V. MIRO (1991) 1 ALL ER 182;**
9. **BARCLAYS BANK PLC AND OTHERS V. EUSTICE AND OTHERS (1995) 4 ALL ER 511;**
10. **GREENOUGH V. GASKELL (1833) 1 M & K 98; AND**

affidavit in support of the main matter. They contended that the said documents contained information which was protected by legal professional privilege as they were memoranda exchanged between the Appellant and its in-house Counsel, in the course of Counsel providing legal advice to the Appellant. The Application was filed pursuant to Order 14A of the **RULES OF THE SUPREME COURT[1], 1999 EDITION** supported by section 10 of the **HIGH COURT ACT[2]** and the **ENGLISH LAW EXTENT OF APPLICATION ACT[3]**.

The issues that were the subject of the application were contained in the Respondent's affidavit in support of summons for production for inspection of documents and in support of the application to appoint a referee pursuant to Order 24 Rule 11(2) of the **RULES OF THE SUPREME COURT[1]** and Order 30 Rule 1of **THE HIGH COURT RULES**. Following the filing of the said affidavit, the Appellant filed a notice of intention to raise a preliminary issue on a point of law, pursuant to order 14A of the **RULES OF THE SUPREME COURT[1], 1999 EDITION**. In the said Notice, the Appellant asked the Court below to confirm that the documents labeled 'FMKAC 3' and 'FMKAC 4', in the Respondent's affidavit, deposed to by a Mr. Faustin Mwenya KABWE, contained privileged

11. **BULLIVANT AND OTHERS V. THE ATTORNEY-GENERAL FOR VICTORIA (ON BEHALF OF HER MAJESTY) (1901) AC 196.**

LEGISLATION REFERED TO-

1. **RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK);**
2. **HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA;**
3. **ENGLISH LAW EXTENT OF APPLICATION ACT, CHAPTER 11 OF THE LAWS OF ZAMBIA; AND**
4. **HALSBURY'S LAWS OF ENGLAND, 4TH EDITION REISSUE VOL 37 PRACTICE AND PROCEDURE.**

This is an appeal from the Ruling of the High Court, delivered on 20th February, 2013. The application, that was the subject of the Ruling, arose from the main matter, which related to the implementation of a liquidation schedule of Access Financial Services Limited and Access Leasing Limited by the Bank of Zambia. In the said application, Access Financial Services Limited and Access Leasing Limited were the Applicants while Bank of Zambia was the Respondent. This appeal has been brought by the Bank of Zambia. In this judgment, we will, thus, refer to the Bank of Zambia as **"the Appellant"** and Access Financial Services Limited and Access Leasing Limited as **"the Respondents",** respectively.

The Appellant's application, before the lower Court, was that certain documents should be expunged from the Respondent's

information protected by the legal professional privilege. 'FMKAC 3' and 'FMKAC 4' contained legal advice from the office of the Assistant Bank Secretary (Legal Services) to the Deputy Governor-Administration and the Acting Director-Human Resources, respectively. The legal advice related to disciplinary charges that had been brought against the Liquidation Manager of Access Financial Services Limited and Access Leasing Limited, Mr. Marshall MWANSOMPELO. These charges arose from an internal audit report, generated by the Internal Audit Department of the Appellant, which revealed a number of irregularities in the liquidation process of Access Financial Services Limited and Access Leasing Limited.

The learned trial Judge extracted the following excerpts from 'FMKAC 3':

> **"In the course of Marshall's testimony, it became apparent to the committee that there were problems with this case going forward in view of the recent court challenges by Messrs. Kabwe and Chungu."**
>
> **"Proceeding with the disciplinary hearings against Marshall in the manner currently envisaged may actually hand the opposition the "smoking gun" they are looking for to confirm their allegations that Bank of Zambia mismanaged the liquidation of AFSL and ALL."**
>
> **"This could result in unfavourable judgment against the Bank sounding in colossal sums of money."**

"Any adverse findings against Marshal will confirm their allegations and will compromise the Bank's defence in Court where we are arguing that there was no mismanagement of the liquidation of AFSL and ALL."

"It could also irreparably undermine what is otherwise a very credible case of the Bank of Zambia having taken supervisory action against AFSL and ALL for the clear and well documented infractions of the BFSA."

"The public could easily confuse the alleged mismanagement as tainting even the takeover of the institutions, resulting in a perception of the whole process being flawed and injustice being exacted upon the shareholders."

"Further, should the Committee recommend the dismissal of Marshall from the Bank's employment, which is a real possibility in this case, there could be a real danger of Marshall turning into a hostile witness against the Bank."

"The consequences of such a possibility are too ghastly to contemplate as it would in a single stroke, spell disaster to the Bank's case against AFSL and ALL, its former directors and shareholders and in addition, cost the Bank an enormous amount of money."

"In light of all these considerations, it is my settled view that another way should be found to deal with Marshall. He has already been removed as Liquidation Manager and this is a good first step."

"Next is to identify what went wrong with regard to our oversight of the liquidation process and then take remedial measures for posterity."

"In any case, to single out Marshall as responsible for the state of affairs at access would be an act of selective justice, given his placement within a hierarchical reporting context."

'FMKAC 4' was advising, among other things, that the procedure employed, in the disciplinary proceedings held against

Mr. MWANSOMPELO, were improper and that the charges he was facing should be dismissed.

After considering the evidence before him, the learned trial Judge stated that 'FMKAC 3' was advising the Bank not to pursue disciplinary proceedings against an errant officer because he was likely to open a Pandora's Box on the allegations of mismanagement of the Respondent institutions. He said that, in other words, the memo was warning the Bank on the need to suppress evidence that was likely to be harmful to the Bank and officers who fell within Marshall's hierarchical reporting context.

The lower Court further stated that the requirements regarding upholding the public interest should necessarily be greater with respect to Counsel employed in government bodies, especially those performing statutory functions. The Court added that such officers represent the citizenry and a greater degree of care is expected from them. He pointed out that this was not to say that Counsel employed in government bodies should not enjoy the protection and benefits of legal professional privilege but that they must diligently guard against pressure to dispense dishonest and/or improper advice because they have a higher public interest

to serve. In this regard, the learned trial Judge cited the case of **ATTORNEY-GENERAL (NT) V. KEARNEY**[1], where the Court said that the professional legal privilege protection, which is granted in the public interest, to secure the due administration of justice, is displaced when a higher public interest requires it.

The learned trial Judge then held that he had no hesitation in finding that it would be contrary to public interest for a statutory body to deliberately avoid disciplining an officer who has been charged with serious offences because they are worried that he would ***"spill the beans".*** He went on to say that, further, in carrying out its statutory functions, it would be contrary to public policy for a statutory body to be selective in which facts to present in determining matters relevant to the execution of its statutory functions.

The lower Court further found that a prima facie case had been established that the exhibits were brought into existence in furtherance of an improper purpose, namely advising the Appellant's management to dispense with the disciplinary hearings against Mr. MWANSOMPELO, not because he was blameless or innocent, but because he was likely to reveal or divulge information

which would impact negatively against the Appellant and for the purpose of suppressing information that might become available to the Respondents and help them in their quest to prove that their liquidation was mismanaged.

The Court, therefore, held that under the circumstances, it would be contrary to public policy for the legal professional privilege, which would have otherwise attached to 'FMKAC 3' and 'FMKAC 4', to apply to communications of this kind. Accordingly, the Court rejected the Appellant's claim for legal professional privilege.

The Appellant has now appealed to this Court, against the Ruling of the lower Court, advancing two grounds of appeal; namely, that-

1. **"The learned trial Judge erred in fact and in law in holding that Marshall Mwansompelo was an errant officer in the absence of evidence establishing the fact.**

2. **The Honourable Judge erred in law and fact in holding that the exhibits 'FMKAC 3' and 'FMKAC 4' of Faustine Mwenya Kabwe's further Affidavit in Support of Summons for Production of Documents and in Support of the Application to appoint a Referee dated 6th December, 2012 were not privileged and that they should not be expunged from the Record of Proceedings."**

In support of these grounds of appeal, the learned Counsel for the Appellant, Mr. Nchima NCHITO, SC, filed written heads of

argument on which he relied entirely. He argued both grounds together. In brief, Mr. NCHITO submitted that the lower Court misdirected itself by proceeding to hold that the Appellant's employee Mr. MWANSOMPELO, was an errant officer and guilty of misconduct. Counsel contended that there was no evidence on record to warrant the Court's finding. He submitted that the Bank had not convicted Mr. MWANSOMPELO of any offence of misconduct. To support his submissions, State Counsel cited the case of **ROSEMARY CHIBWE V. AUSTIN CHIBWE**[2] where this Court said that-

> **"Also both the Local Court and the Magistrate Court made certain findings of fact, which were not supported by evidence. It is a cardinal principle supported by a plethora of authorities that Court's conclusions must be based on facts stated on record. In our view this would have been a proper case for us to interfere with the findings of both the Local Court and the Magistrate Court had it not been for the fact that the Appellant in both these counts admitted that she and her former husband could not live together and the marriage had broken down irretrievably."**

Counsel urged us to reverse what, according to him, was the Judge's finding of fact that Mr. MWANSOMPELO was an errant officer. For this he referred us to the case of **WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED**[3] where we held that-

"The Appellate Court will only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts."

Mr. NCHITO went on to submit that the lower Court erred when it held that 'FMKAC 3' and 'FMKAC 4' were not privileged documents. Counsel, however, started by conceding that the learned trial Judge rightly directed himself when he held that Courts refrain from upholding a claim of privilege in or over communications passing between a client and his advocates where it is shown that the communications were made to pervade or defeat the course of justice. He was, however, quick to add that such assertions must be proved by clear evidence. In support of this argument, he relied on the case of **O'ROURKE V. DARBISHINE**[4], at pages 604, where Viscount FINLAY said that-

"The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications."

Mr. NCHITO stated that the Respondent did not discharge the burden laid down in the **O'ROURKE**[4] case and, accordingly, that

the learned trial Judge should have accepted the Appellant's application to expunge the contested documents from the record.

Mr. NCHITO further submitted that the pieces of advice contained in 'FMKAC 3' and 'FMKAC 4' were warnings against proceeding with disciplinary proceedings against Mr. MWANSOMPELO which had the potential to cause a backlash on account of the fact that the charging process had been mishandled. He contended that there was, therefore, no scheme by the Appellant to deprive Messrs. Aaron CHUNGU and Faustine KABWE of their rights under the law. That 'FMKAC 3' and 'FMKAC 4' were simply pieces of advice to the Appellant against continuing unfair disciplinary proceedings against its officer.

Counsel submitted that legal professional privilege is so sacrosanct that it can only be waived in the most extreme circumstances. In support of this argument, he referred us to the case of **BUTTES GAS AND OIL CO. V. HAMMER (NO. 3)**[5], where Lord DENNING, MR said the following:

> **"No privilege can be invoked so as to cover up fraud or iniquity. But this principle must not be carried too far. No person faced with an allegation of fraud could safely ask for legal advice. To do away with the privilege at the discovery stage there must be strong evidence of fraud such that the Court can say: 'This is such an obvious fraud**

that he should not be allowed to shelter behind the cloak of privilege'"

Counsel further cited the case of **DERBY & CO. LTD V. WELDON (NO. 7)**[6], where it was held that-

"where communications which would otherwise be within the protection of legal professional privilege had been made in furtherance of a fraudulent design, a person was not entitled to assert legal professional privilege as a ground for refusing to disclose those communications in circumstances where the party seeking disclosure was able to establish a strong prima facie case of fraud. However, the Court would be very slow to deprive a party of the important protection of legal privilege on an interlocutory application and would judge each case on the facts, striking a balance between the important considerations on which legal privilege was founded and the gravity of the charge of fraud that was made."

Counsel went on to argue that the recent authorities in England seem to suggest that the legal professional privilege will be waived where there is fraud, dishonest conduct or indeed a crime. He contended that disreputable conduct or mere failure to observe ethics cannot be advanced to waive the privilege. That the Respondents did not prove any crime, fraud or dishonest conduct.

In Response, the learned Counsel for the Respondent, Mr. SANGWA, SC, and Mr. CHENDA, filed written heads of argument.

In opposing the first ground of appeal, the crux of Counsel's submission was that there was evidence to support the learned trial Judge's finding that Mr. MWANSOMPELO was an errant officer.

They contended that whereas 'FMKAC 3' and 'FMKAC 4' are respectively dated 11th October, 2012, and 29th October, 2012, according to 'FMKAC 5', Mr. MWANSOMPELO was found guilty of disciplinary offences as far back as June, 2011.

With regard to the second ground of appeal, Counsel argued that communication which is helpful to effect fraud, underhand or wrongful acts or other improper purpose is not and cannot be protected by legal professional privilege. For this argument, Counsel referred us to passages from a number of authorities. They cited paragraph 581 of **HALSBURY'S LAWS OF ENGLAND**[4], where the learned authors have said the following:

> **"581. Communications for a fraudulent or illegal purpose. Confidential communications between a client and his legal adviser are not privileged if made for the purpose of committing a fraud or a crime, or, a fortiori, when both are engaged in the commission of same wrongful act. In order that the protection may obtain there must be both professional confidence and professional employment. There can be no professional confidence as to the disclosure of communications of this nature and the furtherance of a fraud or assistance given for the purpose of wrongfully evading the law is not part of the duty of a legal adviser towards his client."**

Counsel also cite the case of **WILLIAMS V. QUEBRADA RAILWAY LAND AND COPPER CO.**[7] where KEKEWICH, J made the following observations:

> **"This case is in my opinion, one of unusual gravity and importance. It is of the highest importance, in the first place, that the rule as to**

privilege of production to an opponent of those communications which pass between a litigant or an expectant or possible litigant and his solicitor should not in any way be departed from. However hardly the rule may operate in some cases, long experience has shewn that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court."

Counsel also cited the case of **FINERS (A FIRM) AND OTHERS V. MIRO**[8], where DILLON LJ, said in part that-

"It is well established, however, that that privilege is lost by the criminal or fraudulent intent of the client, whether or not the solicitor was aware of that intent ...."

Lastly, Counsel referred us to the case of **BARCLAYS BANK PLC AND OTHERS V. EUSTICE AND OTHERS**[9], where SCHIEMANN, LJ, said that-

"It will be noted that in the last sentence cited Bingham LJ referred to the 'absence of iniquity'. In so doing he was recognizing the effect of a line of cases which have established that advice sought or given for the purpose of effecting iniquity is not privileged."

Counsel went on to submit that 'FMKAC 3' went beyond the duty of a legal adviser to a client as it amounted to counseling the Appellant to subvert the administration of justice by:

(a) preventing the possibility of the aggrieved stakeholders of AFSL and ALL from discovering the truth about the mismanagement of the liquidation process; and

(b) ensuring that the erring officer will not be tempted to give an unfavourable testimony against the BOZ in the legal proceedings being contested by the stakeholders of AFSL and ALL.

Counsel argued that in the face of this evidence, a prima facie case of improper and wrongful purpose was established in respect of 'FMKAC 3' to take it out of the realm of legal professional privilege.

With regard to 'FMKAC 4', Counsel submitted that this document simply echoed the sentiments of 'FMKAC 3' in terms of letting a wrongdoer go free without atoning for his actions in respect of the mismanagement of the liquidation of the Respondents.

We have carefully considered the evidence on the record of appeal, the heads of argument filed by Counsel and the judgment appealed against. In our view, the legal issues raised by the two grounds of appeal, respectively, are the following:

1. **whether the lower Court held that Mr. Marshall Mwansompelo was an errant officer and that he was guilty of misconduct; and**
2. **whether the documents "FMKAC 3" and FMKAC 4" were protected by legal professional privilege.**

The gist of the submissions advanced by Counsel for the Appellant, in support of the first ground of appeal, is that the lower Court misdirected itself when it held that Mr. MWANSOMPELO was an errant officer and that he was guilty of misconduct. Counsel has argued that the Court was wrong when it made this finding because there was no evidence to support the said finding.

We have carefully studied the portion of the learned trial Judge's Ruling which has been contested by the Appellant in the first ground of appeal. It states as follows:-

> **"In short this memo was advising the Bank not to pursue disciplinary proceedings against an errant officer because he was likely to open a Pandora's Box on the allegations of mismanagement of the Applicant institutions. In other words the memo was warning the Bank on the need to suppress evidence that was likely to be harmful to the Bank and to officers who fell within Marshal's hierarchical reporting context."**(Emphasis by underlining ours)

Clearly, in our view, the above extract did not contain any finding or holding by the lower Court on the guilt or innocence of Mr. MWANSOMPELO for the disciplinary charges he stood charged with. A cursory study of the Ruling appealed against establishes that the said extract came right after the learned trial Judge had reproduced some portions of 'FMKAC 3'. In our opinion, the Court simply re-stated, in its own words, the contents of 'FMKAC 3'. The said MWANSOMPELO was facing disciplinary proceedings and 'FMKAC3' suggested that ***"...another way should be found to deal with Marshall. He has already been removed as Liquidation Manager and this is a good first step."*** This is further evident from the words we have underlined in the extract of the learned trial Judge's Ruling above. We do not see any ground upon which

we can fault the learned trial Judge for the manner in which he re-stated the contents of that document. 'FMKAC 3' also stated, among other things, that-

> **"Further, <u>should the Committee recommend the dismissal of Marshal from the Bank's employment, which is a real possibility in this case</u>, there could be a real danger of Marshal turning into a hostile witness against the Bank."** (Emphasis by underlining ours)

In our view, these words show that the Office of the Assistant Bank Secretary was advising the Appellant to refrain from dismissing an officer who stood charged with disciplinary offences for which, according to the Assistant Bank Secretary, there was a real possibility that he would be dismissed. In any case, the guilt or innocence of Mr. MWANSOMPELO for the disciplinary charges was immaterial to the determination of the issue before the lower Court. The issue before the lower Court was whether 'FMKAC 3' and 'FMKAC 4' were protected by the legal professional privilege.

We, therefore, cannot blame the Judge in the Court below for the manner in which he restated the contents of 'FMKAC 3'. Accordingly, we find no merit in the first ground of appeal.

On the second ground of appeal, Mr. NCHITO has faulted the lower Court for holding that the documents 'FMKAC 3' and 'FMKAC 4' were not protected by the legal professional privilege. He has

argued, among other things, that the Respondent did not adduce clear evidence to warrant the displacement of the privilege. He has further argued that legal professional privilege is so sacrosanct that it will only be waived in the most extreme circumstances.

The gist of the response on behalf of the Respondent is that legal professional privilege has limits. Counsel has submitted that it is trite law that communication which is helpful to effect or stifle fraud, underhand or wrongful acts, or other improper purposes is not and cannot be protected by the privilege.

We have considered a number of authorities on legal professional privilege. Legal professional privilege is an important privilege accorded, in the public interest, to protect communication between a lawyer and his or her client from being disclosed without the authority of the client. The privilege is intended to encourage the client to feel free to give full instructions to his or her lawyer without the fear that the information contained in those instructions may prejudice the client in future. In an old English case of **GREENOUGH V. GASKELL**[10], Lord BROUGHAM stated the rationale for legal professional privilege in the following terms:

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection .... But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skillful person, or would only dare tell his counselor half his case."

The importance of the legal professional privilege to the administration of justice is, therefore, undisputable. Of course, as Counsel has rightly conceded, legal professional privilege is not absolute. It can be displaced in circumstances that have been concisely settled by case law. In the case of **BULLIVANT AND OTHERS V. THE ATTORNEY-GENERAL FOR VICTORIA (ON BEHALF OF HER MAJESTY)**[11], Earl of Halsbury, LC provided the following extensive guidance on the limitations to legal professional privilege when he said the following:

"I think the broad proposition may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. ... The line which the courts have hitherto taken, and I hope will preserve, is this- that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence

with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege."

Similarly, the learned authors of **HALSBURY'S LAWS OF ENGLAND VOLUME 37 (REISSUE)** have said, at paragraph 581, that confidential communications between a client and his legal adviser are not privileged if made for the purpose of committing a fraud or crime, or when both are engaged in the commission of some wrongful act.

The question, therefore, remains that did any of the limitations on legal professional privilege exist to warrant the decision of the learned trial Judge that the documents in question were not protected by the privilege? Counsel for the Appellant has maintained that there was no ground established to warrant the displacement of the privilege. He submitted that legal professional privilege cannot be lightly displaced because it is a sacrosanct privilege. For this he has referred us to a portion in the case of **BUTTES GAS AND OIL CO. V. HAMMER (NO. 3)**[5], which we have already reproduced in this judgment.

We have already stated in this judgment that although legal professional privilege is sacrosanct it is not absolute. So the question is, what test should be met before the privilege can be displaced? In the case of **DERBY & CO LTD V. WELDON (NO. 7)**[6] the Court outlined the test for the displacement of the privilege when it said that-

> **"As I have said, Counsel's primary submission was that the authorities ... showed that unless the relevant facts are admitted or beyond dispute ... there must be positive evidence sufficient to satisfy the court on the balance of probabilities that an allegation of fraud will probably succeed. I think this puts the test too high. In all the cases I have cited what is stressed is that every case must be judged on its own facts. In any given case, the court must weigh, on one hand, the important considerations of public policy on which legal professional privilege is founded (the necessity that the citizen should be able to make a clean breast to his legal adviser ...) and, on the other, the gravity of the charge of fraud or dishonesty that is made."**

Clearly, the test for the displacement of the privilege is not that there must be evidence to satisfy the Court on a balance of probabilities that the alleged fraud, criminality or other wrongful act will probably succeed. That test has been described as being too high. The Court must consider each case on its facts by weighing the public policy justifications for the privilege and the gravity of the alleged fraud, criminality or other wrongdoing.

Applying these principles of law to the instant case, we are of the firm view that the learned trial Judge rightly directed himself when he held that the documents 'FMKAC 3' and 'FMKAC 4' were not protected by legal professional privilege. A cursory scrutiny of the said documents clearly establishes that they contained legal advice, from the Assistant Bank Secretaries, to the Appellant on how to conceal evidence that would potentially be useful to the Respondents in confirming their allegation that the Appellant had mismanaged the liquidation of the Respondent companies. We, therefore, agree with the finding by the lower Court that the disputed documents were brought into existence in furtherance of an improper purpose. The learned trial Judge's finding was particularly apt in light of the following paragraphs of 'FMKAC 3':

> **"Proceeding with the disciplinary hearings against Marshall in the manner currently envisaged may actually hand the opposition the "smoking gun" they are looking for to confirm their allegations that Bank of Zambia mismanaged the liquidation of AFSL and ALL."**
>
> **"Any adverse findings against Marshal will confirm their allegations and will compromise the Bank's defence in Court where we are arguing that there was no mismanagement of the liquidation of AFSL and ALL."**
>
> **"Further, should the Committee recommend the dismissal of Marshal from the Bank's employment, which is a real possibility in this case, there could be a real danger of Marshal turning into a hostile witness against the Bank."**

In our view, the public policy considerations for the grant of legal professional privilege have been outweighed in this case by the gravity of the wrongful act of advising the Appellant to conceal evidence of mismanagement of the liquidation process of the Respondent companies. It would not be in the public interest to allow the Appellant, a public institution, to purposely refrain from disciplining an officer because they do not want the officer to adduce evidence which would assist the Respondents in proving their allegation of mismanagement of the liquidation process.

Accordingly, the second ground of appeal, too, must fail.

This appeal, having failed on both grounds, we dismiss it with costs to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

E.M. Hamaundu
SUPREME COURT JUDGE

R.C.M. Kaoma
SUPREME COURT JUDGE