ANI ENGINEERING ENTERPRISES LIMITED, ATLANA ENGINEERING SERVICES LIMITED AND NEW CAPITAL BANK PLC

SUPREME COURT
NGULUBE, CJ, CHAILA AND CHIBESAKUNDA, JJS.
20TH SEPTEMBER AND 13TH DECEMBER, 2001
(SCZ JUDGMENT NO. 19/2001)

Flynote

Banking – Fraud – interest –evidence

Headnote:

In the court below, the appellant as customers launched proceedings to recover the sum of K58 million which had stood in credit on two accounts frozen by the bank. The bank took away overpayments alleged to have been fraudulently made. The customers denied any wrong doing in connection with the interest.

Held:

(i) A finding of fact should be supported with evidence adduced before a court. Fraud proved.

Cases referred to:-

1. Holt –v- Markham (1923) 1 KB 504.
2. R.E. Jones Limted –v- Waring and Gillow Limited (1926) AC 670.
3. United Overseas Bank –v- Jiwani (1977) 1 ALL ER 733.

For the Appellant – N.K. Mubonda, of D.H. Kemp and Company
For the Respondent – S.C. Mwananshiku, of Mung'omba Associates.

Judgment

Ngulube, CJ, delivered the judgment of the court.

Judge Chaila having died before appending his signature, this judgment should now be treated as by the majority.

For convenience, we will refer to the appellant as the customers and to the respondent as the bank. The customers launched proceedings in the High Court to recover a sum of K58 million which had stood in credit on two accounts (since frozen by the bank) but which the bank took away to recover overpayments alleged to have been fraudulently made. By their pleadings, the customers denied any wrong doing in connection with the interest they had earned on the two deposit accounts which were on seven days notice call. They averred that they had properly either withdrawn the interest earned or left it in the accounts. On the other hand, the bank pleaded in defence that the customers were fully aware which interest rates were properly agreed and applicable, and not the excessively high interest actually paid resulting in overpayments of K43,79,478=14 on one account and K19,921,641=87 on the other in excess of what was properly due. The evidence before the court was that two named employees of the bank connived with some customers to credit their accounts with much inflated interest

which more often than not was then promptly withdrawn. The customers' position was that they should not be held responsible for whatever wrongdoing the employees were engaged in; the customers were not party to the fraud alleged and the bank should not have recouped their losses from the customers' accounts.

The learned trial judge heard the evidence and considered the documentary material placed before him. From the documents produced, the judge concluded that there was no dispute over the fact that there was overpayment on the customers' accounts in respect of interest which was in excess of even the amounts pleaded in the writ and the statement of claim. In one of their grounds of appeal, the customers criticize this finding, arguing that there was in fact a dispute: The customers did not accept that there was any overpayment by way of any inflated interest when the correct rate of interest was allegedly not given. This submission flew in the teeth of the evidence which is on record in the form of the documentary evidence and the viva voce evidence of DW5, Ponda Sakala. Indeed, as Mr. Mwananshiku property observed, the very fact that Mr. Mubonda was basing his arguments on the existence of a mistake as opposed to a fraud implicitly conceded the overpayment. The learned trial judge did not make a finding which was without support from the evidence and the issues raised.

Another finding of fact which was criticized was the finding that the customers never made frequent deposits of any large sums so as to have justified their expecting to receive large sums of interest. The Judge specifically mentioned that he was making this observation after examining the bank statements which were produced in evidence. It was a correct factual observation and we are surprised that the customers feel aggrieved.

The major argument on behalf of the customers was that it was wrong to find there was fraud when all there was here was a mistake. It was pointed out that the police investigations had been anomalies – such as being allowed to withdraw the high interest amounts giving notice – there was no fraud. It was strongly urged that the principles of mistake should have been applied and interpreted in the customers, favour. The bank should have been stopped from recovering its money when the customers had altered their positions in reliance upon the bank statements they had been receiving. There was no fraud and the customers had not been unjustly enriched; in addition, there had been contributory negligence. In sum, it was submitted that the bank should not have been allowed to recover its money. Some paragraphs from Halsbury's Law of England were called in aid and we will be referring to some of them a little later. On behalf of the bank, learned counsel argued forcefully in support of the finding below, pointing out the salient evidence that was before the judge.

We should state at the outset that we do not think there can be much controversy about the law of mistakes or of fraud as such, so that ultimately whether the Judge is to be upheld or not depends on the answer to the question whether his findings of fact were unimpeachable or not. That the facts are all important is illustrated by a number of authorities. For instance, the learned authors of Halsbury's Laws of England; 4th Edition (re-issue) Vol. 3 (1), paragraph 204, state in relation to statements of account to the effect that were credits appear by mistake in the statement, and the customer alters his position in reliance on them, the bank cannot afterwards debit the account with the amount. We have considered some of the authorities the authors have cited. Thus in **HOLT –v- MARKHAM (1)**, the case concerned an overpayment of gratuity by mistake (using a scale not applicable to him) by a Government agency to a demobilized Royal Navy officer who innocently spent the money. A year later, the mistake was discovered. It was held that the plaintiffs could not recover the money.

Again in **R.E. JONES LIMITED –v- WARING AND GILLOW LIMITED (2),** a third party by an elaborate fraud induced the plaintiff to issue a cheque to the defendant (who was owed money by the fraudster on another transaction altogether). The plaintiff swallowed a yarn from the crooked third party about an entirely fictitious transaction involving the supply of non-existent vehicles. Both the plaintiff and the defendant were innocent parties. It was held by majority of their Lordships in the House of Lords – with whom we respectfully agree – that the plaintiff could recover. A third case in which the **HOLT** case was even distinguished was that of **UNITED OVERSEAS BANK –v- JIWANI (1977) (3).** The case concerned a banker who mistakenly credited a sum of money to the customer's account and later represented to the customer the balance which included the money paid in by mistake. The party misled, that is

the customer, spent the money on buying a hotel which he would have bought in any event since his decision to buy it had nothing to do with the erroneous credit. It was held to the effect that the customer had not adversely altered his position when he thought he was richer than he actually was and it was not inequitable to require him to refund the money to the plaintiff bank.

What emerges from the few cases discussed is that it would be misleading to make a sweeping proposition that, once a customer has received a bank statement and spends the money represented, he has altered his position and the bank should always be estopped from recovering its money. There has to be a change of position consistent with an innocent belief or ignorance of the mistake on the part of the customer. In the case at hand, even had this been a case of mistake, we do not see how the customers could have changed their mode of doing their business or in any way adverse way altered their position, induced by the alleged mistake. But infact, the learned trial Judge found that there was fraud. There were fraudulent activities on the accounts by the two bank employees. The interest rate applicable to deposit accounts is usually agreed or specified upfront so that the incredibly high credits of interest ought to have put the customer on inquiry, even had he not been privy to the wrondoing. However, this was a customer who withdrew the interest without giving any notice when in the usual course the customer would stand to lose the interest if money is withdrawn in this fashion: We draw attention to the nature of the deposit account as described by the learned authors of Chitty on contracts, 26th edition, volume "Specific Contracts", at paragraph 2966 where they say:-

"Its nature. Sums paid by a customer into deposit account may be payable on demand, but in most cases are payable either after notice or at a fixed date, e.g. three months after the date of deposit. The customer is not, as a rule, entitled to draw cheques on such an account. The advantage that the customer gains by opening a deposit account is that the banker pays interest on sums paid into such an account. If the customer is entitled to demand payment by giving notice, the rate of interest is usually rather low. If the amount is repayable at a fixed date, i.e. is a "fixed deposit," interest at a higher rate may be granted. In practice payment of amounts standing to the credit of deposit accounts will be granted on demand; but if the credit of deposit accounts will be granted on demand; but if the customer requests payment before the agreed date he stands to lose the interest."

There was no suggestion that the person operating the accounts on behalf of these customers could not be expected to be aware of the foregoing. Cash withdrawals immediately after the inflated credits of interest and without the agreed notice precluded a mistake or any innocent reliance on any mistaken bank statements. In any event, a finding of fraud put an entirely different complexion on the events. Ultimately, therefore, the crucial issue in this appeal is whether the learned trial Judge made findings of fact on the critical issues which were unwarranted and insupportable. There was in this case sufficient evidence or at the very least a sufficient substratum of evidence to justify the findings made. That being the case, the Judge was on firm ground and we cannot possibly interfere with, let alone reverse, his conclusions.

For the reasons we have outlined, this appeal fails, with costs following the event, and to be taxed if not agreed.
