INDO-ZAMBIA BANK LIMITED *v* LUSAKA CHEMIST LIMITED

Supreme Court
ewanika, DCJ, Mambilima and Chitengi, JJS
th of August, 2002 and 28th May, 2003
SCZ Judgment No. 5 of 2003)

Flynote

Banking and Customer – Forged Cheque – Payment by banker – Action to recover money paid – Bankers expert knowledge of detection of the forgery.
Baker and Customer – Negligence – test to be applied.

Headnote

The facts which were before the lower court are common cause. The respondent company maintained a business account with the appellant. There were three signatories to the account all of whom were Directors of the respondent company. During the material time, the procedure which was maintained at the respondent's company was that the accountant was responsible for writing the cheques which he then referred to any of the signatories for signature. Between December, 1999, and 29th January, 2000 one of the signatories was out of the country. On 29th December, 1999, another of the signatories received information from the bank to the effect that the company account ad a negative balance and some cheques had been returned unpaid. When he probed the matter, he found that a number of forged cheques prepared by the accountant had been paid out on the account. After evaluating the evidence on record the learned trial judge found that the respondent had proved that the disputed cheques were forged and that the forgeries started in June 1999, and continued unabated until the end of December, 1999. He also found that both the appellant and the respondent were not aware of the forgeries. He concluded that although the appellant was not negligent, it was liable because it paid put the cheques without the mandate of the respondent.

Held:

1. What is required of banks is not expert knowledge on detection of forgery but a degree of knowledge ordinarily required for the discharge of their duties.

2. The test of negligence is whether the transaction of paying on any given cheque was so out of the ordinary course that it ought to have caused doubts in the bankers mind and caused them to make inquiry.

3. Merely by honouring on undetectably forged cheque, a bank did not represent that the cheque was genuine and in the absence of negligence, no estoppel by representation could arise on the bank clearing such a cheque.

Cases referred to:

1. *Nkhata and Others v The Attorney-General* (1966) ZR 124.

2. *Taxation Commissioners v English Scottish and Australian Bank* [1920]AL 683 at page 689.
3. *Ross v London County, Westminister and Parr's Bank Ltd* [1919] KB 678 at 685.
4. *National Westminister v Barclays Bank International* [1975] QB 655 at 666.
5. *M'Kenzie v British Linen* [1881] AC 82 at page 92.
6. *Greenwood v Martins Bank* [1933] AC 51.
7. *Morrison v London County Westminister Bank Ltd* [1914] 3 KB 356.
8. *Lloyd Bank Limited v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at page 72.
9. *National Westminister v Barclays Bank International* [1975] QB 655.
10. *London and River Plate Bank of Liverpool Limited* [1897] 1 Q B 7 at page

Legislation referred to:

Bills of Exchange Act 1882

Work referred to:

Halbury's Laws of England Vol. 2 page 204

M. Ndhlovu of Central Chambers for the appellant.
D.K. Kasote of Levy Mwanawasa and Company for the respondent

Judgment

MAMBILIMA, J S, delivered judgment of the court

This is an appeal against the decision of the court below which upheld the respondent's claim of K162,055,492.52 against the appellant in respect of payments it made on various cheques allegedly drawn on the respondent's account which was maintained at the appellant's Bank. The facts which were before the lower Court appear to be common cause. The respondent Company maintained a business account with the appellant. There were three signatories to the account all of whom were Directors of the respondent Company. These were: Mr. J. A. Patel, Mr D. N. Patel and Ms Susan Patel. It would appear from the evidence on record that the three are related. The mandate given to the bank was that only cheques bearing any two signatures of the three Directors were to be honoured.

During the material time, the procedure which was maintained at the respondent's Company was that the Accountant, a Mr Steward Sinkamba, was responsible for writing the cheques which he then referred to any of the signatories for signature.
He also wrote the Cash Book from information obtained from bank statements and cheque counterfoils. The respondent company had also employed a part-time accountant consultant, Mr Joseph Moonjelly, whose functions included, inter alia, the verification of all sales, records and depositing of cash cheques at the bank. He was on leave from November, 1999.

Between December, 1999 and 29th January, 2000, Mr J. A. Patel, one of the signatories was out of the country. On 29th December 1999, Mr. D. N. Patel, another of the signatories received information from the bank to the effect that the company account had a negative balance and some cheques had been returned unpaid. When he probed the matter, he found

that a number of forged cheques prepared by Mr. Sinkamba had been paid out on the account. The cheques in question had been drawn in the name of Wencha Pharmaceuticals. According to the evidence of the appellant's witnesses in the court below, the said Wencha Pharmaceuticals was not one of their clients. On 5th January, 2000, the respondent instructed the bank to stop payment of listed cheques and thereafter reported the matter to the police.

Two handwriting experts, both from the Zambia Police Service and based at Force Headquarters were called as witnesses. One of the experts, Abtone Kashif Mpande was of the opinion, after examining signatures on one hundred and thirteen disputed cheques and the specimen signatures which he obtained from the three signatories, that the simulated signature on the disputed cheques were forgeries and did not belong to the three signatories. The other handwriting expert, Mr. Bombeck Philby Kaoma examined signatories on twenty-one disputed cheques and he was unable at the end of his examination to say whether the signatures on the cheques were forgeries by way of simulation.

The appellant's evidence in the court below was that before paying out the money, signatures on the cheques were compared with specimen signatures and there was nothing to suggest that the signatures on the cheques were forgeries. Every month, the respondent was provided with statements and no queries were received from them and neither did the respondent report any cheques lost or stolen. Instructions to stop payment were only received on the 5th of January, 2000. The bank maintained, that at all times, they acted diligently. It is their Senior Chief Manager who informed Mr J. A. Patel of the irregularity in the way the company account was operating. This happened on 29th December, 1999, when 12 cheques were presented for payment and there were insufficient funds in the account. Until then, the respondent had not realized that there were forgeries on their account.

After evaluating the evidence on record, the learned trial judge found that the respondent had proved that the disputed cheques were forged and that the forgeries started in June, 1999 and continued unabated until the end of December, 1999.
He also found that both the appellant and the respondent were not aware of the forgeries. He concluded that although the appellant was not negligent, it was liable because it paid out the cheques without the mandate of respondent.

The appellant has advanced four grounds of appeal, namely: that the learned trial judge erred in law and fact when he found that the endorsement of the word 'forged' on some of the cheques was an admission that the appellant knew that some of the cheques were forged; that the learned trial Judge ought to have applied a different standard of care to the appellant's duty in detecting forgeries on the respondent's account as opposed to that expected of handwriting experts; that the learned trial judge erred in law and fact when he failed to take into account the fact that the respondent knew or ought to have known that its signatures were forged by its own employee and ought to have notified the appellant accordingly and lastly, that the learned trial judge erred in law and fact when he failed to consider the fact that the appellant adduced evidence establishing that the respondent had adopted the allegedly forged cheques and was therefore estopped from denying its own instructions to the appellant.

In support of the first ground of appeal, Mr. Ndhlovu referred us to the evidence of DW2, Paul Mwila who testified that on 29th December, 1999, he called Mr. Dipak Patel when twelve cheques were presented for payment and there were no sufficient funds in the account. He submitted in his written head of arguments that until that time, the appellant was not aware that the respondent's Accountant was committing a fraud on the respondent's account. According to Mr. Ndhlovu, there was no evidence to suggest that the endorsement of the words 'forged cheque' on some of the cheques meant that the appellant knew prior to 29th December, 1999, that some of the cheques were forged. Relying on our decision in the case of *Nkhata and others v The Attorney-General (1),* Mr. Ndhlovu urged us to reverse this finding of fact. According to Mr Ndhlovu, the learned trial judge gave an unsatisfactory reason for finding that the appellant through its employees knew that some of the cheques were forged.

He submitted that had the learned trial judge taken proper advantage of his having seen and heard the defence witnesses, he ought to have inquired as to when and in what circumstances the words 'forged cheque' were endorsed on the said cheques.

In reply to the first ground of appeal, Mr. Kasote in his written heads of arguments submitted that the finding of the learned trial judge cannot be faulted because it was based on the evidence of DW1. He stated that cheques marked "forged cheque", were dated 24th December and 27th December, 1999. The appellant could not therefore say that they were not aware before 29th December, 1999, that some cheques were forged. According to Mr Kasote, the only conclusion one can draw is that the appellant paid little attention to the verification of the cheques because there were sufficient funds in the Account to enable them clear the cheques. He went on to state that the principles laid down in the case of *Nkhata and others v The Attorney-General (1),* do not apply to this case. On the second ground of appeal, Mr. Ndhlovu submitted that in arriving at his decision that the cheques were forgeries, the learned trial Judge stated that he had the evidence of handwriting experts which showed that the cheques were forgeries. According to Mr. Ndhlovu, the appellant, as a banker was obliged to pay the respondent's cheques in accordance with the written mandate of the respondent. The appellant adduced evidence that it exercised its duty of care by verifying the respondent's signatories to the standard of care that is expected of a banker. Mr. Ndhlovu referred us to a statement by Lord Dunedin in the case of *Taxation Commissioners v English Scottish and Australian Bank (2),* that ,"…a bank cannot be held liable merely because they have not subjected an account to microscopic examination."

Mr. Ndhlovu also cited the case of *Ross v London County*, *Westminister and Pans Bank Ltd* (3) in which Bailhache stated inter-alia:

"I must attribute to the cashiers and clerks of the defendants the degree of intelligence and care ordinarily required of persons in their position to fit them for the discharge of their duties."

Relying on these authorities, Mr. Ndhlovu pointed out that the two handwriting experts who gave evidence in the court below differed in their opinions. In carrying out their tasks of comparison, they were aided by gadgets and they devoted considerable time to the exercise. He submitted that it was unrealistic to expect bankers using their naked eye to exercise the same degree of care when examining customers signatures to that of handwriting experts who use gadgets. The learned trial judge thus ought to have applied a different standard of care to the appellants.

Mr. Kasote's response to this submission on the second ground of appeal was that the learned trial judge arrived at his decision after careful consideration of the evidence before him which included the evidence of DW1, to the effect that some cheques were endorsed with the words "forged cheque," by DW2, Paul Mwila. The judge concluded that this was an admission that the Bank was aware that the cheques were forged. According to Mr Kasote, the evidence of the handwriting experts showed that the cheques were forgeries and the Judge's conclusion was fortified by the provisions of Section 24 of the Bills of Exchange Act 1882. Mr. Kasote also referred us to the case of *National Westiminister Bank v Barclays Bank International* (4), in which Kerr J said:- "The principle is simply that a Banker cannot debit his customer's account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so."

Mr. Kasote further submitted relying on page 204 Volume 2 of Halsbury's Laws of England (4), that there was enough material to put the Bank on inquiry because many cheques were presented showing the same date and the same payee. The passage relied on stipulates; "A document in cheque form to which the customer's name as drawer is forged or placed thereon without authority is not a cheque but a mere nullity unless the banker can establish adoption

or estoppel he cannot debit the customer with any payment made on such document.

On the third ground of appeal, Mr. Ndhlovu submitted relying on the statement by Lord Selborne in the case of *M'Kenzie v British Linen* (5), stating that, "actual knowledge of forgery is not essential. It is sufficient that there are reasonable grounds to believe" Mr. Ndhlovu submitted that had the respondent conducted its business in a diligent manner, it ought to have discovered that its own employee was conducting irregular banking transactions between June 15 and December, 30th 1999. He referred us to the evidence of the appellant's witnesses who stated that monthly statements were provided to the respondent and no queries or complaints were received from the respondent with regard to its account. PW2 testified that irregularities could be discovered by looking at the details on the counterfoils. The cheque books were in the custody of the Directors. It was therefore possible for them to detect irregular banking transactions committed by the Accountant. According to Mr Ndhlovu, the appellant was therefore justified to assume that cheques presented for payment between March, 1999 and December, 1999, were genuinely issued. Mr Ndhlovu also referred us to the case of *Greenwood v Martins Bank* (6), in which it was held that if a customer knows or has reasonable ground to believe that his name has been forged on a bill or cheque he is bound with reasonable dispatch to warn the banker of the position. If he does not and the bank's position is thereby prejudiced he adopts the bill or cheque.

In reply to this ground of appeal, Mr. Kasote submitted that there was no evidence to suggest that the respondent knew or ought to have known that the cheques were forged. He argued that the evidence of DW1 was to the effect that the paid out cheques were kept by the Bank and that the Bank Statements collected by the respondent did not show the names of the payees. The Bank was directed to pay suppliers once a month but the respondent allowed cheques which were made on a daily or weekly basis. The evidence before the Court was that until 29th December, 1999, both parties did not know that the cheques were forged. The respondent could not therefore have been expected to know about the fraud.

On the last ground of appeal, Mr. Ndhlovu argued that the respondent adopted the allegedly forged cheques by their conduct and consequently, they ought to be estopped from denying their instructions to the appellant. The respondent submitted a specimen signature card which was intended to guide the appellant in its duty of verifying the respondent's signatures when paying out the cheques. The appellant's employees relied on these signature cards up to 29th December, 1999. Up to that time, the respondent omitted to inform the appellants that there were reasons upon which it could suspect that its own Accountant was forging the signatures on its cheques. The appellant was therefore not in a position to take steps to prevent the alleged forged cheques. The alleged forged signatures were so perfect that one of the handwriting experts called in the court below was unable to conclude that they were forged. Mr. Ndhlovu also referred us to Volume 2 page 204 Halsbury's Laws of England (produced above).

He argued that the appellant established in the court below that it was entitled to rely on estoppel. He also referred us to the case of *Morrison v London County and Westiminister Bank Limited* (7), in which Lord Tomlin opined that the essential factors giving rise to an estoppel were a representation or conduct intended to induce a course of conduct on the part of the person to whom it is made; an act or omission resulting from the representation whether actual or by conduct by the person to whom the representation is made; and detriment to such person as a consequence of the act or omission. According to Lord Tomlin, mere silence cannot amount to a representation unless there is a duty to disclose in which case such silence may amount to a representation to the respondent that the forged cheques were in order.

In reply to the submission on the fourth ground of appeal, Mr. Kasote repeated his earlier submission on the third ground of appeal that the respondent was not aware that its employee was forging the cheques. The respondent could have discovered this if the appellant had returned the original cheques or if the Bank Statements showed the names of the Payees.

According to Mr. Kasote, the appellant therefore denied the respondent the chance of knowing what was happening by withholding this vital information. He submitted further that the case of *Morrison v London County and Westminister Bank Limited* (8), does not apply to this case because the respondent did not ratify the forged cheques.

We have considered the evidence on record, the judgment of the lower court, the elaborate submissions by counsel and the issues raised. On the first ground of appeal, that the learned trial judge erred in law and fact when he found that the endorsement of the word "forged" on some of the cheques was an admission that the appellant knew that some of the cheques were forged, we find that the evidence of PW2, D. N. Patel and DW1, P. Sreedharan clearly established that before 29th December, 1999, neither the appellant nor the respondent were aware of the forged cheques. It was therefore cardinal for the learned trial judge to have ascertained the date when the endorsements of the words "forged" were made on some of the cheques in the light of this evidence from PW2 and DW1.

The finding by the trial judge therefore, that the endorsement of the word "forged" on some of the cheques was an admission that the appellant knew that some of the cheques were forged prior to 29th December, 1999, is not supported by the evidence on record. We uphold the first ground of appeal that the learned trial Judge erred in law and fact to have made such a finding.

Coming to the second ground of appeal, that the learned trial judge ought to have applied a different standard of care to the appellants' duty in detecting forgeries on the respondents' account as opposed to that expected of handwriting experts. We are grateful for the authorities cited to us by counsel. These authorities establish that what is required of banks is not expert knowledge on detection of forgery, but a degree of knowledge ordinarily required for the discharge of their duties. In our view, the need for a microscopic examination would only arise if there are circumstances which ought to put the bank on inquiry with regard to the authenticity of the cheques. As Bailhache J. put it in the case of *Ross v Lord on County Westminister and Parrs Bank* (3); "it is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them". It would of course be negligent for any bank to honour a cheque if the circumstances are such that they ought to be put on inquiry. Sankay L J stated in the case of *Lloyd Bank Limited v Chartered Bank of India, Australia and China (8),* to which Mr. Ndhlovu has referred us, that whether or not a person has been negligent is a question of fact. Relying on the legal principles found in *Morrison v London County and Westminister Bank (7),* he went on to state that:

"the test of negligence is whether the transaction of paying on any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused them to make inquiry".

From the evidence on record, the two handwriting experts who gave evidence in the Court below differed on whether the cheques presented to them were forgeries. These are experts who were called in aid to determine whether the cheques presented to the appellant were forgeries. The evidence from the appellant was to the effect that the signatures on the cheques were verified with specimens kept by the bank. The question to be resolved is whether there was anything out of the ordinary to have aroused doubts in the minds of the appellant's employees. Mr. Kasote argued that there was enough material to put the appellant on guard that something was wrong because many cheques were presented to the bank bearing the same date and the same payee. We find this argument to be self-defeating because the transactions in question went on for more than six months, during which time Statements were being sent to the respondent who did not notice the running down of the account. Also, it is not usual for banks to query the expenditure on an account for as long as there are sufficient funds to meet the documents. It goes without saying that every cheque

issued against money held in an account will be honoured because that is the mandate given to the bank. As it was held in the case of *Natal Westminister Bank v Barclays Bank International* (4), merely by honouring an undetectably forged cheque, a bank did not represent that the cheque was genuine and in the absence of negligence, no estoppel by representation could arise on the bank clearing such a cheque"

From the evidence on record, it would appear to us that the forgeries in this case were perfect and therefore could not be detected by the appellant which applied the ordinary standard of verification expected of a bank which standard is below that expected of handwriting experts. The second ground of appeal therefore succeeds.

On the third ground of appeal, we find that it is common cause that the perpetrator of the fraud was the respondent's own employee. The forgeries went on from June to December, 1999. Both parties were not aware of the forgeries until 29th December, 1999. A glance at the cheques exhibited on the record of appeal shows that they were issued from as early as May, 1999. Mr. Kasote argued that the perpetrator of the crime did it stealthily. He did not present the cheques to the Directors and the said Directors could not be expected to have known what was happening. It is on record that the respondent had employed an Accountant Consultant, Mr. Joseph Moonjelly, whose functions included verification of all sales, records, depositing of cash cheques at the bank and obtaining bank statements. Mr. Ndhlovu also referred us to the evidence of PW2 on page 364 of the record of appeal to the effect that irregular payments could be uncovered by looking at the details on the counterfoils. We therefore agree with Mr. Ndhlovu that had the respondent been prudent in checking and reconciling their account, the fraud in this case could have been discovered much earlier.

Coming to the last ground of appeal, we again restate that the evidence on record shows that both parties were not aware of the fraud until 29th December, 1999. We have found that the appellant applied the ordinary standard of verification expected of a banker. We have also found that with a proper system in place at the respondent's place of work, the respondent, acting with due diligence could have discovered the fraud much earlier. We are persuaded by the views of Mathew J. who stated in the case of *London and River Plate Bank v Bank of Liverpool Ltd (9)* that

"… if the Plaintiff in that case conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position"

For six months, cheques were presented and no query or complaint was raised by the respondent as obviously they were not aware of the fraud but if anyone could have been put on inquiry, it was the respondent. In our view, no negligence can be attributed to the appellant. Section 24 of the Bills of Exchange Act 1882 provides:

"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up forgery or want of authority provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to forgery".

We are of the view that on the facts of this case, the respondent is precluded from setting up forgery. The appeal is allowed and the decision of the Court below is set aside.Costs in this Court and on the Court below shall be for the appellant to be taxed in default of agreement.

Appeal allowed