IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 083/2019**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

REPUBLIC OF ZAMBIA
COURT OF APPEAL
26 FEB 2020
REGISTRY
P.O. BOX 50067, LUSAKA

BETWEEN:

FRASER CHISHIMBA **APPELLANT**

AND

BARCLAYS BANK ZAMBIA PLC **RESPONDENT**

Coram: Kondolo, Makungu, Siavwapa, JJA
On 18th and 26th February, 2020

For the Appellant: *Miss T. Sakala of Frazer Associates*
For the Respondent: *Mr. R. Mwanza of Robert & Partners*

JUDGMENT

MAKUNGU, JA, delivered the Judgment of the Court

Cases referred to:

1. *Sun Country Limited and Others v. Savory and Another, SCZ Appeal No. 22 of 2006*
2. *Examination Council of Zambia v. Reliance Technology Limited, SCZ Judgment No. 46/2014*
3. *Zambia Revenue Authority v. Dorothy Mwanza and Others (2010) ZR Vol. 2, 181*

Legislation referred to:

1. *National Systems Payment Act, No. 1 of 2007*

Other works referred to:

1. *Halsbury Laws of England, Volume 16, 4th edition*
2. *Paget's Law of Banking, 13th edition (Mark Hapgood, Butterworths Law, 1904 (updated).*

1. INTRODUCTION

1.1. This appeal is against the High Court judgment dated 20th February, 2019 by Mrs. Justice C. Lombe Phiri dismissing the appellant's claims for recovery of damages for wrongful refusal by the respondent to pay cheque number 00053 in the sum of K1, 482.96, damages for negligence, damages for injury to reputation, embarrassment and mental anguish.

2. EVIDENCE ON RECORD

2.1 The appellant was the sole witness supporting his own case. In summary, his evidence was that he had been the respondent's customer for 15 years. Between April, 2016 and April, 2017, the respondent dishonoured a number of cheques for untallying signatures. He complained to the bank about

that in writing. In reply, the bank apologized for the inconvenience caused to him and stated that they ought to have contacted him through his relationship manager before dishonouring the cheques. He was requested to sign new signature cards to enable the bank update its records.

2.2 After the change of the specimen signature, on 14th November, 2017 he drew a cheque in the sum of K1, 482.69 payable to Sihal Central Sports Company Limited.

2.3 On 22nd November, 2017 the same was presented to the respondent by the said company through First National Bank Zambia Limited for payment. The respondent declined to pay it on account of untallying signatures.

2.4 The appellant averred that the signatures were actually matching and the respondent was negligent for having not contacted him before dishonouring the cheque and or properly checking their records. That he had agreed with the bank that each time they failed to pay a cheque, they were to notify him. He did not produce any document to prove this.

2.5 As a result he suffered embarrassment and defamation as a lawyer with 27 years experience and Chairman of the Tax Appeals Tribunal. He further stated that his relationship with Jihai Central Sports Company was strained and he suffered mental anguish.

2.6 The defendant also called only one witness, Jacob Fulilwa, who deals with procedures and policies within the bank and has 6 years experience. He stated that there were some cheques drawn by the plaintiff which were unpaid due to mismatches on the system mandate. After the plaintiff complained, the mandate was updated and put on the system to understand the new signature. Cheque no. 530 was dishonoured after careful comparison of the signature on the mandate and the one on the cheque. The signature on the cheque and the one on the mandate totally mismatched as a result of which the cheque was dishonoured.

2.7 He listed the responsibilities of the customer as; to ensure that he draws a cheque in such a way that the following are clear: the payee's name, the date, the amount in figures and words

and the signature as presented on the mandate in order to avoid being inconvenienced.

2.8 He said that if there is a signature mismatch, the bank is supposed to unpay the cheque and that the bank has no agreement with the customer to contact the customer concerning a mismatch of the signature.

3. DECISION OF THE LOWER COURT

3.1 The learned trial judge considered the evidence before her and took into account the pleadings and the submissions by counsel for both parties. She found that the respondent acted as it had ordinarily acted in all cases, and there was no duty on its part to contact the respondent before unpaying a cheque.

3.2 Further that, corresponding to this duty of the bank to the client to honour cheques, the clients also have a duty to ensure that when they endorse cheques, they do so in a manner that ensures that there would be no fraud perpetuated on the account by ensuring that they fill out the

cheque properly and that the signature is endorsed as per the record held by the Bank. The court went on and found that the bank was acting in the interest of its client in declining to honour the cheque.

3.3 The claims for defamation and mental anguish could not succeed because the endorsement on the cheque "untallying signatures" could not in itself demean the reputation of the appellant. Although the appellant suffered some inconvenience and was irritated by the conduct of the respondent, she found it difficult to hold, on a balance of probabilities, that the respondent acted in a negligent manner, thereby causing injury to reputation, embarrassment and mental anguish to the appellant.

3.4 The learned Judge dismissed the action for want of merit.

4. GROUNDS OF APPEAL

4.1 The appeal is based on three grounds couched as follows:

1. The court below erred in law and fact by holding that the respondent bank did not conduct itself in

a negligent manner in dishonouring cheque no. 000530 in the sum of ZMW 1,482.96 where there was evidence on record that the respondent had breached its duty to the appellant as its customer.

2. *The court below erred in both law and fact in holding that the appellant did not suffer any damage or injury to reputation, embarrassment and mental anguish as a result of the respondent's dishonor of cheque nos. 000509 and 000530 in the circumstances of the case as there is mental anguish, disrepute, embarrassment and inconvenience associated with the consequences of unpaid cheque at the point of dishonor regardless of whether or not there are adequate funds on a bank account.*

3. *The court below erred in both law and fact in holding that the appellant did not suffer injury to reputation, embarrassment and mental anguish as a result of dishonouring cheque no. 000530 in the*

face of being a man held in high standing in society.

5. ARGUMENTS ON BEHALF OF THE APPELLANT

5.1 The appellant filed heads of argument and in support of ground one, submitted as follows:

5.2 The respondent was negligent in the manner it handled the transaction. We were referred to **paragraph 832 of Halsbury's Laws of England** which states:

> ***"A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose."***

5.3 Counsel also referred us to the learned authors of **Paget's Law of Banking paragraph 474** which reads:

> ***"It is part of the contractual relation that the customer shall issue, and the banker receive his***

mandate, embodied in the cheque, in plain, unmistakable terms."....

"As regards ambiguity in the mandate, the recognized rule is that an agent who has adopted a reasonable course in face of ambiguity in the principal's instructions cannot be made liable whether such ambiguity arises from the method of expression or the medium of communication. The banker is entitled to the benefit of this rule, but also bear in mind the limits to its operation, including (1) that once a person enters into a contract he is bound by its terms, which, in the event of dispute, will fall to be construed objectively; (2) that a party relying on his own interpretation of the relevant instrument must have acted reasonably in all the circumstances in so doing, and if the ambiguity is patent on the face of the document, it may well be right, especially with the facilities of modern communication, for an

agent to have his instructions clarified by his principal, if time permits."

5.4 It was counsel's further submission that the respondent was under a duty to pay the cheque in question provided that the appellant had sufficient funds for that purpose.

5.5 The respondent breached its duty to contact him in order to verify the authenticity of the dishonoured cheque.

5.6 We were also referred to page 29 lines 15 to 26 of the record of appeal (page 7 of the judgment) where the court stated that *"Admittedly the defendant bank omitted to make an inquiry with the plaintiff regarding whether the plaintiff is the one who drew up the cheque."* It was submitted that this finding, was contrary to the finding that there was no negligence on the part of the respondent. There was need for the relationship manager assigned to the appellant to verify the transactions.

5.7 The lower court only considered claims no. 1 and 2 of the statement of claim and that this was an error because the appellant's claims for damages for wrongful refusal to honour

cheque no. 00530 and damages for negligence were distinct claims which ought to have been addressed and determined distinctively.

5.8 In summing up arguments on ground one, it was counsel's position that the appellant is entitled to damages for the respondent's wrongful refusal to pay the cheque.

5.9 On the second ground of appeal, it was submitted that dishonouring a cheque is an offence under the provisions of the **National Systems Payment Act, No. 1 of 2007**. There was a presumption of insufficient funds on the account when the said cheques were dishonoured. The appellant testified that his character was brought into disrepute and that he was subjected to embarrassment given his standing in society as a legal practitioner of more than 25 years at the bar and Chairperson of the tax appeals tribunal. In addition, he suffered inconvenience as he made alternative arrangements to pay for the dishonoured cheque albeit using the same signature. The trial court found as a fact that the conduct of

the respondent inconvenienced the appellant. However, no damages were awarded for that.

5.10 As for ground three, it was counsel's contention that the appellant's testimony in the court below that he operates several other accounts with different banks and has never faced challenges pertaining to his signature, was not rebutted. The appellant was of the view that the respondent acted unreasonably and negligently in refusing to pay out the cheques on account of signatures that were not tallying.

5.11 He contended that the court below did not adequately address its mind to the evidence he gave which proved his case as pleaded. To fortify this he relied on the case of **Sun Country Limited and Others v. Savory and Another** [2] where the Supreme Court held that:

> ***"In addition a court should not feel compelled or obliged and moved by any decided cases without giving reasons for accepting those authorities. In other words, a court must reveal its mind to the***

evidence before it and not just simply accept any decided case."

5.12 Counsel urged us to allow the appeal with costs.

6. RESPONDENTS ARGUMENTS

6.1 In response, counsel for the respondent, Mr. R. Mwanza in his heads of argument filed on 5th November, 2019 stated that the grounds of appeal only attack the lower court's findings of fact.

6.2 In response to ground one, he submitted that there was no negligence on the part of the respondent. This can be seen from DW1's evidence appearing on page 22 lines 19-27 of the record of appeal where he stated that there was a mismatch between the signature on the cheques and the customer's mandate and that the plaintiff had filled in fresh mandate forms so that his signatures could be updated to avoid recurrence of this.

6.3 The lower court was on firm ground when it found that the respondent owed the appellant a statutory duty to notify him of the anomaly on the cheque and that corresponding to this

duty of the respondent bank to the client to honour his cheques, the client also has the duty to fill out cheques properly and sign them as per the record held by the bank. The court also correctly found that the bank was acting in the best interest of its client. PW1 testified that he was informed that the dishonor of his cheque for untallying signatures was in his interest as the bank did not want to perpetuate a fraud.

6.4 On the second ground of appeal, the respondent's counsel contended that the appellant failed to prove that he suffered mental anguish, disrepute, embarrassment and inconvenience. Cheque no. 000509 was not an issue for determination in the lower court and this was confirmed by the appellants own evidence under cross-examination wherein he stated that "In my pleadings, I have not stated that cheque no. 000509 was dishonoured on account of insufficient funds." The court did on page 30 lines 20 – 27 hold that a reasonable person would not find the words "untallying signatures" defamatory of the plaintiff. The trial court concluded that the

evidence on record does not demonstrate any mental anguish that the appellant suffered.

6.5 It was counsel's further submission that the appellant was informed about the untallying signatures and that it was in his interest that the cheque was dishonoured.

6.6 That the appellant's arguments in support of the second ground of appeal fly in the teeth of the evidence on record and cannot stand. The lower court cannot be faulted for finding that the appellant did not suffer any damage or injury to reputation, embarrassment and mental anguish.

6.7 As for the third ground of appeal, counsel maintained his submissions against the 1st and 2nd grounds. He referred to a number of authorities, including **Examination Council of Zambia v. Reliance Technology Limited** [3] where the Supreme Court stated:

> ***"....this court will always be loath to disturb or lightly interfere with findings of fact of the lower court"***

And the case of **Zambia Revenue Authority v. Dorothy Mwanza and Others** [4] where it was held as follows:

> ***".....it is trite that this court will not interfere with findings of fact unless it is satisfied that the finding was either perverse or made in the absence of any relevant evidence or misapprehension of facts or that they were findings which, on a proper view of the evidence no trial court acting correctly and reasonably can make...."***

6.8 It was counsel's submission that on the totality of the evidence, there is no reason for this court to interfere with the findings made by the court below. He urged us to dismiss the appeal and uphold the decision of the court below.

7. OUR DECISION

7.1 We are indebted to counsel for their submissions which we have taken into account in arriving at this decision. We have also considered the record of appeal.

7.2 We shall deal with the three grounds of appeal together since they are related.

7.3 The particulars of negligence pleaded by the appellant were that the respondent failed to contact him to ascertain the genuineness of the cheque issued despite having his full particulars.

7.4 In the letter from the respondent to him dated 7th March, 2017 on the subject *"Resolution of your complaint – Dishonour of cheque no. 524 for K535"* the bank stated among other things that they ought to have contacted him through his relationship manager before dishonouring the cheque. The bank's witness whilst accepting the contents of the letter, stated that there was no obligation to call the appellant. We interpret that as courtesy and not duty. No future obligation on the part of the bank to call the appellant before any cheque issued by him was unpaid can be implied from the letter.

7.5 Under cross-examination as indicated on page 138 of the record, the appellant admitted that there was no document before court to show that the agreement they had was that

each time the respondent failed to pay a cheque, they were supposed to notify him.

7.6 The passage quoted from **Paget's Law of Banking** by the appellant (page 9 of this judgment refers) states in part that:

> ***"...a party relying on his own interpretation of the relevant instrument must have acted reasonably in all the circumstances in so doing, and if the ambiguity is apparent on the face of the document, it may well be right, especially with the facilities of modern communication, for an agent to have his instructions clarified by his principal, if time permits."***

7.7 In the present case according to the evidence of DW, the respondent (page 144 of the record) had carefully scrutinized the appellant's signature on cheque no. 530 using the electronic system whereby an image of the cheque as opposed to the hard copy was examined before clearance. The appellant's signature on the cheque mismatched with what was presented on the mandate.

7.8 The appellant did not rebut this evidence neither did he rebut DW's evidence that a client has a duty to draw up a cheque properly and clearly and sign it in such a way that there would be no mismatch with the specimen signatures that he gave the bank. The appellant apparently breached his duty on several occasions.

7.9 We therefore take the view that the respondent acted reasonably in all the circumstances of unpaying the cheque. It was indeed to protect the appellant in case the cheque was forged. It was also in order to protect the bank from liability should it have paid on a forged cheque.

7.10 The authority of **Pagets Law of Banking** does not make it mandatory for a bank to communicate with its clients to clarify their instructions. He only suggests that the agent (bank) may contact the principal (customer) *"if time permits"*.

7.11 In this case, there is no indication that the respondent had time to call the appellant before unpaying the cheque.

7.12 According to the author of Pagets Law of Banking; " ....*The recognized rule is that an agent who adopted a reasonable course in face of ambiguity in the principal's instructing cannot be made liable whether such ambiguity arises from the method of expression or the medium of communication."*

The lower court was therefore on firm ground when it found that the bank acted as it had ordinarily acted in cases such as this and there was no duty on its part to contact the appellant.

7.13 The lower court also rightly found that negligence was not proved.

7.14 The appellant's contention that a presumption that he had insufficient funds on the account was created by dishonouring the cheque/s holds no water and is rejected.

7.15 The appellant's argument that the lower court ought to have taken into consideration the fact that he operates several accounts with different banks and had never faced challenges with his signature is far-fetched and the other bank accounts were not in issue.

7.16 The appellant did not plead damages for inconvenience and would under the circumstances not be entitled to such damages even though the lower court found that he suffered inconvenience.

7.17 **Section 33 (1) of the National Systems Payment Act No. 1 of 2007** makes it an offence for any person who willfully, dishonestly or with intent to defraud issues a cheque on an insufficiently funded account. It does not apply to this case as the cheque was unpaid for untallying signatures and no offence is prescribed in the same Act for that.

7.18 It is worth noting that damages for negligence can only be granted if the claimant proves that there was a breach of duty resulting in injury to himself. Since negligence was not proved, the respondent was not liable in damages.

7.19 On the issue of defamation, embarrassment and mental anguish, we are of the considered view that the lower court took a balanced view of the evidence and rightly found at pages 19 of the judgment: *"It happens to the best of people that sometimes their signatures may differ and there is no*

reasonable person who would look down on another simply because their signatures did not match all the time."

7.20 We therefore cannot fault the lower court for dismissing the appellant's claims for defamation and embarrassment.

7.21 We also found no reason to interfere with the lower court's finding that the evidence on record did not demonstrate that the appellant suffered any mental anguish and nervous shock.

8. CONCLUSION

8.1 All things considered, the appeal fails in its entirety. Costs shall follow the event. The costs should be agreed upon, failing that, taxed.

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M.M. KONDOLO
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.J. SIAVWAPA
COURT OF APPEAL JUDGE