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**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

Appeal No 23/2016

B E T W E E N :

BARCLAYS BANK ZAMBIA PLC

APPELLANT

AND

CARGO MANAGEMENT SERVICE LIMITED

RESPONDENT

CORAM : Mchenga DJP, Chashi and Chishimba, JJA
26th March, 2017 and 14th September, 2017

For the Appellant : Mr. R. Mukuka of Messrs Robert and Partners.
For the Respondent: Mrs. D. Findlay of Messrs D. Findlay & Associates

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Shreeji Investments Limited Vs. Zambia National Commercial Bank PLC SCZ Judgment No. 2/2015
2. Fluid Base Industries Limited Vs. Barclays Bank Zambia Plc (Appeal No. 125/2013)
3. Andrew Tony Mutale Vs. Crushed Stones Sales Limited (1994) S.J. 98 (S.C.)
4. Mary Musonda Kaunda Vs. The Attorney General SCJ No. 1 of 1993
5. Eastern Cooperatives Union Limited Vs. Yamene Transport Limited (1988/89) ZR 128
6. Mazoka and Others Vs. Mwanawasa and Others (2005) ZR 138 (SC)
7. Mbalakao Vs. ZNPF Board SCZ Appeal No. 120/2000
8. EMC Truck Centre (Z) Limited & Another Vs. Access Bank SCZ Appeal No. 17 of 2003
9. The Attorney General Vs. D. G. Mpundu (1984) Z.R.6
10. Reardom Smith Line Vs. Caycer Irrine & Co (1929) 46 TLK 146
11. Stracey Vs Urquhart (1930) A. C. 28
12. Stanbic Bank Zambia Limited Vs. A.S. & C enterprises and others (2008) Vol. 1 ZR 259

13. Philip Mhango Vs. Dorothy Ngulube and Others (1983) ZR 61
14. The Attorney General Vs. Marcus Kampumba Achiume (1983) ZR 1
15. Emmanuel Mutale Vs. Zambia Consolidated Copper Mines Ltd (1994) S.J. 67 (SC)
16. GDC Hauliers Limited Vs. C and B Enterprises Limited (2010) Vol. 3 Z.R. 362
17. Priscilla Ngenda Kalisiria Vs. Zambia National Commercial Bank Plc SCZ Judgment No. 8 of 2015
18. Daniel Mwale Vs. Njolomole Mtonga (Sued as Administrator of the Estate of the Late Gabriel Siwonamutenje Kapuma Mtonga) and The Attorney General (SCZ Judgment No. 25 of 2015)
19. Brahma Shum Shere Jung Bahadur Vs Chartered Bank of India, Austria and China.

OTHER WORKS REFERRED TO:

1. Phipson on Evidence, 17th Edition
2. The Stamp Act 1853
3. The Bills of Exchange Act 1882
4. The Cheques Act.
5. Halsbury's Laws of England 4th Edition, Volume 1 (2)

This is an appeal against the Judgment of the High Court holding that the Appellant was negligent when it cashed altered cheques drawn by the Respondent over the counter. The Respondent's case in the lower Court was as follows: The Respondent held and maintained bank account number 1039119 at the Appellant's South End Branch in Ndola.

The Respondent alleged in the Court below that between 19th July, 2012 and 17th of October, 2012, the Respondent drew

cheques on their said account held with the Appellant. The said cheques were payable to divers creditors and institutions. The Respondent discovered that the cheques were not in fact paid out to the intended specific recipients. Instead, the cheques were wrongfully and fraudulently converted into cash without the Respondent's authority. Further, that the cheques were converted into cash by the Appellant and paid out, over the counter, to a person called Gilmore Hamoonga; an employee of the Respondent.

The Respondent further alleged that on 24th August, 2012 the Appellant together with Gilmore Hamoonga and without the authority of the Respondent altered cheque number 4614 and paid out the sum of ZMW21, 500.00 instead of ZMW1, 500.00 which was originally endorsed on the cheque by the Respondent. The Appellant debited the Respondent's account with the altered amount of ZMW21, 500.00.

In a nutshell the Respondent contended that the Appellant, was in breach of its duty by failing to carry out the Respondent's specific instructions endorsed on the cheques and paying out the cheques which were, visibly and fraudulently altered in value and

instructions to the intended payees without enquiry from the Respondent.

In the alternative, the Respondent alleged that the Appellant's employees had colluded with Gilmore Hamoonga in fraudulently altering the cheques and paying out the cheques over the counter.

The Appellant essentially conceded liability for the cashed cheques amounting to the sum of ZMK261,651,366.40. Consequently, the Appellant paid the said sum into Court. The Appellant denied liability in respect of payment of cheque number 4614 in the sum of ZMW21, 500.00 and cheque number 4667 in the sum of ZMK 1, 949. 88.

The trial Court found that there was lack of due diligence by the Appellant in encashing the cheques in issue over the counter generally endorsed for payment to specific third parties. Further, that the Appellant was negligent through its employees and failed to exercise due care to examine the cheques presented and failed to guard the Respondent from fraud perpetrated in collusion with its employees.

The trial Court relied on the evidence of PW3 and PW4 and found that the transactions on the Respondent's account during the period in question were tainted with fraud. Further that the Appellant did not exercise due care and skill in executing the Respondent's instructions to pay specific payees. Consequently, the lower Court found that the Respondent was entitled to damages as a result.

With regards the Respondent's claim for damages and loss suffered due to statutory penalties and interest as a result of late payments, she found that the Respondent was entitled to the damages sought.

The trial Court went further to consider the disputed cheque number 4167 in the sum of ZMW1, 946, 882.50 intended to be paid to CFAO. The Court found that Appellant did not adduce any evidence to show that the subject cheque was paid to the intended payee. After examining the cheque that was payable and indeed paid to Gilmore Hamoonga the lower court noted that the said cheque was visibly altered. The figure two and the word twenty were inserted to alter the figure to ZMW21, 500.00 from the original figure of ZMW1, 500.00. She added that there was no evidence on

record to show that DW1 was authorized to cash cheques which exceeded the ordinary limit of a cashier.

The court found that the cheque was fraudulently, wrongfully and without authority of the Respondent converted to cash and paid by the Appellant's employees over the counter to the Respondent's agent Gilmore Hamoonga.

The Appellant advanced ten grounds of appeal reproduced verbatim as follows;

- 1. The Court below erred in glossing over and in not considering or making a pronouncement on the import of the much admitted and harped evidence on the role the Respondent's authorized agent Gilmore Hamoonga in the alleged altering, fraudulent, wrongful converting to cash of cheques paid to the Respondent's agent as canvassed by the Respondent in its pleadings and witness statements as regards the finding of liability against the Appellant.*
- 2. The finding by the Court below that the Appellant was negligent, paid without authority, acted in disregard of statutory duty, did not act in good faith thus liable in the absence of particulars of negligence and non consideration of the role played by the Respondent's officially introduced agent Gilmore Hamoonga was wrong and erroneous.*
- 3. The Court below erred, on available evidence, in determining that it was not in dispute that the cheques paid by the Appellant without admission of liability were admitted or that the said*

cheques had been made payable to various creditors, suppliers and government institutions.

- 4. The Court below erred in determining and ordering that the Respondent's claim had succeeded as endorsed in the wake of payment into Court of ZMK261, 657, 366.41 admittedly appropriated by the Respondent.*
- 5. The Court below erred in determining that the Respondent had proved and merited damages and also in determining against the Respondent's pleadings as couched and evidence as adduced that the Respondent has specifically pleaded special damages in the form of penalties, interest and that such damages ought to be assessed.*
- 6. The Court below erred in law and fact in proceeding on the premise the ZMK261, 657, 366.41 paid into Court and appropriated by the Respondent was paid with admission of liability and in the process did not pronounce on the effect of payment and appropriation on money paid into Court.*
- 7. The Court erred in determining that the Appellant's liability was founded on authority of the case of Stanbic Bank Zambia v. A.S. & C Co. Enterprises Limited.*
- 8. The Court erred in determining that DW1 conceded to the Appellant's alleged breach of statutory duty by endorsing a valid statement asked about in general cross examination that it is not normal banking practice to allow a cheque made payable to a specific payee to be cashed over the counter and also in determining that DW1 was not authorized to cash cheques which exceeded the ordinary limit of the cashier.*
- 9. The Court below on available evidence erred in determining that the value of the cheque number 4167 should be refunded to the Respondent.*

10. *The Court below on available evidence and the law erred in determining that the Appellant needed to make inquiries as regards cheque number 4614 made payable to and paid to the Respondent's officially introduced agent Gilmore Hamoonga for ZMK21, 500.00 and that the Appellant should shoulder any alleged loss resulting from payment of cheque No. 4614.*

The Appellant filed into court heads of argument dated 23rd December, 2016. Grounds 1 and 2 were argued together. The Appellant under these two grounds, in a nutshell argued that the trial court glossed over the role played by the Respondent's authorized agent, Gilmore Hamoonga, in perpetrating the fraudulent encashing of the cheques in question.

The Appellant relied and extensively quoted the Supreme Court case of *Shreeji Investments Limited Vs. Zambia National Commercial Bank PLC*⁽¹⁾. The Appellant went further to give its own analysis of the above cited case. The Appellant's argument in a nutshell was that the **Shreeji case** decided that where a banker, in good faith and in the ordinary course of business, pays a cheque drawn on him, which is not endorsed or is irregularly endorsed, the Bank does not, in so doing, incur any liability by reason only of the absence of, or irregularity in, endorsement, and the Bank is deemed to have paid in due course.

The Appellant contended that the Respondent ought to be bound by the actions of its own employee and agent's fraudulent activities. We were referred to the case of ***Fluid Base Industries Limited Vs. Barclays Bank Zambia Plc*** ⁽²⁾ where the Supreme Court stated as follows;

"... the fraud was perpetrated by the appellant's own book keepers who were responsible for accounting records, banking and collection of bank statements. And since two of the employees were introduced to the bank as being responsible for conducting business on the appellant's account; the bank had no reason to doubt their authority to transact on behalf of the company."

The Appellant's argument was that in the wake of the role played by its agent in the fraudulent payments, the Respondent cannot escape liability completely. Further, that the Respondent, as principal, cannot be absolved from blame as to whether its agent was acting fraudulently as the said principal was clothed with actual and ostensible authority to act on behalf of the Respondent.

It was the Appellant's argument that the Respondent did not adduce credible evidence pointing to negligence on the part of the Appellant. We were referred to a passage in ***Phipson on Evidence***,

17th Edition were the learned authors discussed the burden of proof in civil matters.

Under ground 3, the Appellant argued that the sum of ZMW261, 657, 366.41 paid into Court was paid into court without any admission of liability on the part of the Appellant. Further, that the Respondent did not adduce any evidence that the cheques in issue bore names of the intended payees when they were presented to the Appellant. In addition, that there was no evidence at trial to prove that the cheques were in fact altered in value at point of presentation for encashment at the Appellant Bank.

It was the Appellant's argument under ground 4 that the trial Court ought not to have allowed a situation where through its Judgment the Respondent was to recover ZMW296, 340, 266.22 without considering the fact that the Appellant had already paid into Court the sum of ZMW261, 657, 366.41.

Under ground 5, the Appellant argued that the Respondent did not specifically plead for special damages in terms of the alleged charges, interest and penalties incurred owing to the alleged payment of dues to various statutory bodies. Further, that the

Respondent did not adduce any evidence by way of documentation or otherwise that it had indeed incurred penalties and interest as alleged. We were referred to the following cases; **Andrew Tony Mutale Vs. Crushed Stones Sales Limited** ⁽³⁾, **Mary Musonda Kaunda Vs. The Attorney General** ⁽⁴⁾ and **Eastern Cooperatives Union Limited Vs. Yamene Transport Limited** ⁽⁵⁾ where the Court stated that there must be specific proof of special damages and that the Court should not be left to guess a litigant's actual loss.

With regards to the need for parties, through their pleadings, to explicitly present their claims, the Appellant referred us to the following cases; **Mazoka and Others Vs. Mwanawasa and Others** ⁽⁶⁾, **Mbalakao Vs. ZNPF Board** ⁽⁷⁾, **EMC Truck Centre (Z) Limited & Another Vs. Access Bank** ⁽⁸⁾ and **The Attorney General Vs. D. G. Mpundu** ⁽⁹⁾.

The arguments advanced under ground 6 are similar to the arguments under ground 5. The Appellant essentially argued that once money is paid into Court and has been appropriated no issue remains for determination regarding the said money. We were referred to the case of **Reardon Smith Line Vs. Caycer Irrine & Co** ⁽¹⁰⁾ and **Stracey Vs Urquhart** ⁽¹¹⁾ where it was held that;

“if the Respondent accepts money paid into Court, the action is at an end against the Defendant making the payment and against any other Appellant sued in the alternative.”

The Appellant's arguments under grounds 7 and 8 were addressed when arguing ground 1 and 2. Under ground 9 the Appellant argued that there was no evidence on record to support the Court's finding that the value of Cheque No. 4167 ought to be refunded to the Respondent.

The Appellant under ground 10 contended that none of the witnesses adduced evidence to the effect that the Appellant's employees in collusion with the Respondent's agent altered Cheque number 4614.

The Respondent filed onto Court heads of argument dated 18th April, 2017. In response to grounds 1 and 2 the Respondents argued that the trial Judge found as a fact that the cheques were fraudulently converted to cash over the counter by the Appellant's employees who participated in a scheme to defraud the Respondent.

The Respondent contended that the Appellant should not have paid out cheques drawn out to specific juristic entities over the counter to the Respondent's agent. We were referred to the case of

Stanbic Bank Zambia Limited Vs. A.S. & C enterprises and others

(12)where the Supreme Court held that;

“the Bank acted recklessly and in total disregard of the fact that the cheques were made payable to specific juristic persons, were generally crossed indicating that they were not transferable to third parties and the bank was in breach the Code of Banking Practice in Zambia by encashing third party cheques.”

It was the Respondent's submission that the **Shreeji case** cited by the Appellant ought to be distinguished as the cheques in issue herein were drawn out to specific payees and not the Respondent's agent. Further, that the Appellant went against the guidance of the Court in the **Shreeji case** on the need for banks to carefully examine cheques presented to them in order to detect forgeries. The Respondent went further to refer us to the holding of the Court in the **Shreeji case** where the Court stated that;

“in order to justify payment of a forged cheque on the principle of estoppels, the Bank must show due diligence before it can assert this defence, as the doctrine of estoppels is a creation of equity. He who comes to equity must come with clean hands.”

It was argued that the Appellant did not cash out the cheques in good faith in line with **Section 19 of the Stamp Act 1853**, **Section 60 of the Bills of Exchange Act 1882** and **Section 2 of**

the Cheques Act. There was evidence adduced on record indicating that the Appellant was negligent when it encashed cheques over the counter. We were referred to the cited case of **Stanbic Bank Zambia Limited Vs. A.S. & C enterprises and others** ⁽¹²⁾ where the Court stated that;

“the test for negligence is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the Banker’s mind and caused them to make an inquiry...”

The Respondent submitted that an appellate Court cannot easily interfere with findings of fact made by a trial court unless the findings were perverse or made in the absence of evidence. We were referred to the cases of **Philip Mhango Vs. Dorothy Ngulube and Others** ⁽¹¹⁾ and **The Attorney General Vs. Marcus Kampumba Achiume** ⁽¹²⁾ as authority.

It was the Respondent’s contention that it was not possible for the Respondent to detect the fraud from the Bank Statements as the amounts cashed and paid over the counter by the Appellant correspond with the amounts endorsed by the Respondent on the cheques. Further, that the Respondents agent did not have express

or implied authority to cash generally crossed cheques over the counter made out to specific payees. In addition, that the Respondent would only be held liable if it expressly adopted the agent's action. We were referred to a passage from **Halsbury's Laws of England 4th Edition, Volume 1 (2) paragraph 136** where the authors discussed the concept of adoption under agency law.

● In response to grounds 3 and 4, the Respondent argued that the Appellant admitted liability for cheques listed in its amended defence as per **Order 21 Rule 5 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**. Further, that the admission by the Appellant is supported by evidence on record. The difference between the amount claimed and the amount paid into court by the Appellant is as a result of cheques that the Appellant

● disputed.

The Respondent, in response to ground 5, argued that it did plead damages and provided particulars of damages in its amended statement of claim. Further, that the record will show that the Respondent did in fact suffer damage arising from the Appellant's negligence. According to the Respondent, reference to a court action resulting from a non-payment for cheque number 4767 is an

example of damage suffered as a result of the Appellant's negligence.

The Respondent submitted that the case of **Andrew Tony Mutale Vs. Crushed Stones Sales Limited**⁽³⁾ referred to by the Appellant is in fact in favour of the Respondent as the court opined that as long as a Defendant is put on notice as to claims for damages there can be no prejudice if and when the court grants the said damages. We were referred to the case of **Eastern Cooperative Union Limited Vs. Yamene Transport Limited**⁽¹⁵⁾ where the Supreme Court reiterated the principles in the cited case of **Andrew Tony Mutale Vs. Crushed Stones Sales Limited**⁽³⁾.

The Respondent submitted that the authorities cited by the Appellant in fact support the fact that the Respondent was entitled to damages having demonstrated that the Respondent did indeed suffer damages.

Under ground 6, the Appellant referred us to **Order 22 of the Rules of the Supreme Court of England (White Book) 1999 Edition** and the case of **Emmanuel Mutale Vs. Zambia Consolidated Copper Mines Ltd**⁽¹⁵⁾ where the Court discussed the issue of payments

made into court and costs. It was submitted that there was no obligation on the lower court to take into account or consideration the payments made by the Appellant into Court as well as out of court as the same only affected the discretionary award of costs by the court.

In response to ground 8 the Respondent argued that the trial Court made a finding of fact to the effect that cheque number 4167 did not get to the intended payee. We were referred to the case of **GDC Hauliers Limited Vs. C and B Enterprises Limited** ⁽¹⁶⁾ where the Supreme Court stated that appellate courts will only reverse findings of fact if it is shown that the findings were perverse or not supported by evidence.

The Respondent repeated its earlier arguments regarding reversal of findings of fact in response to ground 9. The Respondent added that DW1 was a witness with an interest to serve and that he did not adduce any evidence indicating that he had authority to cash a cheque in excess of ZMW20, 000.00. We were referred to the case of **Priscilla Ngenda Kalisiria Vs. Zambia National Commercial Bank Plc** ⁽¹⁷⁾ where the Supreme Court discussed circumstances when an appellate Court can reverse findings of fact made by a lower court.

The Respondent urged the court to dismiss the appeal as the record will show that the lower court properly analyzed the evidence adduced at trial.

We have considered the appeal, the heads of arguments and the Judgment of the lower court.

The issues raised in the appeal revolves around the Banker/Customer relationship and the extent to which a bank will be held liable for payment of crossed cheques issued by a Customer payable to third parties, encashed across the counter by a customer's authorized agent. Nine grounds of appeal were advanced. The view we take is that the main issue is the contested liability by the bank, whether it was negligent in paying out the alleged Cheques in issue.

It is trite that the relationship of banker and customer constitutes the bank a debtor of the customer and arises by virtue of a customer holding an account with the bank. The bank undertakes to pay any amount due against the written orders of the customer issued whether by cheque to a payee or transfer. According to the learned authors of the **Halsbury's laws of England**

paragraph 149 Volume 3(1) 4th Edition Reissue the customer on his part is

“obligated to exercise reasonable care in the execution of written orders so as not to mislead the bank or make forgery easy.”

Ordinarily, a banker, who in good faith and in the ordinary course of business, pays a cheque payable to order drawn on him, to which the person in possession has no title by reason of endorsement being forged, is protected from liability; when it is done in good faith that is honestly whether done negligently or otherwise. This does not apply to payment made contrary to the crossing as that would not be in the ordinary course of business.

It is not in dispute that banks owe a duty of care to customers in carrying out its mandate or instructions issued by a customer. It is further not in dispute that Gilmore Hamoonga was an authorised employee of the Respondent. Further, that he presented the crossed cheques payable to third parties over the counter for payment encashment of the cheques in cash.

The Appellant's main gist of argument in ground one and two is that the Respondent ought to have been found negligent for the actions of Gilmore Hamoonga who had actual or ostensible

authority to transact on behalf of the Respondents and did present the cheques in issue.

In the Court below evidence was adduced of the cheques payable to various entities issued by the Respondent encashed over the counter by Mr. Hamoonga. It was not disputed by the Appellant that the crossed cheques were encashed over the counter by Mr. Gilmore Hamoonga.

The Respondent's contention is that the negligence was on the part of the Appellant Bank.

The duty of care being owed by the banks to customers by virtue of the banker and customer relationship is already determined. The issue is whether there was breach of that duty of care by the Appellant bank. Negligence as a tort is a breach of a legal duty to take care which results in damages to the claimant. According to the text **"Winfield and Jolowicz on Tort at page 132** the ingredients are

"Legal duty on the part of defendant towards customer to exercise care in such conduct of duty as falls within the scope of the duty; breach of that duty is a failure to come up to the standard required by law and consequential damage to which can be attributed to defendant's conduct."

Therefore to be held liable in negligence, there must be a legal duty to take care.

The next issue is whether the Appellant bank acted in the ordinary course of its duty by paying cash over the counter in respect of the presented cheques issued and bearing the names of third parties.

According to **Halsbury's laws of England (Supra)** paragraph 17, on payment in contravention of the crossing, payment of a crossed cheque is not considered to be in the ordinary course of business by the bank. Though the **Bills of Exchange Act 1882** does not directly prohibit a banker paying in the contravention of the crossing, a banker paying is liable for any loss suffered by the customer. A banker presented with a cheque drawn in contravention of the customer's order cannot debit the customer's account. A banker must question such a payment or payments.

In respect of the issue whether the bank was negligent by paying out the crossed cheques over the counter whose value was paid into court, we are of the view that there was negligence on the part of the Appellant in paying cash over the counter for crossed

cheques issued to third parties. In our view, paying out crossed cheques issued to third party entities over the counter, in cash, to the Respondent's employee, was out of the ordinary course of the mandate. The fact that the cheques were drawn payable to 3rd parties ought to have put the Appellant on alert and inquiry.

It is our view that the Learned Trial Judge was on firm ground when he found the Appellant liable in respect of the crossed cheques issued to the 3rd Parties (juristic persons) in the sum of K261,000.

The mandate given to the bank was clear, to pay the juristic entities issued with the cheques. Instead the bank breached the contractual banker/customer relationship by paying cash over the counter to Gilmore Hamoonga. A mandate is binding on a bank which must act upon it. Clearly Mr. Hamoonga had no title to the crossed cheques. The fact that he was an employee of the Respondent does not absolve the Appellant Bank from liability as the payment was not done in the ordinary course of business. The Appellant bank breached its statutory duty to act in good faith and was negligent by failing to exercise care and skill expected of a reasonable banker. We refer to the cited case of **Stanbic Bank Zambia**

Limited Vs A.S and C. Enterprises (Supra) where a bank was held liable for paying out crossed cheques due to the Respondents to other entities without title.

It was held that;

“a banker is under statutory duty to act in good faith and without negligence and exercise care and skill as would be exercised by a reasonable banker and includes....The duty to inquire about its customer's title of the cheques before deciding to collect the cheques. This duty is the duty of the bank which it owes itself to protect itself from being liable to the true owner and from being used as an engine for fraud.”

As regards the test of negligence, the Supreme Court stated that it is whether the transaction of paying any given cheque was so out of the ordinary course that it would have aroused doubts in the banker's mind and caused them to make an inquiry. The Supreme Court went on to hold that

“Appellant bank acted recklessly and total disregard of the following facts; that the cheques were endorsed to specific juristic persons; that the cheques were generally crossed indicating that there were not transferable to the third parties; that there was no link established between the Respondents and Appellant's Bank client.”

Though the Appellant contends that the reliance by the court below on the above cited case was erroneous, we are of the view that it was not erroneous or wrong. The aforementioned case dealt with the bank's statutory duty to act in good faith and with negligence and held a bank liable for negligence arising out of paying third parties a crossed cheque endorsed to specific juristic persons. The learned trial Judge was on firm ground by relying upon the above case.

The facts of this case have established negligence. Crossed cheques issued to juristic entities were paid out to Mr. Hamoonga, a person who had no right of title, clearly against the mandate issued by the customer to the Appellant Bank.

We are of the firm view that the finding of liability cannot be considered perverse or overturned as there was breach of duty established.

We find no merit in grounds one and two.

In ground three, the Appellant assails the holding by the Court that the cheques paid into Court without admission of liability were admitted and that they were made payable to various creditors,

supplier or government institution. The contention being that no proof of copies or cheque stubs were adduced to prove the payments.

We have perused the evidence adduced in the court below. The fact that the cheques were paid over the counter was not disputed by the Appellant. It is trite that upon presentation and payment of cheques issued, the bank retains the original cheque leaflets. The Appellant bank did not produce them before court in disputing whether indeed the cheques were issued to the other suppliers or creditors. The finding of fact that the cheques had been made payable to various creditors, suppliers and government institution cannot be assailed or be said to be perverse or made upon misapprehension of the evidence adduced. It was a finding of fact made upon proper review and analysis of evidence adduced. We find no merit in the ground and accordingly dismiss it.

The issue of whether or not the payment of ZMW261, 657.41 paid into court without admission of liability was admitted is not in any event relevant after the finding of liability in respect of payment of crossed cheques issued to the various creditors, suppliers and government institution paid to Mr. Hamoonga over the counter.

Ground four contends that the Court below erred by awarding the sum as endorsed on the claim namely ZMK 296,340,366.22 in the wake of the payment made into court of the sum of ZMK 261,657,366.41. The contention being that this would be unjust enrichment. In addition, that there is a difference between the alleged sum of ZMK 296,340,366.22 and the amount paid into court of ZMK 261,657,366.41. Further that the total of the twenty cheques issued to third parties amounts to the sum of ZMK 289,703,875.99.

We are of the view that the issue of the total sum of the cheques was not raised in the Court below and we will not labour the issue. We refer to the Supreme Court case of ***Daniel Mwale Vs. Njolomole Mtonga (Sued as Administrator of the Estate of the Late Gabriel Siwonamutenje Kapuma Mtonga) and The Attorney General*** ⁽¹⁸⁾ where the court opined that an issue not raised in the court below cannot be raised for the first time in an appellate court.

As regards the issue of unjust enrichment being alleged, the same does not arise. The Respondent is and was entitled to the claim endorsed on the writ and statement of claim, less the amount

paid into court. The issues of unjust enrichment does not therefore arise. Ground four is therefore dismissed for lack of merit.

In ground five, the issue is whether the Respondent had proved the claim for damages and whether special damages such as penalties and interest were specifically pleaded.

We have perused the statement of claim appearing at page 29 of the record particularly paragraph 14 where the Plaintiff averred that it had suffered and continues to suffer damages as follows;

“In terms of its failure to remit and make payment of statutory dues on the dates by virtue of which penalties and or interest in the amounts due and payable .. have been levied by the relevant statutory institutions.”

The Respondent went on to particularize the special damages. Under the particulars, the Respondent named Workman's Compensation, NAPSA and Zambia Revenue Authorities as institutions that had penalized it.

The Learned Trial Judge was therefore on terra firma when it held that the Respondent had specifically pleaded special damages claim in the form of penalties.

Special damages having been pleaded the next issue is whether damages or loss was proved. In our view the incurred loss that was proved was in respect of penalties imposed by Workman's Compensation. Though no evidence was laid of the penalties imposed by Zambia Revenue Authority and NAPSA, Judicial Notice is taken of the fact that penalties are charged and imposed for late payment by the above mentioned institutions. The Learned Trial Judge was therefore on firm ground when he held that the Respondent had suffered damages to be assessed by the Deputy Registrar.

In ground six, the issue raised is the effect of payment of admission money paid into court by the Appellant without admission of liability, the appropriation and the payment out of court by the Respondent. Whether it put an end to the action by the Plaintiff.

We are of the view that the payment into court and the subsequent payment out of court did not and does not bring an action to an end. The payment into Court merely has a bearing on interest which stops running on the amount paid.

The Appellant in ground seven contend that the court below erred by holding that DW1 had conceded to the Appellant's alleged breach of statutory duty when he endorsed the statement stating that it is not normal banking practice to allow a cheque made payable to a specific payee to be cashed over the counter and that he was not authorised to cash cheques exceeding the ordinary limit.

We have perused the evidence of DW1 particularly appearing at pages 376 to 377. DW1 had conceded in cross examination that it was not normal banking practice to allow a crossed cheque issued to Zambia Revenue Authority to be cashed over the counter by a person.

We therefore find no merit in the ground raised.

In ground eight, the issue is whether the Court below erred by determining that the sum of ZMK1,949,880 issued on issue No. 4167 payable to CFAO be refunded to the Respondent.

We are of the view that it was not in issue that the above mentioned issued cheque was not credited to CFAO, despite the Respondent's account having been debited. As earlier held, this was contrary to the mandate given by the Respondent to the

Appellant bank which it failed to honour. The Learned Trial Judge was on firm ground in awarding refund of the sum of ZMK 1,949,880.

In respect of ground nine, the Appellant contended that the court below erred by holding that the loss in respect of the encashed cheque number 4614 in the sum of ZMW 21,500 payable to Gilmore Hamoonga be borne by the Appellant. It is not in issue that cheque number 4616 for the sum of K1,500 payable to Gilmore Hamoonga was duly issued by the Respondent. However at the time of payment, the cheque was altered to the figure of K21,500 by the insertion of the number 2 between the letter K and figure 1 to read K21,500 instead of K1,500.

The issue is whether any reasonable banker would have suspected fraud taking into account the course of dealing with the Customer and the person acting as the agent. Cheque No. 4614 was altered and presented by the Respondent's agent.

The issue is whether the alteration was apparent at the time of presentation and payment of the cheque that is visible such that a prudent banker would have noticed it.

We have perused the cheque 4614 appearing at page 97 of the record. We are of the view that the alteration was not apparent to warrant liability on the Appellant Bank. We refer to the case of ***Brahma Shum Shere Jung Bahadur Vs Chartered Bank of India, Austria and China***⁽¹⁹⁾ where it was stated that a bank is protected even though it has paid a materially altered cheque if;

“the alterations were not apparent at the time of payment,”

or where it acts in good faith and without negligence.

We are of the further view that Gilmore Hamoonga being a duly authorised agent of the Respondent who presented the altered cheque, the bank cannot be held liable for the fraud perpetrated by him. The bank acted in good faith by paying the Respondent's agent who had authority and had on previous occasion withdrawn cash in excess of his alleged limit of K5, 000.


The lower Court therefore erred and misdirected itself in awarding the refund of the sum of K21, 500. We therefore set aside the order of refund of the sum of ZMW 21,500.

The Respondent was therefore only entitled to the claimed sum of K296, 340 less the following amounts;


- i. The amount paid into and out of court in the sum of ZMW261,657.36
- ii. The sum of K21, 500 which has been set aside.

In a nutshell, the outstanding amount due to the Respondent by the Appellant Bank after the above deductions is the sum of K13, 182.64 with interest from date of writ to date hereof at the short term deposit rate, thereafter at current bank lending rate.


The Parties shall bear their own costs in this Court and in the Court below.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. Chashi
COURT OF APPEAL JUDGE



F.M. Chishimba
COURT OF APPEAL JUDGE