

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
 (CIVIL JURISDICTION)

APPEAL NO.59/2013
SCZ/8/049/2013

BETWEEN:

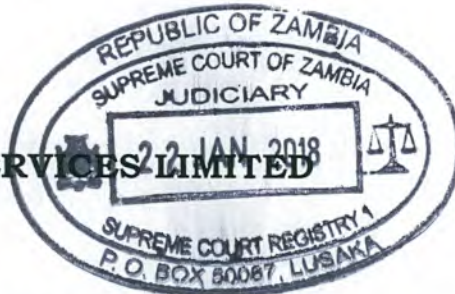
C AND H FUEL SERVICES LIMITED

APPELLANT

AND

FINANCE BANK ZAMBIA LIMITED

RESPONDENT



CORAM: Hamaundu, Malila and Kaoma, JJS

On 12th August, 2015 and 19th January, 2018

For the Appellant: Mr H. M. Mweemba, Legal Aid Board
 (Standing in for Mr Lukangaba of Mweemba
 Chashi & Co)

For the Respondent: Mr A. Roberts, Messrs Alfred Roberts & Co

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Cocks v Mastermind (1882) 9B & C, 942**
2. **Towey v Ulster Bank Limited (1986) IEHC 4,**
3. **Stanbic Zambia Limited v A.S and C Enterprises & two Others [2008] ZR 259**
4. **London Joint Stock Bank v Macmillan & Arthur (1918) AC 777**
5. **Barclays Bank Plc v Bank of England (1985), All E.R. 385**
6. **Yeoman Credit Limited v Gregory (1963) 1 All E.R 245**
7. **Lombard Banking Limited v Central Garage and Engineering Co. Limited Others (1962) 1 All E.R 949**

Legislation referred to:

The Bills of Exchange Act, 1882, Section 48

Other works referred to:

1. **Halsbury's Laws of England 4th edition, Vol 3(1), para 163**
2. **Paget's Law of Banking, 13th edition page 560, para 22.4**
3. **Robert Lowe, Commercial Law, (6th Edition, Sweet & Maxwell) page 288**

This is an appeal against a judgment of the High Court which dismissed the appellant's claim for monies not credited to its account; interest wrongly charged, and; loss of business. The facts in this case were, by and large, common cause and are these:

The appellant was a customer of the respondent bank with whom it held three accounts numbered 0334212100010, 0334228050013 and 0334165380016. A firm or company known as Hazel's Farmers Shop was also a customer and held an account at the same branch of the respondent bank as that at which the appellant held its account.

In 2007, the appellant was availed by the respondent an overdraft facility in the sum of K70million (All the sums of money reflected in kwacha in this case represent the values before the kwacha was rebased). This was secured by a mortgage over one of the appellant's properties, namely, stand 10275 Lusaka. On 10th April, 2008, the overdraft facility was enhanced to K100m.

On the same day, the appellant deposited into its account numbered 0334165380016 a sum of K1,795,000 in cash. On 6th October, 2008, the appellant deposited into two of its accounts four cheques drawn on Hazel's Farmer's Shop. A cheque in the sum of K8,716,800 and another in the sum of K9,985,200 were deposited in account number 0334280050013. Two other cheques in the sums of K20,472,728 and K1,816,900 respectively were deposited in account number 0334212100010. The total sum of money deposited through those cheques on that day came to K40,991,628.

On 17th October, 2008, the appellant wrote to the respondent complaining that its overdraft account was overdrawn because the four cheques had not been credited to its accounts. The appellant went on to state that it had issued cheques to other recipients on the assumption that the four cheques had been credited to its accounts. The appellant informed the respondent that should the latter claim that the cheques had been returned unpaid, it would not accept that reason because the respondent had failed to relay such information within 72 hours.

The appellant wrote another letter dated 31st October, 2008, in which it claimed that the cheque deposits relating to the sum of K20,472, 728.00 and K1,816,900 were not reflecting on the accounts. The appellant repeated its warning that it would not accept any claim that the cheques were returned unpaid. On 22nd May, 2009, the appellant reminded the respondent, by letter, about the four uncredited cheques and, also, contended that the cash deposit of K1,795,000 which it had made on 10th April, 2008 had not been credited.

There being no apparent response to the issues it had raised, the appellant took the matter to its lawyers who, on 11th June, 2009, wrote to the respondent a letter of demand seeking payment of the uncredited sums of money; as well as interest allegedly wrongly charged on the accounts. There was also a demand for loss of business. The total sum demanded came to K328,277,383.00

On 30th July, 2009, the respondent issued a letter of demand on the mortgage. This was after noting that the appellant's accounts numbers 0334280050013 and 0334212100010 were overdrawn by K12,931,877.30 and K22,274,755.51 respectively. The respondent pointed out that

the overdraft facility on account number 0334212100010 had expired on 30th April, 2009, and that the collateral that had been pledged could only be released once the outstanding balances had been settled in full.

In response, the appellant served on the respondent process of this action, which it had filed on the 22nd July, 2009, claiming the sums of money that it had earlier set out in its letter of demand. The claims were broken down as follows:

- (i) the sum of K42,786,628.00 being the value of the cheques that were not credited;
- (ii) the sum of K25,013,021.00 being interest wrongly charged to the appellant; and,
- (iii) a sum of K259,933,687.00 for loss of business

The respondent defended the action and also counter-claimed the sums owed on the overdraft facility; in default of payment the respondent sought the reliefs of foreclosure and sale.

In its action the appellant placed reliance on the contents of a letter of dismissal which the respondent had written to one of its employees for having failed to process the cheques within the stipulated time.

The respondent, on the other hand, produced the employee's exculpation letter in which she stated that she had held on to the cheques at the request of Hazel's Farmer's Shop who had not yet deposited sufficient funds in their account to satisfy the cheques; and that the appellant had been informed of that request. The respondent further produced documents which tended to show that, infact, the employee, named Martha Nyirenda Chingwe, had had dealings with both the appellant and Hazel's Farmer's Shop in her personal capacity.

The evidence of both parties at the hearing was materially as we have outlined above.

The trial court made the following findings of fact;

- (i) that the appellant presented the four cheques to the respondent;
- (ii) that the cheques were drawn on Hazel's Farmer's Shop account held with the respondent;
- (iii) that the four cheques were not deposited in the appellant's account;
- (iv) that as at the 6th and 8th October, 2008 the account of Hazel's Farmer's Shop was not sufficiently funded for the purposes of paying all the four cheques;

- (v) that the appellant had an overdraft facility of K100 million with the respondent which was secured by a mortgage on stand 10275 Lusaka, and;
- (vi) that the appellant continued to utilize the overdraft facility even after October, 2008

The trial court further found that, infact, the cash deposit that had been made by the appellant on 10th April, 2008, had been credited to the account. However, the court held that, for the appellant to succeed in its claim, it had to prove that at the material time the account of Hazel's Farmer's Shop had sufficient funds to pay the four cheques. In this case, the court found that the appellant had not so proved.

The trial court found also that by not introducing the cheques in the clearing system, the respondent was in breach of its duty to the appellant. However, it was the court's view that the breach of duty on the respondent's part notwithstanding, there was no loss that the appellant could be said to have suffered because the cheques would have been dishonoured, in any event.

On those grounds, the court dismissed the appellant's claim for the sum of K42,786,628.00 with respect to the cheques and cash allegedly not credited to its accounts. The court, as a

consequence, dismissed the appellant's claim for interest allegedly wrongly charged.

The trial court also dismissed the claim for loss of business on three grounds, namely; (i) that the claim was premised on the claim for the unpaid cheques which had failed; (ii) that, in any event, the appellant had continued to enjoy the overdraft facility whose purpose was for operational costs, and; (iii) that the calculations made by the appellant on this claim were unreliable in that they were not made by a competent expert in the field of Accountancy.

On the counter-claim, the court found that the appellant was owing the sum of K19,263,059.92 and K11,713,090.45 on accounts 0334212100010 and 0334280050013 respectively as at 30th June, 2009, and not K22,274,755.51 and K12,931,877.30 as counter-claimed by the respondent. The court entered judgment accordingly and ordered payment within 30 days, failing which the respondent was at liberty to possess the property and sell it.

The appellant's appeal is on three grounds as follows:

- (i) The learned trial judge erred in law and in fact when he held that the appellant was not entitled to the amounts on the cheques, the interest wrongly charged and the loss of business occasioned by the respondent's actions.**

- (ii) The learned trial judge erred in law and in fact when he held that despite the respondent's negligence, the appellant was not entitled to the amounts on the cheques because the account of Hazel Farms Shop was insufficiently funded.
- (iii) The learned trial court fell into error of the law when it awarded the respondent's counter-claim.

The respondent also cross-appealed on the following three grounds:

- "1. The lower court erred in law by holding that section 48 and 49 of the Bills of Exchange Act, 1882 did not apply to the respondent bank and only related to a holder of a bill.
- 2. The lower court erred in law and fact in not seriously considering that notice of dishonor of the cheques had been brought to the attention of the appellant's accountant, one Mr Ngulube by the respondent's ex-employee Martha Chingwe's exculpatory letter dated 23rd October, 2008 as well as the findings of the judgment of the Industrial Relations Court in the case of Martha Chingwe v Finance Bank Zambia Limited Complaint No. 212/2009
- 3. The lower court erred in law and fact in not seriously considering the fact that one Martha Chingwe, the respondent's ex-employee who actually received the cheques deposited by the appellant had personal dealings with both the drawer of the cheques and the appellant and that she was related to the drawer who was her cousin and was therefore conflicted in her duties as a banker due to her connivance. That therefore any delay, if at all, in giving notice of

dishonor of the cheques was excusable under Section 46(1) of the Bills of Exchange Act, 1882.”

The appellant filed heads of argument. The appellant argued the first two grounds together. The appellant's argument in this regard was two-pronged; namely, in tort and in contract. The appellant's argument regarding the limb in tort stemmed from the finding by the trial court that the respondent had breached its duty to the appellant. In the appellant's view, once it was established that the respondent had breached its duty to the respondent, the only other issue to consider was whether the appellant had suffered any loss arising from that breach. The appellant went on to point out that by its failure to notify the appellant of the fact that the cheques had been dishonoured, the respondent had; first, prevented the appellant from pursuing the other party to the cheque, and; secondly, caused the appellant to overdraw its accounts in the belief that they would be credited. According to the appellant, these two factors comprised the loss to the appellant arising from the breach. We were referred to the case of **Cocks v Mastermind**⁽¹⁾ where it was held that the holder of a bill is entitled to know whether it has been honoured or not and that the prejudice to the holder as a result of the breach of that duty owed to him is defined as the loss of the right to take

steps against other parties to the bill the same day it is dishonoured.

We were also referred to **Halsbury's Laws of England, 4th Edition, Volume 3** and, in particular, to a passage which states:

"If a Banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay"

Finally, still on this limb, the appellant referred us to the Irish case of **Towey v Ulster Bank Limited⁽²⁾**, where the court measured the damages for such breach by reference to the overdraft as it stood when the plaintiff's business collapsed, together with interest that had accrued thereon from that time onwards.

The second limb of the appellant's argument was founded on contract. To start with, we were referred to the case of **Stanbic Zambia Limited v A.S and C Enterprises & two Others⁽³⁾** and to the holding in that case, which states:

"The code of banking is a binding regulatory mechanism on banks as well as members engaged in banking business in Zambia."

It was then argued that the Code on banking practice in Zambia is one of the documents that regulate transfers of money.

The appellant pointed out that, according to the **Zambia Electronic Clearing House Rules**, cheques that are deposited have to be presented on the same day. It was the appellant's argument that, in this case, the cheques deposited by the appellant have to-date never been presented, thereby causing the account to be overdrawn. This, the appellant argued, was a breach of the code of banking.

In the third ground of appeal, the appellant's grievance is against the award by the court below of the respondent's counter-claim. The appellant argued that the award was against the testimony of the witnesses on record which was that had the cheques presented to the bank been deposited and credited to the appellant's account, the position of the accounts would have changed to being in credit and, therefore, the appellant at that point would not have been owing on the mortgage.

We were therefore urged to allow this appeal.

Counsel for the respondent advanced six points to oppose the arguments by the appellant in the first and second grounds of appeal.

The first point was that the issue of presenting the cheque as provided by the **Zambia Electronic Clearing House Rules** did

not arise because the cheques deposited were "*in-house*" cheques in that both the drawer and payee held accounts in the same branch. The rules requiring presentation only apply to interbank cheque clearing; but in this case the respondent acted both as paying and collecting bank.

The second point in the argument was that the drawer's account in this case had insufficient funds to meet the value of the cheques in issue.

The third point was that the notice of dishonor required under **Section 48** of the **Bills of Exchange Act, 1882** is only in respect of the drawer and not the payee. Counsel pointed out that, in this case, the drawer was notified that there were insufficient funds in the account. The latter, then, requested an employee of the respondent to hold on to the cheques until sufficient funds were deposited; the respondent's ex-employee went out of her way to inform the appellant's Accountant that the cheques could not be cleared.

The fourth point was that, at all material times, and even after the commencement of this action, the respondent availed an overdraft facility to the appellant for its business operations; as

such the appellant could not have suffered loss of business, as alleged.

The fifth point in the argument was that the appellant never made any claim against the drawer of the cheques to mitigate any possible loss.

Finally, the sixth point was that it would amount to unjust enrichment on the part of the appellant to allow it to receive value for cheques on a drawer's account with insufficient funds.

Amplifying the above points, learned counsel argued that the respondent's duty as a paying bank was only bound to pay cheques where there were sufficient funds available for the purpose; or if the cheques were within limits of an agreed overdraft. **Halsbury's Laws of England 4th edition, Vol 3(1), para 163** and the case of **London Joint Stock Bank v Macmillan & Arthur⁽⁴⁾** were cited in support of that argument. Counsel went on to submit that it was beyond dispute that there were insufficient funds in the account of Hazel's Farmer's Shop. Consequently, counsel argued, there was no duty on the part of the respondent to effect payment of the four cheques to the appellant.

According to learned counsel the case of **Towey v Ulster Bank Limited**⁽¹⁾ referred to by the appellant is misplaced and distinguishable from this one; and so is the case of **Stanbic Bank Zambia Limited v A. S and C. Enterprises & two others**⁽³⁾, and the **Zambia Electronic Clearing House Rules**, also relied on by the appellant. This is because, counsel argued, the rules and authorities say that presentment only applies to inter-bank cheques and not in-house ones. **Paget's Law of Banking**, 13th edition page 560, para 22.4 and the case of **Barclays Bank Plc v Bank of England**⁽⁵⁾ were cited to support this argument.

With regard to the notice of dishonor under **Section 48** of the **Bills of Exchange Act, 1882**, counsel argued that the section requires that the notice be given to the drawer only. Counsel submitted that, in this case, there was ample evidence on record to show that the respondent's employee even went beyond the respondent's duty and notified the appellant's accountant that the cheques could not be honoured.

As for the claim for loss of business, counsel submitted that the appellant's witness admitted during his testimony that the appellant continued utilizing the overdraft facility even after the cheques were dishonoured. Counsel argued that the appellant

should have made a claim against the drawer, Hazel's Farmer's Shop in order to mitigate any potential loss or damage. The appellant did not do so.

Responding to the arguments in the third ground, learned counsel submitted that the respondent's second witness had made it very clear in his testimony that, even assuming that the four cheques in issue had been credited, their values were insufficient to clear the debit balances of the appellant's overdraft. Counsel argued that this testimony was not challenged. Counsel submitted, also, that the respondent had produced statement of accounts in the court below to prove that point; and that these were not challenged either.

With those arguments counsel urged us to dismiss the appellant's appeal.

Coming to the cross-appeal, learned counsel for the respondent argued in the first ground that *Section 2* of the *Bills of Exchange Act 1882* defined the "*holder*" as a person in possession of a bill and therefore the bank being in possession of the bill, as agent of and on behalf of the payee of the bill, was a holder.

The second and third grounds were argued together.

The respondent's argument under these two grounds was that **section 48** of the **Bills of Exchange Act** requires notice of the dishonor to be given to the drawer only and that in this case the notice of the dishonor was given through personal communication. We were referred to the **Zambia Electronic Clearing House Rules**, the works of the learned author **Robert Lowe**, "*Commercial Law*," the cases of **Yeoman Credit Limited v Gregory**⁽⁶⁾ and **Lombard Banking Limited v Central Garage and Engineering Co. Limited Others**⁽⁷⁾ which, according to counsel, are authorities for the proposition that notice of dishonor through personal communication is allowed.

It was argued in the alternative that, if there was delay in notifying the appellant, the delay is excusable under **Section 46(1)** of the **Bills of Exchange Act**, in view of the conduct of Martha Chingwe which was outside her duties as an employee of the respondent.

We were, therefore, urged to allow the cross-appeal.

We have considered the arguments in this appeal.

The appellant's first ground of appeal relates to the trial court's refusal to award the appellant's claim as pleaded, namely to be credited with the sum of K42,786,628.00 being the value of

the cheques and cash that were allegedly not credited, the sum of K25,013,021.00, being interest wrongly charged; and, the sum of K259,933,687.00 being loss of business. In terms of arguments, the ground is covered by the appellant's limb of argument that is based on contract.

We have considered the holding in the case of **Stanbic Zambia Limited v A.S and C Enterprise & two others**. We have also looked at the **Zambia Electronic Clearing House Rules**. Both authorities were referred to us by the appellant. Neither of these authorities states that where a banker does not promptly notify a payee that the cheques that he has deposited have been dishonoured, then the payee's account should be credited with the value thereof. We, therefore, agree with the court below when it held that the appellant's action could only succeed if the appellant proved that, at the material time, the account of Hazel's Farmer's Shop had sufficient funds to pay for the cheques. In this case, it was not in dispute that the account of Hazel's Farmer's Shop did not have sufficient funds. The trial court was, therefore, on firm ground when it held that the appellant had failed to prove that the account of Hazel's Farmer's Shop had

sufficient funds. Consequently, the court was on firm ground in dismissing the appellants claims.

The first ground of appeal is therefore without merit.

The appellant's second ground of appeal is in tort and is premised on the finding by the court below that the respondent bank was in breach of its duty to the appellant, as its customer, when the bank's employee Martha Chingwe defaulted in presenting the appellant's cheques into the clearing system. The appellant, particularly, attacks the court below for declining to award damages to the appellant even after it had found that the respondent was in breach of its duty to the appellant.

On the other hand, the whole of the respondent's cross-appeal is also against the finding that the respondent was in breach of its duty. Therefore, we shall consider the appellant's second ground of appeal and the respondent's cross appeal together.

The appellant's action as pleaded has been dealt with in the first ground. It was never a case for damages for breach of duty or negligence. What has compelled both parties to advance arguments on a claim that was not before the court below can be seen from the following passages of the judgment of the court

below. Dealing with the claim for the deposits that were not credited to the appellant's accounts, the court said:

"In order for the plaintiff to succeed in the claim in respect of the four cheques drawn on the Hazel's Farmer's Shop, it must be demonstrate that the drawer's account had sufficient funds to meet the value of the four cheques... An evaluation of the evidence shows that the plaintiff has not demonstrated to my satisfaction that there were sufficient funds in the account of Hazel's Farmer's Shop, the drawer, to cater for the four cheques."

After examining the bank statement pertaining to the account of Hazel Farmers Shop, the court went on to say:

"It is therefore clear that the balance in the Hazel's Farmer's Shop account was not at the material time sufficient to clear the four cheques. This means that the defendant was not obliged to credit the plaintiff's account with the value of the four cheques. This fact was confirmed by PW in her evidence in chief when she testified that a bank will only credit the payee's account if there are sufficient funds in the drawer's account"

Our view is that this portion of the judgment is what constituted the *ratio decidendi* of the decision of the court below on the case that was pleaded by the appellant. The court went on to say:

"Further, the fact that the defendant has admitted that its employee did not actually deposit or introduce the four cheques into the accounts does not change the situation

because the fact still remains that there were insufficient funds in the drawer's account and as such the plaintiff was not entitled to the said moneys. It was negligence on the part of the defendant's officer as DW3 admitted but this does not entitle the plaintiff to the moneys because even assuming the plaintiff is entitled to damages arising from the said negligence, the damage would have to be proportionate to the loss suffered. In my considered view, the loss suffered, if any, by the plaintiff arising from the said negligence of the defendant is by no stretch of imagination equal to the value of the said cheques." (underlining ours for emphasis)

These are the remarks which have brought about the arguments on breach of duty.

It seems very clear to us that, when looked at in the light of the case that the appellant pleaded, these remarks were obiter. In fact, even the court below appears to be alive to the fact that it was not dealing with a claim for damages for negligence. Hence in its remarks the court merely refers to damages arising from negligence on an assumption basis.

The point we wish to drive home, therefore, is that the appellant did not plead and present any case for damages for negligence or breach of duty in the court below; and that the issue of negligence and damages were merely referred to in passing by the court below. Therefore, the appellant cannot now

come before us and start advancing arguments based on a case of damages for negligence.

It follows that the respondent's cross-appeal is against obiter remarks that were made by the trial court and is, therefore, untenable. The said remarks do not form the *ratio decidendi* of the court's decision. Otherwise, the real decision arising from the court's *ratio decidendi* is in favour of the respondent.

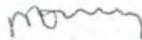
For the foregoing reasons, the appellant's second ground of appeal has no merit. Similarly, the respondent's cross appeal has no merit.

The appellant's third ground of appeal is founded on the argument that, had the deposits been credited to the appellant's accounts, the overdraft would have been extinguished and, consequently, the respondent would have had no basis for counter-claiming monies on the mortgage. From that argument, it is clear that the success of this ground is dependent on the success of the first ground of appeal. Since we have held in the first ground of appeal that the trial court was on firm ground when it held that the appellant could not have the cheques credited to its accounts, the third ground collapses.


All in all, the appellant's appeal has failed in its entirety. We dismiss it. The respondent's cross appeal has also failed. However, the costs of this appeal are awarded to the respondent, to be taxed in default of agreement.



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E. M. Hamaundu
SUPREME COURT JUDGE



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Dr. M. Malila, SC
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE