

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT KABWE  
(Civil Jurisdiction)**



**Appeal No. 134/2023**

**BETWEEN:**

**MANSFIELD SCOTT INVESTMENTS LIMITED APPELLANT**

**AND**

**BARCLAYS BANK ZAMBIA PLC**

**RESPONDENT**

**CORAM : Siavwapa JP, Chishimba, and Patel JJA**

**On 21<sup>st</sup> May, 2024 and 13<sup>th</sup> June, 2024**

For the Appellant : Mr. Desai, Mr. Stephen and Mr. Chungu  
Messrs. Mwamba & Milan Advocates

For the Respondent: Mr. M. Nkhoma of Messrs. Robert & Partners

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## **JUDGMENT**

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**CHISHIMBA JA**, delivered the judgment of the Court.

**CASES REFERRED TO:**

- 1) Barclays Bank Plc v Quincecare Limited & Another (1992) ALL ER 363
- 2) Philip v Barclays Bank Plc (2022) Q.B. 578
- 3) First National Bank v Libyan Investments Limited CAZ Appeal No. 64 of 2020
- 4) Abraham Mohammed & Alantara Transport Limited v Safeli Chumbu (1993 - 1994) ZR 4
- 5) Kudus (AP) v Chief Constable of Leicestershire (2001) UKHL 29
- 6) Nkhata & Others v The Attorney General (1966) ZR 124
- 7) Zambia revenue Authority v Dorothy Mwanza & Others (2010) 2 ZR 181
- 8) Dunlop Pneumatic Tyre Company Limited v Selfridge & Company Limited (1915) AC 847
- 9) Shreeji Investments Limited v Zanaco Plc SCZ Appeal No. 143/2009
- 10) Morrison v London County Westminster Bank Limited (1914) 3 KB 356
- 11) Baden Delvaux et Lecuit v Societe General (1983) WLR 509



**LEGISLATION CITED:**

- 1) The Court of Appeal Act, 2016

**OTHER WORKS CITED:**

1. Chitty on Contracts. General Principles. Volume I. Sweet and Maxwell, 2008

**1.0 INTRODUCTION**

1.1 This appeal assails the judgment of Mr. Justice Edward Musona, dated 12<sup>th</sup> January, 2023, in which he dismissed the appellant's claims entirely, with costs to the respondent.

**2.0 BACKGROUND**

2.1 The appellant entered into a contract for the sale of 18,000 metric tons of maize valued at US\$4,230,000.00, with a company incorporated in Malawi known as Admike Import and Export. The contract was financed by Alliance Capital Limited, a Malawian company. The terms of the contract, with the financing company, were that the appellant was to open an escrow account with its bankers, the respondent.

2.2 The appellant averred, that the representative of the respondent, advised it against the option of opening an escrow account, on the basis that opening the said account, would involve lengthy legalistic processes, which would delay the transaction. It was stated, that the respondent instead,

advised the appellant to open an account and change its banking mandate on the US Dollar account No. 1021654, held with the respondent, by substituting its authorized signatories with the representatives of Admike Import and Export Company Limited and Alliance Capital Limited. The account was opened in January, 2016 and the mandate changed on 8<sup>th</sup> February, 2016.

- 2.3 The appellant stated that the respondent's representative promised to manage the whole process, being aware of who the parties to the transaction are and to set up an internet banking profile, to enable the appellant monitor activities on the account. Following the change in signatories, Alliance Capital Limited transferred the sum of US\$2,081,502.50 into the transaction account.
- 2.4 During the period that Admike Limited and Alliance Capital Limited were signatories to the account, several payments were made, to various individuals and organizations, between 1<sup>st</sup> April, 2016 and 31<sup>st</sup> August, 2016 amounting to \$1,856,516.20. At the time that the appellant regained access to the account, by changing the banking mandate to restore the initial signatories, no funds were left in the account. The

appellant alleged that the transfers and payments made while it had no control over the account were unauthorized.

- 2.5 In its defence, the respondent stated that during a conference call between the representative of the appellant, and Alliance Capital Limited in which the banks representative was put in the loop, Alliance Capital Limited insisted on having signing mandate, so as to have full control of the money to be sent to the transaction account. That the appellant eventually ceded to the demand, by Alliance Capital Limited, and passed a resolution to change its banking mandate.
- 2.6 When the transaction account was opened, no other funds were deposited into it except for the money remitted by Alliance Capital Limited. That this is the same amount that was paid out by the new signatories to the account who included Alliance Capital Limited.
- 2.7 The respondent, denied being privy to the contract, between the appellant and Admike Import and Export Limited. The bank's interactions with the Admike Limited and Alliance Capital Limited, were restricted to maintaining accounts in its books. That the modality for determining approved payments, solely rested with the parties to the transactions. Further that internet banking, as a service offered by the

respondent, is availed to persons authorized to transact on the account.

2.8 The respondent stated that the appellant, through its new mandated signatories at the time of the transfers, had knowledge of the transfers, and were neither advised nor needed to be advised.

2.9 The appellant then commenced an action against the respondent by writ of summons and statement of claim seeking the following reliefs:

- 2) *Special damages for economic loss due to the respondent's negligent misrepresentation and its failure to carry out its fiduciary duties owed to the appellant in its capacity as the appellant's banker;*
- 3) *In the alternative, a declaration that the respondent assumed the role of an escrow agent to the appellant and proceeded to act outside its escrow mandate and in breach of its fiduciary duties as an escrow agent, causing the appellant financial loss, thereby making it liable for special damages for economic loss;*
- 4) *General and exemplary damages for negligence;*
- 5) *And interest and costs.*

### **3.0 DECISION OF THE COURT BELOW**

3.1 The learned Judge considered the evidence on record and found that the new signatories to the bank account were nominated by the appellant itself. The payments made to the various individuals were authorized by the appellant's

signatories. The court further found that in all dealings, the respondent was neither privy to the contractual terms of the maize business nor to the operational arrangements between the appellant, Admike Import and Export Limited and Alliance Capital Limited.

3.2 The learned Judge further found that the appellant could not claim viewing rights to the transaction account or bank statements except through the nominated authorized signatories. That the respondent was on firm ground when it declined to give viewing rights or bank statements to the appellant, without the approval of nominated signatories.

3.3 Consequently, the court below came to the conclusion that the appellant had not established its case on a balance of probabilities and dismissed all the claims with costs to the respondent, in default to be taxed.

#### **4.0 GROUND OF APPEAL**

4.1 Dissatisfied by the decision of the court below, the appellant appealed advancing six grounds as follows:

- 1) *The lower court erred in law and fact when it misapprehended the appellant's case and failed to properly analyse the evidence before (it);***

- 2) *That the lower court erred in law and fact when it failed to conclusively adjudicate on all claims raised by the appellant;*
- 3) *The lower court erred in law and fact when it anchored its judgment on its holding that there was no evidence to show that the disputed payments were not authorized by the appellant's signatories;*
- 4) *The lower court erred in law and in fact by holding that the bank was not privy to the contractual terms of the maize business between the appellant and Admike Import and Export Limited nor to the operational arrangements that were schemed between the parties including Alliance Capital;*
- 5) *The lower court erred in law and fact by holding that the bank was on firm ground when it declined to give viewing rights or bank statements to the appellant without approval of the nominated bank signatories; and*
- 6) *The lower court erred in law and fact by holding that the appellant failed to prove its case on a balance of probabilities.*

## **5.0 APPELLANT'S HEADS OF ARGUMENTS**

5.1 The appellant filed heads of argument dated 5<sup>th</sup> May, 2023 and argued the six grounds of appeal together. The appellant submitted that the court below misapprehended the appellant's case and as a result failed to adjudicate on all the claims before it. The primary claim before the court below was that the respondent was negligent by allowing 'unauthorised' payments or transfers of funds. The

payments were unauthorized because they were not used for the intended purpose or were unrelated to the contract.

5.2 While accepting that the 'unauthorised transfers' did not in any way suggest that the transfers were not made by the signatories, it was argued that the issue is that the signatories diverted funds for purposes not related to the maize contract between the appellant and Admike Import and Export Limited. That by attending the conference call and having been given a copy of the contract, Ms. Phiri the relationship Manager knew that the funding was meant for purchase of maize under the contract between the appellant and Admike Import and Export Limited. Therefore, the finding by the trial court, that the respondent was neither privy to the contractual terms of the maize contract, nor to the operational arrangements, between the parties to the maize contract, was completely perverse and contrary to the vivid evidence presented before the trial court.

5.3 Further, that by advising against the opening of an escrow account, and offering an alternative to change signatories of the account, in question to individuals from Alliance Capital Limited, the respondent must be taken to have been aware of the nature of the transaction and purpose of funds.



Therefore, the issue was whether the respondent was negligent in permitting payments out of the appellant's account. That it is on this basis that the trial court misapprehended the appellant's case.

5.4 It was submitted on the above basis that the trial court failed to make a determination as to whether the bank was negligent in the manner it handled the payments out of the appellant's account. We were invited to set aside the judgment of the trial court under **section 24(1) of the Court of Appeal Act, 2016**.

5.5 The appellant contended, that in view of the evidence on record, the respondent was negligent so as to entitle the appellant to damages for failing to stop the payments and alert the appellant of the payments made not for the intended purpose. The cases of **Barclays Bank Plc v Quincecare Limited & Another** <sup>(1)</sup> and **Philip v Barclays Bank Plc** <sup>(2)</sup> were cited on the duties owed by a bank to exercise reasonable care in and about executing a customer's order to transfer money. In this regard, the appellant contends that a bank is required to refrain from executing an order if and for so long as the circumstances would put an ordinary prudent banker on inquiry.

- 5.6 That whenever the bank is put on inquiry and there are reasonable grounds to believe that the order or instruction is an attempt to misappropriate funds, the bank should not execute such order or instruction. If the bank executes the order, it is liable for negligence. Our decision in **First National Bank v Libyan African Investments Company Limited** <sup>(3)</sup> was called in aid, where we found the appellant bank liable in negligence when it ignored and did not act on the respondent's mandate when put on notice, but transacted with two imposters.
- 5.7 It was submitted that the respondent had actual knowledge of the nature of the transaction between the appellant, Admike Import and Export Limited and Capital Alliance Limited having been given a copy of the contract for the purchase of maize. That the bank knew that the money was meant for the purchase of maize and was to be drawn by the appellant once invoices are issued. Therefore, the appellant was put on inquiry and ought to have refrained from making payments that were not meant for the maize contract.
- 5.8 Further, that the letter dated 2<sup>nd</sup> February, 2016, by the appellant, to Alliance Capital Limited, and the email at page 65 of the record of appeal, show that the respondent was put

on notice, that the funds in the account were specifically for the maize contract and were being abused through payments to issues not related to the contract. That the payments were not in compliance with the contract and for the intended purpose.

- 5.9 It was argued that the account belonged to the appellant while the signatories were mere agents of the appellant. The appellant remained the customer and was thus owed fiduciary duties by the bank, including being availed bank statements and viewing access to the account.
- 5.10 The fact that the funds came from Alliance Capital Limited, does not in any way absolve the respondent, from liability, because the money in the account was the appellant's property meant for the appellant to be paid after supplying the maize.
- 5.11 In this regard, the appellant argued that it is entitled to damages and cited the case of **Abraham Mohammed & Alantara Transport Limited v Safeli Chumbu** <sup>(4)</sup> for the principle that the normal measure of damages is the value at the time of loss. In this case, the appellant was going to make a net income of \$1,800,000.00 from the maize contract.

5.12 The appellant submitted that it is also entitled to an award of exemplary damages in view of the conduct of the bank to make payments not intended for the maize contract. For authority, we were referred to the case of **Kudus (AP) v Chief Constable of Leicestershire** <sup>(5)</sup> for the principle that exemplary or punitive damages are additional to an award intended to compensate fully for the loss suffered by the claimant, both pecuniary and non-pecuniary, being intended to punish and deter. In this case, that the bank be punished by an award of compensatory damages in for the contract price of \$5,040,000.00.

5.13 We were urged to set aside the judgment of the lower court and to enter judgment in favour of the appellant with costs.

## **6.0 ARGUMENTS BY THE RESPONDENT**

6.1 The respondent filed heads of argument dated 22<sup>nd</sup> May, 2023. Counsel submitted that the grounds of appeal appear to be an invitation to the court to interfere with findings of fact. That the grounds of appeal alleging misapprehension of the case; failure to analyse evidence and adjudication of the claims; anchoring the judgment on findings that there was no undisputed payments; that the bank was not privy to the maize contract and the lack of viewing access by the

appellant, all point to findings of fact which are not to be lightly interfered with by an appellate court.

6.2 The court was referred to the cases of **Nkhata & Others v The Attorney General** <sup>(6)</sup> and **Zambia revenue Authority v Dorothy Mwanza & Others** <sup>(7)</sup> on the circumstances when an appellate court will reverse findings of fact of the trial court. On this basis, in light of the totality of the evidence and circumstances of the case, there is no reason in law and fact, for us to interfere with the findings of fact of the trial court. We were urged to uphold the judgment of the trial court.

6.3 The respondent addressed each ground of appeal separately. With respect to ground one, the respondent submitted that the ground raises two issues: the court misapprehending the case, and failing to properly analyse the evidence on record. With respect to the alleged misapprehending of the case, it was submitted that a scrutiny of the claims in the pleadings shows that the particulars of damage reveal that the claimed damages are premised on economic loss captured as projected profit margin from the maize contract in the sum of \$1,800,000.00.

- 6.4 That the appellant presupposes that the contract as it stood was capable of performance and that the appellant was capable of performing it which is contrary to the evidence. Further, that a reading of paragraphs 19 and 20 of the statement of claim at pages 31 to 35 of the record of appeal, shows that the appellant asserts that the contract was rendered frustrated on account of the appellant's inability to carry out its obligations due to the unauthorized transaction or misappropriation wrought by the respondent.
- 6.5 However, it is not in dispute that the withdrawals from the appellant's account, were at the instance of the appellant's own appointed signatories from Alliance Capital Limited. The bank was not privy to the alleged underlying transaction and conditions. That the appellant has failed to show the connection between the alleged claim of misappropriation of payments by Alliance Capital Limited towards the contract, and frustration of the contract blamed on the respondent.
- 6.6 On the alleged failure to properly analyse the evidence before the trial court, it was submitted that the appellant opened a dollar account with the respondent, and appointed two signatories. That it is not true that the account manager or anyone else in the bank advised the appellant to substitute

signatories. This is because Alliance Capital Limited agreed with the appellant that new signatories be introduced to the account to replace the original signatories. That the appellant was understood as not standing to lose anything there having been no money in Account No. 01021654 deposited by the appellant or documentary proof of any maize owned by the appellant.

- 6.7 It was argued that the new signatories were duly appointed by the appellant, through a resolution by Isaac Kapambwe and Florence Chani on behalf of the appellant. Further that the respondent did not owe the appellant any fiduciary duty to advise the appellant as the new signatories were appointed by the appellant. That in any case, all money paid to the various payees, including one to the appellant, came from Alliance Capital Limited or Admike Import and Export Limited. The respondent denied having as one of its products, advisory services or giving advice to the appellant, or that it permitted any unauthorized withdrawals when all payments were made by the appellant's authorized signatories. This is because, as stated by Titus Nyirongo (Pw1) in cross-examination, the real reason for the change of signatories was for Alliance Capital Limited to have

control and ensure smooth running of transactions, and to have financial control.

6.8 In any case, it was argued that Florence Chani, an original authorized signatory of the appellant, is a qualified advocate of the High Court, practicing law, who clearly knew of the possible consequences of giving up or delegating one's mandate in the manner done. The respondent denied being requested to open an escrow account. Further, that as even the exhibited escrow agreement was never signed. In addition, that no written instructions for the respondent to follow, were produced in evidence. That the maize contract, was in fact frustrated by the appellant, for not having ex-stock maize. Further, by Alliance Capital Limited purchasing maize directly from suppliers, not to mention the Alliance Capital Limited Chief Executive Officer, Christian Majavina, being the addressee under Admike Import and Export Limited maize invoices.

6.9 On capacity to perform the maize contract, it was submitted that the claimed sum of \$5,040,000.00 or the projected profit of \$1,800,000.00, as special damages, is speculative the appellant having failed to provide documentary evidence to demonstrate capacity to supply the 18,000 metric tons of



maize. That there was no evidence of the claimed general and exemplary damages, neither was the witness examined on it.

- 6.10 In ground two, the respondent submitted that the appellant's case, is anchored on the claim of negligence due to payments made out of Account No. 1021654 by the new signatories appointed by the appellant with mandate to issue payment instructions for and on behalf of the appellant. There was no evidence to show that there was a request for an escrow account or that the appellant held one with the respondent bank. In any case, even the agreement for an escrow account remained unsigned.
- 6.11 In ground three, the respondent contends that the payments from the account were made by authorized signatories, and therefore, there was no negligence on its part. The respondent was not a signatory to the maize contract but merely facilitated it. Further, and that there were no instructions to the bank to pay in a certain way. In addition, that none of the appellant's witness demonstrated how the respondent was to manage the contract.
- 6.12 It was argued that the respondent had a copy of the maize contract as part of the documents held by the bank in

respect of a customer's documentation. That there was no evidence of what was alleged to have been the respondent's knowledge or awareness of what were said to be underlying transactions or conditions precedent. Further, there was no evidence of a written request to the bank on viewing access for all and sundry other than for the two new signatories.

6.13 The contention by the respondent, was that it was not privy to the payment arrangements in existence involving invoices or use of money transferred into account Number 01021654 between the appellant, Alliance Capital Limited and Admike Import and Export Limited or any other person or entity.

6.14 The claim for general and exemplary damages for negligence, lacked any evidence to show the appellant's entitlement to the claims, neither was there any evidence of any outrageous conduct by the respondent to warrant payment of punitive or exemplary damages.

6.15 In ground four, the respondent argued that its role in dealing with the appellant was that of banker and customer. There was no evidence of the bank having undertaken to "manage the whole process". This is because the bank is not a maize trader and could not have been expected to have

been aware of all the parties including persons who may have been part of the appellant but not dealing directly with the respondent, or persons not part of the appellant. That this would have been onerous. It was submitted that banks do not manage transactions on behalf of contracting parties but act on instructions, issued from duly authorized signatories.

6.16 Thus, Alliance Capital Limited and Admike Import and Export Limited, whose two nominees were duly appointed by the appellant, and held a mandate on behalf of the appellant, were making the payments. That the invoice at page 63 of the record of appeal, shows that 'Christian Majavina', the Chief Executive Officer of Alliance Capital Limited, was being sent invoices by the appellant, as representative of Admike Import and Export Limited. The said Christian Majavina, is the Chief Executive Officer of both Alliance Capital Limited and Admike Import and Export Limited.

6.17 In ground five, the respondent submitted that there is no evidence of a written request to the bank for viewing access for all and sundry, other than for the two new signatories. The new signatories were the only persons authorized to

have dealings with the respondent on the account in issue and were availed viewing access. The respondent could not avail any person not a signatory from the appellant viewing access for which the appellant was charged for the service as per the global banking form at pages 89 to 95 of the record of appeal.

- 6.18 Lastly, in ground six, the respondent submitted that on the evidence before it and the law, the trial court cannot be faulted for to having arrived at the decision that the appellant had failed to prove its case on a balance of probability.

## **7.0 APPELLANT'S ARGUMENTS IN REPLY**

- 7.1 The appellant filed arguments in reply dated 7<sup>th</sup> June, 2023. Counsel submitted that some of its arguments, such as misapprehension of the appellant's case and failure to adjudicate on all issues, raise both issues of fact and law. That the respondent has not demonstrated how and why this court should not interfere with the findings.
- 7.2 The appellant submitted that the primary issue identified by the trial court, for determination, is wrong because that was not the issue before court. It maintained that the real issue was whether the respondent was negligent in the manner it

handled the payments out of the appellant's bank account. That this issue was not determined by the trial court because it did not understand the case. That the loss suffered by the appellant, was because the respondent was negligent in allowing payments of the money meant for the maize contract. This gave rise to the claim for economic loss.

7.3 The fact that withdrawal were made by authorized signatories, is irrelevant to, the determination of the issue before court and is not in contention. That the issue was whether the respondent ought to have facilitated those payments, having been put on inquiry on the misappropriation of the funds by the authorized signatories

7.4 In response to the arguments by the respondent to ground two, the appellant maintained that the trial court did not adjudicate on all the claims before it. That whether or not the respondent was negligent, has nothing to do with the fact that payments were made by the authorized signatories.

7.5 The appellant maintained that DW1 knew the nature of the transaction, having been given a copy of the maize contract between the appellant and Admike Import and Export Limited. That Ms. Phiri knew that the purpose of the funds was to solely service the maize contract. That the appellant

was not aware of the payments made until it was availed a bank statement.

7.6 With respect to ground four, the appellant maintains that having explained to the respondent, the nature of the transaction it had with Admike Import and Export Limited and Alliance Capital Limited, followed by a teleconference call with Alliance Capital Limited and the respondent, and a copy of the maize contract being availed to the respondent, the bank cannot say it was not aware of the transaction or operational arrangements involving the maize contract.

7.7 In ground six, the appellant maintained that it has demonstrated, that the respondent was negligent and therefore, proved its case on a balance of probabilities.

## **8.0 ANALYSIS AND DECISION OF THE COURT**

8.1 We have considered the appeal, the authorities and the arguments advanced by the Learned Counsel. The undisputed fact on record, is that the appellant and Admike Import and Export Limited (hereinafter referred to as Admike) of Malawi, entered into a contract for the supply of 18,000 metric tons at a cost of \$4,230,000.00. The contract provided, that the purchase of the maize would be settled in cash, on collection, upon presentation of the appropriate

documentation. Alliance Capital Limited (hereinafter referred to as Alliance) of Malawi, agreed to provide financing for the maize contract, on condition that the said payment would be secured through an escrow account.

8.2 Ms. Phiri (Dw1) a bank Relationship Manager, attended a conference call, at the behest of the appellant, to hear the concerns that Alliance had regarding the use of the financing money. During the call, Alliance, as financier, insisted that the only way it would have full control over its funds when transferred to the appellant, would be through a current account with its nominated individuals as signatories, instead of the appellant's signatories. The appellant accepted this position and issued a board resolution to change the banking mandate by replacing its signatories with signatories nominated by Alliance and Admike. As at 3<sup>rd</sup> February, 2016, there was no money in the said account.

8.3 Following the change of signatories, Alliance transferred the total sum of \$2,081,502.50 into the appellant's United States Dollar account No. 1021654. Thereafter, the newly authorized signatories of the account proceeded to transfer money to various individuals and entities.

- 8.4 On 15<sup>th</sup> March, 2016 the appellant wrote to the respondent, through Ronald Kapambwe, instructing them to stop making payments on the transaction account. The actual resolution by the appellant to remove the said signatories was written in June, 2016 to the bank.
- 8.5 Titus Nyirongo, the finance manager of the appellant testified that the appellant opted not to open an escrow account because of the lengthy legalistic processes involved, which would have delayed the transaction. According to him, the bank relationship manager for the appellant, would manage the whole transaction, being aware of who the parties to the transaction were and being privy to the contract. The respondent was also supposed to set up an internet banking profile for the appellant on the transaction account, granting the appellant viewing access to the account, which was not done.
- 8.6 He stated that the contract between Admike and the appellant, was frustrated because of the respondent's negligent misrepresentation and failure to carry out its fiduciary duties as the appellant's banker. That the respondent did not follow the agreed procedures on the



outward transfer of funds resulting in financial loss to the appellant.

- 8.7 Doreen Chiwaya, who brokered the transaction between the appellant and Admike testified that the respondent's representative advised against the creation of an escrow account in favour of changing the banking mandate on the existing United States Dollar account No. 1021654.
- 8.8 The evidence adduced on behalf the respondent, by Elizabeth Phiri, the relationship Manager was that the bank had no dealings with the appellant and Admike other than through the account, neither was it a party to the contract between the two. As regards the money paid out from the transaction account, she stated that the source of the funds was Alliance Capital Limited and that the respondent was not privy to the payment arrangements in existence as it is not a concern to the bank. That there was no loss suffered or occasioned to the appellant, as the funds paid out all came from Alliance Capital Limited, there having been no funds when the account was opened.
- 8.9 In our view, the six grounds of appeal are related and raise the following issues for determination:

- 1) Whether the respondent was privy to the maize contract between the appellant and Admike, and to the operational arrangements between the appellant, Admike and Alliance;
- 2) Whether the respondent was negligent in allowing the transfer of funds or payments to the various payees; and
- 3) Whether the appellant was entitled to internet viewing access of the transaction account.

In that regard, we shall address the six grounds of appeal in the above order. Determination of the issues above, will resolve the contentions raised in grounds one and two, whether the court below misapprehended the case, failed to analyse the evidence before it, and to adjudicate on all the claims before it.

8.10 The appellant has argued that the respondent was privy to the maize contract, between itself and Admike, having been given a copy of the contract. PW1 also stated that the respondent was supposed to manage the whole transaction having been given a copy of the contract. It is not in dispute that the parties to the maize contract appearing at pages 57 to 61 of the record of appeal are Mansfield Scott Investments Limited as Seller, and Admike Import and Export Limited as

Buyer. It is also common cause that a copy of the maize contract was given to the respondent by the appellant.

8.11 In the case of **Dunlop Pneumatic Tyre Company Limited v Selfridgde and Company Limited** <sup>(8)</sup> it was held that:

*“In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.”*

8.12 The Learned authors of **Chitty on Contracts. General Principles. Volume I. Sweet and Maxwell, 2008** at para. **18-021** state that:

*“The common law doctrine of privity means, and means only that a person cannot acquire rights, or be subjected to liabilities, arising under a contract to which he is not a party. But it does not follow that a contract between A and B cannot affect the legal rights of C indirectly.”*

At para. 18-022 the authors go on to state that:

*“While the primary effect of a contract between A and B is to oblige the parties to perform their promises to each other, the contract may also impose on A a duty of care to C, the breach of which will enable C to sue A in tort for negligence. The contract may, for example, have this effect because it gives rise between A and C to the relationships of passenger (or cargo owner) and carrier.”*

- 8.13 These authorities entail that a person can only be bound by a contract, acquire rights thereto and liabilities thereon, if he/she is a party to that contract. In this case, the respondent is not a party to the contract between the appellant and Admike to acquire rights and liabilities enforceable at law. In our view, being aware of the existence of a contract between two or more parties, or having a copy of the same, does not impose rights, duties and liabilities on a person/entity who is not a signatory or party thereto. Therefore, we find that the respondent was not privy to the contract between the appellant and Admike.
- 8.14 Knowledge of who the parties to the maize contract were, or being a banker to a party to a contract, does not mean the bank is privy to the contract, and therefore, must manage the whole transaction on behalf of the appellant. It is not in dispute that the appellant held a United States Dollar Account No. 1021654 with the respondent and in that regard, the relationship between the appellant and respondent was that of customer/banker. For the bank to manage the transaction, there must be an instruction in writing to that effect. A perusal of the record of appeal does not reveal any such written instructions from the appellant

to the respondent to manage the transaction, by ensuring that the payments made by authorized signatories relates to the contract.

8.15 The fact that there was a conference call made between the appellant and Alliance at which Dw1 was present, does not assist the appellant and is not evidence that the bank was privy to the contract or agreed to micromanage the business relationship of the parties to the contract. The evidence by the bank being that it attended the conference call to hear the concerns Alliance Capital had regarding the money it was going to transfer into the appellant's account. Therefore, we find no evidence that the respondent was privy to the maize contract between the appellant and Admike, or that it was to manage the whole transaction on behalf of the appellant.

8.16 We refer to **Haslbury's law of England 4<sup>th</sup> Edn Vol 9 (i) paragraph 748** which states that the general rule in respect of the doctrine of privity of contract is that **"a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those who reach agreement ....."**

- 8.17 In *casu*, the contract between the appellant and Admike cannot be enforced against the bank which is not a party to it. Therefore, any rights or obligations or breach/ damages arising there under, cannot in the circumstances of this case, be transposed upon the Bank which is not privy to the contract. On this basis, we find no merit in the said ground four.
- 8.18 The next issue to be addressed is whether the respondent was negligent in allowing the transfer of funds or payments made from the appellant's account to the various payees. The appellant under this ground submitted at the hearing that the court below did not address the duties owed by a bank to its customers and the issue of unauthorized payments. Counsel contended that the issue was not about the mandate, but the knowledge and information available to a prudent banker carrying out instructions. We were urged to amplify the duty of care expanded in the decision in **Philip vs Barclays Bank** <sup>(2)</sup>. Further, to hold that where a respondent had knowledge of the transaction or is put on notice, it ought to inquire before proceeding to pay out. Where it does not make inquiries, it should be held liable in damages.

- 8.19 We have read the U.K Supreme Court decision in **Philip v Barclays Bank** <sup>(2)</sup> arising from the court of appeal decision. The facts of the case are that Mrs. Philips was deceived by fraudsters who posed as representatives of the National Crime Agency and Financial Conduct Authority into making a payment of £700,000 to an account in the United Arab Emirates (UAE). Mrs. Philips issued the instructions to the bank for the international transfers to be effected. Upon, becoming aware that she was a victim of what is APP fraud, she sued the bank alleging that it breached its Quincecare duty, by failing to implement policies and procedures to detect and prevent the said fraud. APP fraud stands for authorised push payment, where the victim is induced to authorise their bank to send a payment to a bank account controlled by the fraudster.
- 8.20 The Quincecare duty, arise from the decision of the case of **Barclays Bank v Quincecare Limited** <sup>(1)</sup> and is a duty of care owed by a bank to its customer, requiring the bank where it has reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer; to refrain from executing that payment instruction, without

first making inquires to verify that the instruction has in fact been authorised by the customer.

- 8.21 The court of appeal in the **Philips** case, expanded that duty to arise or apply in the case of a customer instructing their bank to make a payment in the context of APP fraud. The Bank appealed to the Supreme Court of England, where the court analysed the Quicecare duty first formulated in the case of **Singularis Holdings Ltd v Daiwa Capital Marketing's Europe Ltd** <sup>(9)</sup> and other decisions which were limited to a situation where a payment instruction is given to the bank by an agent of the customer who was an authorised signatory of the account acting in fraud of the customer rather than being an instruction from the customer itself.
- 8.22 In respect of the agent's authority, the Supreme Court held that a bank cannot rely on the apparent authority of an agent if it failed to make the inquires that a reasonable person would have made in all the circumstances of the case to verify that the agent had that authority. The authority which is conferred on an agent by a customer does not include or extend to authority to act dishonestly in pursuit of the agent's own interest or fraud. The duty of care



requires the bank if put on inquiry, not to act without checking that the order is indeed a valid order of the customer to transfer money. The Supreme Court concluded that the above principles had no application to the case before it, where there was no agent involved and the customer directly and unequivocally authorised the bank to make the payment. The appeal was allowed and judgment granted in favour of the bank, dismissing the claim that the bank acted in breach of duty of care in effecting payments in accordance with her instructions.

8.23 The learned Counsel, Mr. Chungu, urged this Court, to extend the application of the duty of care to this case.

8.24 In the lower court, the appellant alleged negligent misrepresentation/breach of fiduciary duty of care by the respondent in allowing the payments made by the authorised signatories. It is trite that a negligent misrepresentation is one made carelessly or without reasonable grounds for believing it to be true. The representor must owe a duty of care to the representee. A duty to take care could arise out of the fiduciary relationship as in *casu*.

8.25 We will now address the duty of care, owed by a bank to a customer. The principles of banking law is the basic duty under the contract between a bank/customer to make payments from the credited account in compliance with the customer's instructions. The terms upon which a bank is authorised and undertakes to carry out the instructions is referred to as a bank's mandate issued by the customer. Therefore, where a bank receives instructions, in accordance with the mandate, the duty of the bank is to simply carry out, the instructions promptly. The bank is not concerned with the risks of the paying instructions. We were implored to extend the duty of care owed by the bank, to refraining from executing instructions of an agent, where the bank has been put on inquiry, by having reasonable grounds for believing that the instructions was meant to misappropriate funds or fraudulently transfer funds.

8.26 It is not in dispute that the appellant held a United States Dollar account with the respondent. However, following the conference call and in view of the concerns raised by Alliance Capital regarding the funds it would advance to the appellant, the banking mandate was changed to substitute the signatories of the appellant with those of Alliance and

Admike. Namely Mr. Gift Manda and Christain Majavina as signatories and any one of them had authority to sign on the account. We refer to page 88 of the record, the resolution nominating the above agents as signatories of the USD dollar account.

- 8.27 It is usual banking practice, that a bank only allows payment or transfer of funds, from a customer's account made by the duly the authorized signatories known to the bank. This aspect of banking practice was explained in the case of **Shreeji Investments Limited v Zambia National Commercial Bank Plc** <sup>(9)</sup> where the Supreme Court stated as follows:

*“It is settled law that a bank in receiving ordinary deposits becomes the debtor of the depositor and its implied contract with him/her is to discharge this indebtedness by honouring such cheques as he/she may draw upon it. Hence, when a cheque is duly signed and its appearance and statement of contents present no reasonable ground for suspicion and the signatures of the account holder tallies with the specimen recorded with the bank and there are sufficient funds in the account, a banker is duty bound to honour it (per Lord Shaw in London Joint Stock Bank Ltd v Mcmillan and another (1918-1919) ALL ER 30).”*

- 8.28 The Supreme Court further stated that:

***“The learned authors of Peter G. Watts. 2010. Bowstead & Reynolds on Agency, 19<sup>th</sup> edition. Sweet & Maxwell, London, at paragraph 8-013 state, that where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.***

***The learned authors further state at paragraph 8-063 that an act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.”***

8.29 The appellant has argued, that the respondent was negligent, in allowing the various payments or transfer of funds because the funds were not used for the intended purpose, namely for the maize contract. It was argued that the respondent was privy to the contract and had a copy of the contract, and so knew the purpose of the funds.

8.30 The issue is whether the instructions to the bank to make payments by the authorized signatories from the account were fraudulently made by the agents. Whether the payments made, would cause a reasonable banker, to first make inquiries to verify payments, before allowing

payments. Lastly, whether the bank was put on inquiry not to effect payments made by the authorised signatories without checking that it was in order or made for the intended purpose.

8.31 It is not in issue that there was no notice given to the bank or express agreement between the bank and the appellant that it should not comply with payment instructions by the authorised signatories. The bank had no reasonable grounds for believing that the payments were being fraudulently made by the authorised signatories.

8.32 In *casu*, the authorised signatories were authorised to make payments. The bank did verify that the signatories had authority. This is not in dispute. As to whether the bank was put on inquiry, we are of the firm view that the bank was not put on inquiry not to act without checking that the instructions of the authorised agent signatories were for the intended purpose of the contract. The contract said to be the basis of intended purposes of the money is between the appellant and Admike. The bank which had mere sight of it, is not privy to it. Further, the contract did not expressly provide that the bank had to verify payments made by

authorised signatories with the appellant. We refer to the contract at pages 57 to 61 of the record.

8.33 The appellant in a letter dated 8th February, 2016, made a resolution to change signatories and nominated Mr. Manda and Christain Majavina as signatories and any one of them to sign authority on the account. There was, on record, a letter dated 6<sup>th</sup> February 2016, (purported) to Admike intending to reinstate the initial mandate on the account. The said letter, allowed the director of Admike, access to whatever money was on account before they take over the mandate. Various correspondences between the parties were copied to the bank. The actual resolution to reinstate the original mandate of the Appellant's account signatories was written to the bank sometime in June, 2016. We hold that the bank was not put on alert not to authorise payments by the mandated signatories on the basis alleged.

8.34 We find the arguments advanced, that the bank was put on alert, as to the intended purposes of the money and that payments ought not to have been allowed, to be untenable, on the basis of privity of contract and in light of the change in the banking mandate by the new signatories introduced to the respondent. By introducing new signatories to the

account, the appellant represented to the respondent that these were the persons permitted to authorise payments with the requisite authority to act on behalf of the appellant. The appellant became bound by the acts of the new signatories with respect to the respondent dealing with the new signatories as agents on the faith of the banking mandate.

8.35 In the case of **Morrison v London County Westminster Bank Limited** <sup>(10)</sup> the court held 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”.*

8.36 Further, in the case of **Baden Delvaux et Lecuit v Societe General** <sup>(11)</sup> it was held that:

*“A banker had an obligation to comply with lawful instructions save in exceptional circumstances, in which it came under a duty to inquire about the true nature of the transaction.”*

8.37 We have found no evidence of the appellant, giving express instructions to the respondent, which instructions were accepted, to ensure that all transfers issued by the new signatories related to the maize contract between the said

parties. There is only an email dated 15<sup>th</sup> March, 2015 to DW1 at page 65 of the record of appeal advising the bank to stop making payments. The said letter was not accompanied with a change of signatories' mandate or resolution until a later date, by which time there was no money in account.

8.38 In our decision in **First National Bank v Libyan African Investments Company Limited** <sup>(3)</sup> cited by the appellant, we found the appellant bank liable, because it was given actual notice in writing of two fraudsters, presenting themselves as officials of the respondent, including a restraining order, but the bank went on to deal with them. That case, is distinguishable from the present, in that there was no such notice to the bank to ensure that transfers only related to the maize contract with sufficient details of payees etc.

8.39 Therefore, we hold that the respondent was not negligent when it honoured the instructions issued by the authorised signatories to the account to pay the various payees until it was put on notice. The respondent is not liable for the claim of special damages arising out of alleged negligent misrepresentation. The resolution to remove the said signatories was written to the bank in June, 2016. Only one



payment of \$1,585.79 was made after the resolution, which was refunded. We reiterate that there was no negligence or breach of fiduciary duty on the part of the bank to entitle the appellant to special damages for economic loss. It is not the duty of banks to manage contracts on behalf of parties, to which it was not privy to.

8.40 The next issue is whether, the respondent denied the appellant internet viewing access to the account. We have found no evidence of a written request to the bank for viewing access by the appellant other than for the two new signatories. The new signatories being the only persons authorized to have dealings with the respondent on the account in issue, were the only ones to be availed viewing access as per the global banking form at pages 89 to 95 of the record of appeal. We note that though the account in issue belonged to the appellant, it gave its powers to new signatories to manage the account.

8.41 Therefore, we uphold the finding of the court below that the bank was on firm ground when it declined to give viewing rights to the appellant or bank statements which are only availed to signatories.

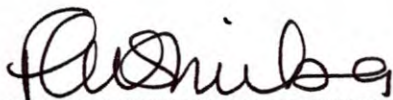
## **9.0 CONCLUSION**

9.1 In conclusion, we reiterate that the respondent was not privy to the contract between appellant and Admike and to the arrangements between Admike and Alliance. Further that, the respondent was not negligent in allowing the transfer or payment of money from the account to the various payee. We uphold the judgment of the lower court and dismiss the appeal. Costs follow the event, to be taxed default of agreement.



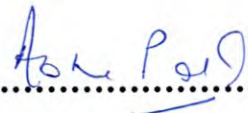
.....  
M. J. Siavwapa

**JUDGE PRESIDENT**



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F. M. Chishimba

**COURT OF APPEAL JUDGE**



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A. N. Patel SC

**COURT OF APPEAL JUDGE**