

IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 249/2021
HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

BAYPORT FINANCIAL SERVICES LIMITED APPELLANT

AND

CYNTHIA MILUMBE BBUKU RESPONDENT



CORAM: CHISHIMBA, SICHINGA AND NGULUBE, JJA.
On 10th October, 2023 and 30th October, 2023.

For the Appellant: *Mr. N. Ngandu - Messrs. Shamwana & Co.*

For the Respondent: *Mr. N.K.R. Sambo – Messrs. Sambo Kayukwa & Co.*
Legal Practitioners

J U D G M E N T

NGULUBE JA, delivered the Judgment of the Court.

Cases referred to:

1. *Nkongolo Farms Limited vs Zambia National Commercial Bank – SCZ No. 19 of 2007*
2. *Bradford Third Equitable Benefit Building Society vs Boarders [1941] 2 All ER 205 HL 218*
3. *Joseph Constantine Steamship Limited vs Imperial Smelting Corporation Limited [1941] 2 All ER 165*
4. *Indo Zambia Bank Limited vs Lusaka Chemist (2003) Z.R. 32*

5. *Grindlays Bank International (z) Limited vs Nahar Investments Limited (1990-92) Z.R. 86*
6. *Lloyd vs Grace Smith & Co. [1912] AC 716*
7. *National Westminster Bank vs Barclays Bank International Limited [1975] 1QB 654*

1.0 INTRODUCTION

- 1.1 The appellant appeals against the decision of Lombe-Phiri, J, of the High Court at Lusaka, delivered on 8th April, 2021. She held that the appellant's action of withdrawing monies from the respondent's account was unlawful as the same was based on fraudulent action which the appellant was fully aware of.
- 1.2 The Court below ordered a refund of the full amount debited from the respondent's account inclusive of interest.

2.0 BACKGROUND AND CLAIM

- 2.1 In the preliminary part of this judgment, we shall refer to the parties by their respective designations in the lower Court. The appellant is Bayport Financial Services Limited, the defendant in the Court below. The respondent, is Cynthia Milumbe Bbuku and she was the plaintiff in the lower Court.
- 2.2 The plaintiff discovered that money was being deducted from her bank account by the defendant on the premise that she obtained a loan facility in the sum of K71,800.00.

- 2.3 The plaintiff averred that the defendant purporting to have provided the plaintiff with a loan facility, forged and uttered false documents to her employer and bankers and gained access to her account with National Savings and Credit Bank (NATSAVE) at the Lusaka branch. That the defendant deducted the sums of K3,220.00 from her account in September and October 2018.
- 2.4 The defendant averred that at the plaintiff's request, it provided a loan facility to the plaintiff who provided the necessary documentation. It was averred that the defendant recovered the amount agreed upon in the Credit Agreement from the payroll.
- 2.5 It was averred further that following a Court order, the defendant provided all documentation relating to the loan facility to the police. The defendant denied that it was made aware of any fraud against the plaintiff.

3.0 HEARING IN THE COURT BELOW

- 3.1 At the hearing of the matter in the lower Court, the plaintiff testified on her own behalf and called five witnesses. The plaintiff's (PW1) evidence was that on 23rd August, 2018, PW2 asked her if she obtained a loan from the defendant as an officer from the defendant company called PW2 to ask if she knew the plaintiff. PW1 denied having obtained a loan from the

defendant. The defendant deducted the sum of K3,220.00 from her September salary and continued to deduct the sum of K2,800.00 from her bank account. The only loan she obtained was from the Public Service Micro Finance Company (PSMFC) in the sum of K15,000.00 which was recovered in full from the pay roll. The National Registration Card (NRC) in possession of the defendant had errors relating to her particulars.

- 3.2 PW2 stated that one of the defendant's officers called her as the focal person for PSMFC to find out if she knew the plaintiff. She stated that she knew the plaintiff as a co-worker in the Ministry of Community Development. That she then called the plaintiff and informed her about the call and gave her the contact number for the defendant.
- 3.3 PW3 the Credit Manager for PSMFC confirmed that the plaintiff obtained a loan from PSMFC in the sum of K15,000.00 which was recovered from the plaintiff through the payroll by February 2018.
- 3.4 PW4's evidence was that he received a complaint from the plaintiff to the effect that an unknown person had impersonated her and obtained a loan from the defendant. He requested for the loan application forms which the plaintiff filled in and were compared to the disputed documents. That the documents were

submitted to the Police Forensic Science Department for examination. It was found that the plaintiff did not sign the disputed documents. The defendant was informed about the finding and they admitted that the plaintiff did not sign the disputed documents. It was further found that the copy of the NRC attached to the disputed documents for the loan application had dissimilarities with the NRC submitted by the plaintiff. Even though the NRC numbers were the same, the signatures and the particulars (including the date of birth and village were different).

3.5 PW5, the handwriting expert stated that on 22nd February, 2022, he received the following documents for examination: Bayport customer declaration forms; Bayport loan payment schedule; Bayport call back data forms; PSMFC forms; Standing order forms; requested specimen samples and random specimen samples for the plaintiff. His examination revealed that there were dissimilarities between the handwriting and signatures on the disputed documents and the random specimen samples obtained from the respondent.

3.6 DW1 who was an agent of the defendant at the material time stated that she received a call from a person who identified herself as Cynthia Milumbe Bbuku and stated her intention

was to apply for a loan. When DW1 met this person, she produced all documents required for the loan application which are the Bayport pre-approval forms, three months pay slips, latest bank statements and a copy of her NRC. She stated that she forwarded these documents to her supervisor. She conceded that the person she dealt with as the loan applicant was not the plaintiff.

3.7 The gist of DW2's evidence, the Branch Sales Supervisor, was that she received pre-approved loan application documents for a client from DW1, the appellant's agent. The client was asked to provide her original NRC as the copy of the NRC attached to the forms was not the one the client had initially provided. He stated that he did not take a picture of the client but it was attached to the application forms.

3.8 He stated that he was responsible for verifying the signature on the pre-approved forms. He verified that the signature on the forms was for the focal person Mushya Makeleta the Chief Human Resource officer from the Ministry of Community Development where the plaintiff worked.

3.9 DW3's evidence was that he checked the loan pre-approval forms which had the plaintiff's names and the picture on the identity card had the face of the person he dealt with. He stated

that the net pay on the pay slip matched what was in the bank statement. The Chief Human Resource Officer, Mr. Makeleta confirmed having signed the pre-approval forms. He stated that the client obtained a loan in the total sum of K71,800.00 from the defendant to refinance her loan from PSMFC in the sum of K5,019.94.

3.10 DW4's evidence was that he was tasked with depositing money into the PSMFC account and escorted the plaintiff to submit the deposit slip at their offices and clear her debt. DW5's evidence was that the plaintiff's husband reported to the defendant that someone had impersonated his wife and obtained a loan from the defendant. That the plaintiff approached DW5 concerning the impersonation but refused to verify her identity. DW5 declined to give her any information. Thereafter, the police requested for the documents that were used in the loan acquisition.

4.0 DECISION OF THE LOWER COURT

4.1 After considering the evidence on record, the arguments and the submissions of the parties, the Court below found that where an institution is providing a service to a customer, it owes a duty to exercise reasonable care to protect the interest of the customer, and if the customer suffers loss in connection with

transactions made by fraudsters, it has to be presumed that it is due to the institution's failure to put in place a system that prevents such payments. The Court below therefore found the defendant liable for damages for the loss suffered by the plaintiff.

4.2 The Court below accordingly ordered that the plaintiff be refunded the amount of money which was debited from her bank account by the defendant.

5.0 THE APPEAL

5.1 The appellant (defendant in the Court below) was dissatisfied with the decision of the lower court and appealed to this court, advancing eleven grounds of appeal couched as follows-

- 1. The Judge erred in law and fact when she held that it was common cause in this matter that the respondent paid off Public Service Micro Finance (PSMFC) loan and was given a clearance letter.**
- 2. The Judge erred in law and fact when she held that the appellant was put on notice of the fraud and that they had a duty to protect the client and put an end to the fraud but continued to perpetuate the fraud.**
- 3. The Judge erred in law and fact when she held that the appellant was liable in damages for not putting a system in place to protect customers.**
- 4. The Judge erred in law and fact when she held that the appellant was liable in damages for the loss suffered**

by the respondent from the point they were notified of the fraud.

5. *The Judge erred in law and fact when she found as a fact that the respondent's personal documents were in the hands of third parties as she obtained a loan from PSMFC.*
6. *The judge erred in law and fact when she held that from the evidence on record it is clear that the liability for fraud rests on the appellant.*
7. *The Judge erred in law and fact herself when she held that the respondent had established fraud based on the analysis of the loan application forms alone.*
8. *The Judge erred in law and fact when she made a declaration that the appellant's action of withdrawing monies from the respondent's account was unlawful as the same was based on fraudulent action which the appellant was fully aware of.*
9. *The Judge erred in law and fact when she held that the Court cannot impute negligence on the respondent for the very fact that her personal documents were found in the hands of a third party.*
10. *The Judge erred in law and fact when she failed to apply the mercantile law that a person who is negligent in keeping her personal documents and as a result they are found in the wrong hands should bear the consequences.*
11. *The Judge erred in law and fact when she made an order that the appellant should refund the respondent the money deducted from her without taking into consideration the sum of K5,020.00 the appellant paid*

into the Public Service Micro Finance Company (PSMFC) account on behalf of the respondent by way of refinancing the respondent's loan at PSMFC.

6.0 APPELLANT'S CONTENTIONS

6.1 The appellant relied on its heads of argument filed on 19th October, 2021. Counsel argued grounds four and eight together and grounds five and nine were also argued together. In arguing ground one, it was submitted that the learned trial Judge erred when she found that the respondent had paid off her loan from PSMFC. The Court's attention was drawn to the evidence of DW4 where he stated that the appellant refinanced the respondent's loan of K5,020.00. That DW4 testified that he personally deposited the said amount into a ZANACO account for purposes of repaying the loan to PSMFC as per procedure when re-financing loans and signed the deposit slip, after which he was issued with a receipt. It was argued that despite the respondent alleging that she paid the loan in full in August 2018 through the payroll, she did not produce her August pay slip which would have shown the last loan deduction.

6.2 Counsel submitted that PW3's evidence that the loan clearance letters are given when the loan is paid in full resonates with the appellant's evidence that the loan was provided to the

respondent on 10th August 2018, which was the date when the clearance letter was issued. It was argued that had the learned trial Judge properly directed her mind to this evidence, she would have found that the loan from PSMFC was not cleared through the payroll at the month end of August 2018.

6.3 Because of the foregoing reasons, we were urged to reverse the lower Court's finding that the respondent cleared her PSMFC loan through the payroll. To support this argument, we were referred to the case of ***Nkongolo Farms Limited vs Zambia National Commercial Bank***¹ where it was held that a finding of the lower Court can be reversed where it was not supported by evidence.

6.4 In arguing ground two, it was submitted that the lower Court erred in finding that the appellant was put on notice regarding the fraud and had the duty to protect the respondent against the fraud. That this was a misdirection because the alleged fraud took place on 10th August, 2018 and the appellant had already fallen victim to the fraud. Counsel submitted that the respondent discovered the fraud on 23rd August, 2018 when the fraud had already occurred. That therefore, the lower Court's finding that the appellant failed to protect the respondent was a serious error.

- 6.5 In support of ground three, Counsel submitted that the lower Court's finding that the appellant was liable in damages for not putting a system in place to protect its customers was at variance with the unchallenged evidence of DW2 and DW3 relating to the verification process conducted by the appellant. It was argued that the mere fact that fraud took place cannot be attributed to a lack of a proper system on the part of the appellant.
- 6.6 It was contended in support of grounds four and eight that the appellant only became aware of the fraud when the respondent approached them and when the letter from the police was written to them. That therefore the lower Court had no basis upon which to conclude that the appellant should have stopped the deductions based on mere allegations of fraud. He argued that in any event, the lower Court in refusing to grant the injunction, was cognizant of the fact that fraud must be alleged and proved and thus refused to grant the injunction. To support this submission, we were referred to the cases of ***Bradford Third Equitable Benefit Building Society vs Boarders***² and ***Joseph Constantine Steamship Limited vs Imperial Smelting Corporation Limited***.³

6.7 Grounds five and nine attack the lower Court's finding that the respondent's personal documents were in the hands of third parties because the respondent had obtained a loan from PSMFC. It was argued that this finding was not supported by evidence. It was submitted that the lower Court failed to properly evaluate the respondent's evidence that she had misplaced her purse on 23rd December 2015 but failed to produce a police report. That further some of the documents found with a third party includes pay slips for the months of May, June and July 2018. That despite the payslips being e-payslips they could only have been printed by the respondent as stated by DW2.

6.8 It was submitted in support of ground six that there was no basis to conclude that the liability for fraud rests on the appellant because it continued to perpetuate the fraud. It was submitted that this was contrary to the evidence on record because the defendant was notified of the fraud after it had already taken place. Counsel urged us to reverse this finding of the lower Court.

6.9 In arguing ground seven it was submitted that the lower Court erred when it held that the respondent had established fraud on the analysis of the loan application form alone because there

were various documents before the court such as pay-slips, bank statements and loan pre-approval forms signed by the Human Resource Officer from the Ministry of Community Development, the respondent's employee.

6.10 We were referred to the case of ***Indo Zambia Bank Limited vs Lusaka Chemist***⁴ where the Court held that-

“What is required of banks is not expert knowledge on detection of forgery, but a degree of knowledge ordinarily required for the discharge of their duties. That the need for a microscopic examination would only arise if there are circumstances which ought to put the bank on inquiry with regard to the authenticity of the cheques; though it would be negligent for any bank to honour a cheque if the circumstances are such that they ought to be put on inquiry.”

6.11 It was accordingly submitted that the evidence of DW1 to DW3 confirmed that the appellant took reasonable steps to verify the authenticity of the documents presented for the loan application. That therefore the lower Court should have evaluated all the documents presented before concluding that fraud was established. That the trial Judge failed to evaluate the entire evidence in coming to the conclusion as to whom

between the two innocent parties, would bear the loss occasioned by the fraud.

6.12 The gist of the arguments in ground ten was that the catalyst for the fraud in issue was the fact that the respondent failed to keep her documents safe. Counsel relied on the cases of **Grindlays Bank International (Z) Limited vs Nahar Investments Limited**⁵ and **Nkongolo Farms Limited vs Zambia National Commercial Bank & Others (supra)** where the Supreme Court in employing the principle in **Lloyd vs Grace Smith & Co.**⁶ held that in cases where innocent parties are deceived the principle is that the loss occasioned by the fault of third persons in such circumstances ought to fall upon one of the two parties who clothed that third person as agent with authority by which he was enabled to commit fraud. Counsel accordingly argued that the respondent should bear the loss due to her negligence which enabled a third person commit fraud. We must stop here and hasten to mention that we did not quite follow Counsel's argument here because there was no relationship of principal and agent in this matter.

6.13 In support of ground eleven, it was submitted that the lower Court erred when it ordered that the appellant should refund the respondent the money that was deducted from her account

without considering the sum of K5,020.00 which was paid into the PSMFC account to refinance the respondent's loan. Our attention was drawn to the clearance letter written by PSMFC which confirms that it received a deposit of K5,020.00 on 10th August, 2018 in respect of loan repayment for the respondent. That there was no evidence that the respondent paid back this money to the appellant.

6.14 We were urged to allow this appeal and condemn the respondent in costs.

7.0 RESPONDENT'S ARGUMENTS

7.1 The respondent also relied on the heads of arguments filed into Court on 22nd September, 2018. In opposing ground one, it was submitted that the lower Court made the correct finding because DW3 confirmed that he personally dealt with the impersonator and not the respondent. He confirmed that the person he dealt with was not the respondent. DW3 requested the impersonator to obtain the loan statement from PSMFC before he processed the loan.

7.2 It was submitted in ground two that the respondent alerted the appellant about the fraud but the appellant did not cooperate with her to establish her claim. The appellant did not take any action to suspend the recovery of the loan or to protect the

respondent. It was argued that the appellant's system was taken advantage of, which was what led to the fraud and if the appellant had a proper system, the fraud would not have occurred. Counsel argued that in any event, the appellant was the one that was defrauded but wants to extend the fraud to the respondent.

7.3 In relying on the case of ***Lloyd vs Grace, Smith and Co.*** (*supra*), it was submitted that it was an omission on the part of the appellant's agents that caused the respondent's loss.

7.4 In grounds four, five, six, seven, eight, nine and ten, it was submitted that this whole matter is anchored on fraud which the respondent was not part of. Counsel for the respondent argued that all documents presented for the loan application and the signatures thereon were forged and the NRC had false details. That the photograph the appellant had was not for the respondent. We were urged to dismiss the appeal with costs.

8.0 THE COURT'S CONSIDERATION AND DECISION

8.1 We have carefully considered the record of appeal and the submissions by both parties.

8.2 We note that the grounds of appeal are so intertwined that the appellant has made repetitions in its submissions. Nevertheless, the issues as we see them relate to the following-

- 1. Whether the appellant failed in its duty to exercise reasonable care towards the respondent, thereby rendering itself liable to pay for the respondent's loss.**
- 2. Whether the Court should have taken into consideration the sum of K5,020.00 paid to PSMFC to repay the respondent's loan.**

8.3 In considering the first issue, we will address the following questions: whether the appellant failed to put in place a system to protect its customers including the respondent; whether the appellant was put on notice of the fraud; whether fraud could be established on the basis of the loan application forms; and whether the lower Court's finding that the respondent's documents were found in the hands of third parties was erroneous.

8.4 It is not in dispute that the appellant deducted money from the respondent's bank account on the pretext of recovering a loan that she allegedly obtained from the appellant. The contention between the parties in lower Court was whether the respondent actually obtained the loan. The respondent's contention was that she never obtained a loan from the appellant.

8.5 DW1's evidence was that she was working for the appellant as an agent at the material time and dealt with a client who had the respondent's names. That the client already had approval forms signed and stamped by the signatory from her work place

accompanied with other documents such as payslips and a certified copy of the NRC. The witness was shown a picture of the person she dealt with and confirmed that she was the one who appeared in the picture but stated that the respondent was not the person in the picture. This witness denied having assisted the client to write on the pre-approval forms.

8.6 DW2 the appellant's Branch Sales Supervisor confirmed that he received the documents from DW1 but denied that the respondent was the one on the photograph from the appellant's server. The above evidence shows that the respondent was not the one who actually obtained a loan from the appellant. This view is further supported by the forensic handwriting expert report on pages 124 to 127 of the record of appeal. The conclusion of the report indicates as follows-

“The dissimilarities observed in terms of figures and letters design, stroke connection, indicates strong degree of certainty that Milumbe Bbuku Cynthia did not write and sign in any document in dispute; the signature alleged to have been signed by MILUMBE Bbuku Cynthia is a fictitious forgery.”

8.7 The lower Court accepted the evidence that the loan application forms were not filled in by the respondent and that the purported signature on the loan application form was not made

by the respondent. The lower Court's finding that there was fraud involved in the disbursement of the loan and that the respondent's documents were in the hands of third parties, was therefore not erroneous. The lower Court properly evaluated the evidence before it because it took into account the evidence of the police investigations (forensic report) which confirmed that the respondent did not write on the loan application forms. The police investigations alluded to by the lower Court took into account other documents in the forensic report aside from the loan documents.

8.8 Having established that there was fraud by a third party in the issuance of the loan by the appellant which was to the detriment of both parties, the question is whether the appellant should be held liable for the respondent's loss.

8.9 The evidence of DW2 was that she verified the loan application documents handed over to her by checking if any of the authorized signatories from her work place had signed on the forms. Her evidence shows that she confirmed that the forms had one of the signatories after checking the signatures which the appellant had in the system. She checked the payslips whose information corresponded with what was in the bank statements. DW3 contacted the Human Resource Officer (Mr.

Mushya Makeleta) from the Ministry of Community Development where the respondent worked who confirmed having signed the pre-approval forms.

8.10 In view of the above, there was nothing to suggest that the appellant had failed to put in place a system to protect its clients from fraudsters. There are no relevant facts that the appellant would have considered to show that there was serious or real possibility that the person who obtained the loan impersonated the plaintiff. As held in the case of **National Westminster Bank vs Barclays Bank International Limited**,⁷ the appellant was not under any duty to know the respondent's signature in a transaction of this nature just comparable to a cheque presented to bank unless there is something to put it on inquiry.

8.11 Further in accordance with the principle enunciated in the case of **Indo Zambia Bank vs Lusaka Chemist (supra)**, there are no facts that would have put the appellant on inquiry with regard to the authenticity of the loan application forms as the appellant took the necessary steps to verify the information and signatures on the forms at the time of issuing the loan. We are therefore of the firm view that the lower Court erred when it concluded that the appellant failed to put in place a system to

protect its customers from fraud. We also find that the lower Court erred when it found the appellant liable for the respondent's loss as the appellant was also an innocent party.

8.12 The appellant was put on notice of the fraud after the respondent became aware of the purported loan. However, we concur with the appellant that the alleged fraud was merely an allegation and that they could not have stopped the deductions on mere allegations. Despite the view we have taken, the appellant acted to its detriment when it did not stop making the deductions after becoming aware that there was a possibility of fraud. Having established that the purported loan was issued through the fraud of a third party, it follows that the parties to this action are innocent parties. It is therefore in the interest of justice for each party to be restored to the positions in which they were before this matter arose. The lower Court was therefore on firm ground when it ordered that the appellant should refund the money which was deducted from the respondent's account.

8.13 The question that arises is whether the lower Court should have taken into account the sum of K5,020.00 which was paid to PSMFC meant to repay the respondent's loan. The appellant has challenged the lower Court's finding that it is common

cause that the respondent paid off the PSMFC loan and was given a clearance letter. It is not in dispute that the respondent cleared her loan with PSMFC but the issue is how the respondent cleared the said loan, whether it was through deductions from the payroll or whether it was a deposit of the outstanding amount into the PSMFC account.

8.14 The letter dated 26th February, 2019 from PSMFC on page 66 of the record of appeal states as follows-

“We write to confirm that Ms. Milumbe Cynthia Bbuku obtained a Short-Term loan of K15,000.00 in February 2018 from the Public Service Microfinance Company. The loan was fully settled through payroll.

We further wish to confirm that a deposit of K5,020.00 was made into Public Service Microfinance Company Short Term Account number 1918269301982 ZANACO Acacia Branch on 10th August 2018 IFO Cynthia Milumbe Bbuku in respect of loan repayment as per attached deposit slip.”

8.15 The above extract of the letter confirms that a deposit of K5,020.00 was made into the PSMFC ZANANCO account by the appellant. There was no dispute that the outstanding amount on the respondent's loan was the sum of K5,020.00 as shown on the loan statement on page 105 of the record of appeal and

that the appellant issued the loan on 10th August, 2018. This gives credence to the appellant's evidence through DW4 that the money was deposited to refinance the respondent's loan with PSMFC on 10th August, 2018. This evidence is also supported by the deposit slip on pages 72 and 112 of the record of appeal. It therefore follows that it was not common cause that the respondent paid off her loan with PSMFC as the lower Court ought to have established whether the money was recovered through the payroll or through refinancing by the appellant. Had the lower Court taken this route, it would have determined whether or not the appellant refinanced the respondent's loan as shown by the deposit slip on page 72 of the record of appeal.

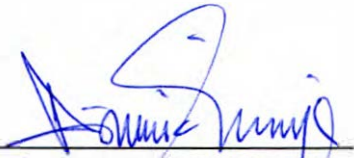
8.16 Having found that the appellant deposited the sum of K5,020.00 into the PSMFC account, we are of the considered view that the lower Court should have taken into consideration the amount paid into the PSMFC account and deducted it from the amount to be refunded by the respondent. We therefore order that the sum of K5,020.00 shall be deducted from the amount ordered by the court below to be refunded to the respondent. This shall also take into account the money which was already refunded to the respondent by the appellant.

9.0 CONCLUSION

9.1 The appeal partially succeeds for the aforesated reasons. Each party will bear its own costs of the appeal.



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE