

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE

2010/HK/506

CIVIL JURISDICTION

BETWEEN:

FLUID BASE INDUSTRIES LIMITED - PLAINTIFF
AND
BARCLAYS BANK ZAMBIA LIMITED PLC - DEFENDANT

Before the Hon. Judge I.C.T. Chali in Open Court on the 11th day of January,
2013

For the Plaintiff: Mr. F. Chalenga – Messrs Freddie and Company

For the Defendant: Mr. R. Mwanza – Messrs Robert & Partners

JUDGMENT

Cases referred to;

1. *Barclays Bank Zambia Limited v. Sky Fm Limited And Geoffrey Hambulo* (2006) Z.R. 51
2. *Thackwell v. Barclays Bank Plc* (1986) 1 All E.R. 676.
3. *Indo-Zambia Bank Limited v. Lusaka Chemist Limited* (2003 Z.R. 32.
4. *National WestMinister Bank v. Barclays International*
5. *Bank of Zambia v. Attorney General* (1974) Z.R. 24
6. *Marfani & Company v. Midland Bank Limited* (1968)2 ALL E.R. 573
7. *Michael Chilufya Sata v. Zambia Bottlers Limited* (2003) Z.R. 1
8. *E. Suffolk Rivers Catchment Board v. Kent* (1941) A.C. 74

Texts referred to;

1. *Charlesworth's Business Law by Paul Robson, 16th Ed* (Sweet & Maxwell, (1997)
2. *Charlesworth & Percy On Negligence, 12th Ed* (Sweet Maxwell, 2010)
3. *Osborn's Concise Law Dictionary 11th Edition* (Sweet & Maxwell, 2009)

Introduction

The references in this judgment to sums of money in Zambian Kwacha are as denominated before the rebasing of the currency.

The Pleadings

The Plaintiff took out a writ of summons accompanied with a Statement of Claim seeking the following reliefs;

1. A declaration that the sum of K331,011,750 was fraudulently withdrawn from the Plaintiff's account without the Plaintiff's authority;
2. A declaration that the purported debit of K331,001,750 from the Plaintiff's account was null and void;
3. An order that the Defendant refunds the Plaintiff the said sum;
4. Damages for negligence; and
5. Costs.

In its statement of claim the Plaintiff had pleaded that it used to maintain a bank account number 2009300 with the Defendant at the Kitwe Business Centre Branch to which the signatories were Fanwell T. Banda and Mrs. Veronica K. Banda who were the Plaintiff's Directors. The Plaintiff stated that between 1st January, 2009 and 31st August, 2010 in the course of carrying out its business at the said branch, the Defendant negligently cleared and caused to be cashed a total of 54 forged cheques purported to have been drawn by the Plaintiff and signed by the said signatories, resulting in the debit of the Plaintiff's said account to the tune of K331,011,750. The Plaintiff claimed that it did not issue the cheques in question and that the signatures on them were forged and not of the authorised signatories. It alleged gross negligence on the part of the Defendant in clearing the forged cheques and debiting the Plaintiff's account. In the alternative, the Plaintiff stated that it would rely on the principle of *res ipsa loquitur*.

The particulars of negligence as per statement of claim were as follows:

1. Failure to detect that the signatures on the cheques were forged;

2. Failure to compare the signatures on the forged cheques with the samples or failure to notice after comparing with the samples that the signatures on the cheques were forged;
3. Failure to call the directors or signatories to confirm payment or to take any necessary steps so as to verify with the Plaintiff before clearing the cheques;
4. Failure to adhere to the code of banking practice in Zambia.

In its defence, as amended with leave of the Court, the Defendant first raised issue with the account number and the signatories thereto. The Defendant further denied any lapse or failure on its part or being in breach of the code of banking practice as alleged or at all. It stated that if there was any negligence on its part same was exacerbated by the Plaintiff's own gross negligence. The particulars of the Plaintiff's negligence were given (paraphrased by the Court) as follows;

1. Failure by the Plaintiff to observe 54 alleged fraudulent transactions over a period of one year 8 months and involving 10 of the Plaintiff's former employees;
2. Failure to secure cheques;
3. Running Plaintiff's business with unsafe practices thereby giving rise to the fraud;
4. Pre-signing of cheques or whole cheque books;
5. Failure to reconcile bank statements which could serve to stem the fraud; and
6. Failure by Plaintiff to make sanity cheques on its accounting process.

The Defendant further stated that cheques alleged to have been forged were the same cheques the Defendant had issued to the Plaintiff and were presented with signatures to the Defendant by the Plaintiff's authorised employees. The Defendant accordingly denied that the Plaintiff was entitled to any relief. The Defendant counterclaimed for damages in negligence and for costs.

The oral evidence

At the trial of the action I received evidence from three witnesses for the Plaintiff and one witness for the Defendant.

Plaintiff's evidence

PW1 was FANWELL BANDA, a director in the Plaintiff company which he said was incorporated in July, 1997 and, in the course of its business, opened Bank Account No. 2009300 with the Defendant Bank at the Kitwe City Square Branch. The signatories to the said account from inception were PW1 and his wife, VERONICA K. BANDA. He said the instructions to the Bank were that the two signatories were to be signing before any cheque could be honoured. In this respect they provided Mr and Mrs. Banda's specimen signatures to the Bank.

PW1 said initially all was well with the Bank. However, between January, 2009 and August, 2010 they started having some difficulties with the service they were receiving from the Bank. One major problem was that whenever they wanted to do a bank reconciliation they had difficulties getting information such as bank statements. The Plaintiff also observed that whenever they wanted to know if cheques that had been issued to the Plaintiff's service providers had been paid they had problems receiving information from the Bank. The Plaintiff thus resorted to getting interim statements to work with whenever they were desperate. At that time the Plaintiff had employed IMASIKU KALALUKA as its Book Keeper until May, 2009 when he left.

PW1 said that in August, 2010, they obtained an interim statement from the Bank in order to conduct an audit of their operations. In the course of the said audit they discovered that a total of 54 cheques had been fraudulently raised and paid to IMASIKU MALALUKA and his associates. Of that number, 29 cheques had been paid to KALALUKA himself during the nine months he had worked for the Plaintiff. Even after he had left employment and up to August, 2010, KALALUKA continued to be paid. Another beneficiary of the said cheques was DIMITA PHIRI, a friend of KALALUKA, who received a total of 15 cheques. PHIRI also paid his wife 5 cheques and his friends BRIAN MUONGA and KANGWA BWALYA 3 cheques and to 2 cheques respectively.

PW1 identified the list of cheques paid to KALALUKA at page 1 of the Plaintiff's Bundle of Documents. He said the list showed that for the month of May, 2009 alone 7 cheques were presented for encashment by KALALUKA in a space of one week. This was while he was out of the Country. Copies of the cheques cashed by

KALALUKA appear at pages 2 to 17 of the Plaintiff's Bundle. PW1 said the signatures on the said cheques are not of the authorised signatories. He said he did not sign any of those cheques.

From the interim statement, PW1 said he observed that cheque No. 4945 for K10 million had been issued on the Plaintiff's account with the Defendant. He further observed that it had been deposited in someone's account at the Zambia National Commercial Bank (ZANACO) Chingola Branch on 3rd August, 2010. He could not recognise that payment because it was too large and outside the Plaintiff's local limits. He said he further observed that the said cheque had been cleared for payment on 4th August, 2010 when, according to PW1's understanding, it normally took three days to clear a cheque between banks. He identified a copy of the cheque in question at page 82 of the Plaintiff's Bundle. It was in the name of EVELINAH NJOVU and was dated 30th July, 2010.

Further on 4th August, 2010 PW1 said he discovered that cheque No. 4946 was missing from the cheque book. They wrote to the Bank of the missing cheque on the same day to stop payment thereof. However, payment was effected. Later it was discovered that it had been paid to JOSEPHINE INONGE KUNDA and was in the sum of K6,000,000. A copy thereof appears at page 80 of the Plaintiff's Bundle. It was dated 30th July, 2010 and was deposited at ZANACO on 5th August, 2010. PW1 said he went with Police Officers to Chingola on 8th August, 2010 with a view to stopping payment of that cheque from that end. However, they found that the cheque had been cleared and the money withdrawn through the Automated Teller Machine (ATM).

PW1 further identified the list at page 26 as the 15 cheques with a total value of K76,950,000 paid to DIMITA PHIRI copies whereof appear at pages 27 to 36 of the Plaintiff's Bundle. He said the signatures on those cheques are not his.

At page 54 of the Bundle is the list of 5 cheques paid to PRUDENCE CHISANGA, DIMITA PHIRI's wife, with a total value of K15,300,000. Copies of the said cheques are at pages 55 to 59 of the Bundle. PW1 said the signatures on those cheques are not his.

At page 64 is the list of 3 cheques paid to BWALYA KANGWA with a total value of K50,200,000 and whose copies appear at pages 65 to 67 of the Bundle. PW1 said the signatures on those cheques purporting to be his were in fact not his signatures.

At page 71 is a list of 2 cheques paid to BRIAN MUONGA altogether valued at K23,500,0000 and whose copies are at pages 72 and 73. PW1 said he did not sign on those cheques.

PW1 said the fraud was reported to the Police who investigated the matter further which resulted in the criminal prosecution and convictions of IMASIKU KALALUKA, BRIAN MUONGA and PRUDENCE CHISANGA before the Subordinate Court of the first class at Kitwe. KALALUKA's case was of 21 counts of forgery, 21 counts of uttering false documents and 21 counts of obtaining money by false pretences. MUONGA faced one count of theft and one of breaking into a building and committing a felony therein. CHISANGA faced one count of theft. From the record of the Subordinate Court, all the charges related to the cheques the subject of these proceedings. PW1 said other persons involved in the fraud were not prosecuted.

PW1 also testified that the Bank had never in its dealings with the cheques in issue brought any anomaly or query to his attention. He said that the arrangement with the Bank was that for every payment the Plaintiff made there had to be a banking sheet or letter alerting the Bank as to what cheques had been drawn and issued. This understanding, however, was not in writing. He said in the absence of the backing sheet or letter he expected the Bank to phone him or Mrs. Banda for confirmation of payment regardless of the value of the cheque.

PW1 said that what really grieved him was that of the total 54 cheques fraudulently drawn between January, 2009 and August, 2010 no single cheque was returned by the Bank. It appeared to him that the Bank was satisfied with the signatures on those cheques as well as with other details.

He said the amounts for DIMITA PHIRI and IMASIKU KALALUKA were drawn from three separate cheque books but from the same account belonging to the Plaintiff. He said the trend was to draw and present the cheques at the end of the month when the employees were preparing local payments.

Under cross examination PW1 said that between 2009 and 2010 they had 4 cheque books in use at the same time. He said they had a fifth cheque book also which they had stopped using after the discovery of the fraud. He admitted that in respect of payments to KALALUKA 5 different cheque books were used according to the list of cheques issued to him which appears at page 1 of the Plaintiff's Bundle. Also in respect of DIMITA PHIRI 5 cheque books were involved as per list at page 26 of the Bundle. Only two cheque books were utilised for the cheques to PRUDENCE CHISANGA as per list at page 54. Two cheque books were used for BWALYA KANGWA and BRIAN MUONGA as per the lists at pages 64 and 77 respectively, while three cheque books were used for other people as per list at page 77 of the Bundle.

PW1 said that he runs his business including his accounts to internationally accepted standards, except that the systems were corrupted by thieves that he had employed starting from January, 2008. Internally the Plaintiff had employed IMASIKU KALALUKA who was followed by DIMITA PHIRI and then by BWALYA KANGWA as Book Keepers. These were responsible for accounting records up to trial balance. KALALUKA and PHIRI had been introduced to the Bank as such. He said the Plaintiff's operations are small and as such all their staff are known to the Bank. The Plaintiff also employed two external accounting firms at Kitwe to look at their books, as well as tax consultants at Lusaka. Regarding the internal accounting staff, PW1 said they had access to the cheque book for up to 3 days or more in each month between the 25th and 30th of each month when they used to prepare the schedules of payments. During those days he used to release the cheque books to them to enable them, among other things, prepare payments and do reconciliation of the accounts. However, he did not notice missing cheque leaves from any of the cheque books and there was no evidence of wrong doing by the staff so as to put the Bank on alert. Even their external accountants did not detect any fraud until September,

2010 when the said accountants alerted them. PW1 said it was his accounting staff who used to obtain bank statements from the Bank.

PW1 said that in 2009 there was a break-in at the Plaintiff's offices when some computers and cheque books and cheque stubs were stolen. He did not recall which cheque book series were stolen during that break-in. It was also PW1's further testimony that he never pre-signed any cheques, but that Mrs. Banda, who was not an active Director at the company, used to pre-sign up to 10 cheque leaves at a time.

He said that his wife's signatures on all the copies of the cheques before Court were not forged; they all bore her signatures. He testified that no employee of the Bank was arrested or charged over the cheques in issue. He said the full extent of the fraud had not been established by his external accountants up to the time of commencing the trial in April, 2012.

Finally in his testimony, PW1 admitted that there had been no written agreement that the Bank should contact him over every cheque the Plaintiff issued. He further admitted that cheque No. 4945 could not be stopped by the Bank because it had been cleared by the time the instructions to stop payment were issued by the Plaintiff. The same thing happened with regard to cheque No. 4946. He said these are the two cheques which raised the Plaintiff's suspicions in August, 2010.

PW2 was POLICE SUPERINTENDENT KAOMA PHILBY BOMBEKI, a Forensic Handwriting Expert based at Police Service Headquarters in Lusaka at the time. He testified that in the course of his duties he personally examined 42 disputed Barclays Bank cheques bearing disputed signatures together with request and random specimen signature, samples of FANWELL BANDA (PW1). He examined the documents visually, under microscope, and effected the comparison between the disputed and the specimen samples in all aspects of questioned-document examination. The documents were later photographed, printed, and chart mounted. In his final report, he concluded, after considering all the identification features, that the signatures on the 42 cheques were not of PW1 but mere simulation signatures, i.e. forgeries. He produced two reports dated 25th February, 2011 appearing at pages

94 to 95 of the Plaintiff's Bundle and the other dated 12th April, 2012 in the Plaintiff's Supplementary Bundle.

The Plaintiff's last witness was Detective Inspector SEPISO SIYWA who investigated the case of fraud at the Plaintiff company. In the course of that investigation he collected 42 paid cheques out of the 52 which were suspected to have been forged and cashed through various banks, including BARCLAYS, STANBIC, INVESTRUST, STANDARD CHARTERED and ZANACO. PW3 also collected bank statements from Investrust for IMASIKU KALALUKA (pages 18 to 25 in Plaintiff's Bundle); from Stanbic for DIMITA PHIRI, (Pages 37 to 53 in the Plaintiff's Bundle); from Stanchart for PRUDENCE CHISANGA (pages 60 to 63 of the Plaintiff's Bundle); and from ZANACO for BWALYA KANGWA (pages 68 to 70 in Plaintiff's Bundle).

The 42 paid cheques were sent to the Forensic Handwriting Expert whose report PW3 later received to the effect that the signatures on them were forgeries. PW3 pursued the suspects and managed to arrest some of them for forgery, uttering, and obtaining money by false pretences. The suspects who were prosecuted and convicted were IMASIKU KALALUKA, BRIAN MUONGA, and PRUDENCE CHISANGA. He said DIMITA PHIRI was also arrested but escaped.

During cross examination, PW3 testified that two of the suspects in the fraud had been working for the Plaintiff company as Book Keepers at different periods. He said those had access to the cheque books when they prepared payments to the company's creditors. It was a range of 4 cheque books from which those employees were plucking cheque leaves for a period covering more than one year. PW3 had established that PW1 had been the custodian of the cheque books during that time January, 2009 to July 2010. The report of fraud was only made to the police in August, 2010. PW3 said he had not been able to establish which employee of the Bank processed which cheque among the 42 he collected.

Defendant's evidence

One witness was called on behalf of the Defendant, namely, JULIUS MWAPE from the Bank's Operations Centre at Kiwe which processes the work from the Banks branches on the Copperbelt, including deposits and cheques. The process also

involves, among other things, updating customers' accounts. He said that when a cheque is received from a branch, they look at the basic information on it, that is, the amount in words and figures which must correspond; the signatures on the cheques must correspond with the specimen signatures on the customer's mandate; and that the cheque is not more than six months old or post-dated. They also check if the customer has issued a stop payment notice against the cheque. He said that there are times when a customer sends in a list of cheques he has drawn. If such list is available, then they check if the particular cheque is on the customer's list. The Bank, he said, is not obliged as a matter of course to get any confirmation from the customer for each cheque they receive unless there is express written instruction to that effect. He said the Bank has no handwriting experts. As such they only check if the signatures on the cheques are visually similar to the specimen signatures they hold for the customer. If these appear to be similar and all other information being satisfactory, they effect payment.

In the case before court, Mr. Mwape said, from the records the Bank has, the fraud goes back to the year 2008 but was only brought to the attention of the Bank in the year 2010. During that period they did not receive any notice of stop payment from the Plaintiff. As far as the Bank was concerned all was well with the cheques they were processing on the Plaintiff's account. The Bank did not receive any report, verbal or written, of theft of Plaintiff's cheque books or cheque leaves therefrom. Neither did the Bank observe any indication of any fraud going on at the Plaintiff company or indeed any adverse report to put the Bank on alert.

When they finally heard about the goings on at the Plaintiff Company in the year 2010, the Bank carried out internal investigations. They established that none of the Bank's employees was implicated or found wanting in relation to the case. And no employee of the Bank was prosecuted over the criminal cases that arose out of the alleged frauds. What the Bank establishment was that the Plaintiff was negligent in the manner they kept the cheque books. Further the cheques from the four cheque books in use were being pre-signed by Mrs. Banda, which must have made it easy for the fraudsters to perpetrate their deeds. And in terms of the accounting practices at the Plaintiff Company, the Bank found that the Plaintiff had not been making use of the Bank statements regularly supplied to them which showed all the transactions

passing through the account. The statements are available at the request of the customer. Any anomaly or suspicious dealing on the account could easily and quickly be noticed on the statement. The witness denied that the Bank had not been sending the statements to the Plaintiff regularly. Further, the Plaintiff had been assigned a specific officer or manager in the Bank for any information or assistance they needed. The Plaintiff did not make any complaint to that officer of non-receipt of the Bank statements.

Mr. Mwape further testified that if the Bank observed dissimilarities in the signatures on the cheque and the mandate, they always send back that cheque with an appropriate query.

However, the Bank is not obliged to call on the Plaintiff's Directors for confirmation of any particular cheque. The Bank did not have written instructions limiting the amounts to be paid on each cheque or the number of cheques for a particular period. The witness described this case as unique in the manner the cheques were handled at the Plaintiff company. He found it difficult to understand how Book Keepers who were employed at different times were able to commit similar frauds without being detected. That, he said, shows a high degree of negligence on the part of the Plaintiff's Directors in the manner they handled the cheque books. He said, even while this case was pending before Court there had been another fraud committed at the Plaintiff Company by yet another Book Keeper in the same manner as past cases.

Under cross examination, Mr. Mwape said the requirement for the customer to provide specimen signatures is in order for the Bank to compare that with the ones on the cheques coming in for processing. In the absence of the required signature there is no authority for the Bank to pay. He said by the customer looking at a bank statement he is able to see what is going on regarding his account at the Bank. This is so even if the statement only shows cheque numbers and amounts paid out without the names of the payees being indicated.

Mr. Mwape said that one of the safeguards for the customer is the date of the cheque, namely, that it must be current and not stale, i.e. more than six months old. When his attention was drawn to the copy of the cheque at page 32 of the Plaintiff's Bundle which was made out to DIMITA B. PHIRI in the sum of K5,000,000, Mr. Mwape admitted that at the time it was passed for payment by the Bank on 5th August, 2009 that cheque had become stale because it had been issued on or dated 31st July, 2008. In this instance, he said, the Bank had not complied with the safeguard regarding dates. He described the incident as a rare occurrence in the Bank.

On the signatures, Mr. Mwape said, the Bank concluded that the signatures on the 54 disputed cheques were properly those on the mandate. That is how the said cheques were all honoured. It was only much later that they learnt that PW1 had not signed them.

At the close of the trial, I invited Counsel for the parties to file written submissions, which they did and which I have carefully taken into account in arriving at my decision.

As already stated, the Plaintiff's case is short premised on fraud concerning the cheques and negligence on the part of the Defendant, the paying Bank. The Bank on the other hand, in short, denied any fraud or negligence on its part; it in fact counter-alleged negligence on the part of the Plaintiff itself and pleaded estoppel by Plaintiff's conduct.

Submissions by Plaintiff's Counsel

Mr. Chalenga, Counsel for the Plaintiff, submitted that on the evidence before Court it had been established that the 54 cheques had been forged. Therefore, the Bank paid them without the Plaintiff's authority or mandate.

Mr. Chalenga cited the English case of NATIONAL WESTMINSTER BANK v. BARCLAYS BANK INTERNATIONAL (1975) QB 655 in which KERR, J. said at page 666 of the report;

“The principle is simply that a Banker cannot debit his customer’s account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so”.

Mr. Chalenga contended that by the Bank paying the 54 forged cheques, the only reasonable conclusion to be drawn from that conduct is that the Bank paid little attention to their verification. The transactions were such as to put the Bank on inquiry. For example, he said the cheques were consistently in the names of the same payees. The Bank ought to have detected the fraud or lack of authority to pay. He further referred me to the case of BARCLAYS BANK ZAMBIA LIMITED v. SKY FM LIMITED AND GEOFFREY HAMBULO (2006) Z.R. 51 in which the Supreme Court held;

- “1. The basis of a Bank’s liability where it has paid on a forged instrument is not negligence, but because money has been paid without authority of the customer.***
- 2. The Appellant had no authority to honour the cheques with the forged signature of the 2nd Respondent”.***

Counsel submitted that this is the law as laid down even in the earlier case of BANK OF ZAMBIA v. ATTORNEY GENERAL (1974) Z.R. 24 where the Supreme Court said that **“even gross carelessness by the customer in the care of its cheque forms and stamp is too remote to found a defence of estoppels on the basis of conduct inducing the Bank to pay”.**

He submitted that the Bank in this case cannot argue that the Plaintiff adopted the forged cheques by its conduct so as to be stopped from denying its instruments.

Submissions by Defendant’s Counsel

On behalf of the Defendant Bank, Mr. Mwanza urged the Court not to find the Bank liable. Firstly, Mr. Mwanza drew the Court’s attention to the Plaintiff’s Pleadings in Reply to the Bank’s Defence. In particular part of paragraph 2 of the Reply reads;

- “i. It was impossible to notice as the fraud involved an employee who was concealing the transactions but on the other hand the Bank as an independent was in a right position to notice and detect the fraud.***
- ii. The Plaintiff did secure the cheques but the employee stole cheque leafs from the cheque book whilst discharging his duties as a book keeper.***
- iii. The Plaintiff never pre-signed the cheques without an allocated/identified payee and further no such pre-signed cheque was involved in the fraud.***
- iv. Bank statements were (received) by the same employee and wrong entries stated in the Bank reconciliation statements to conceal the wrong transaction, thus it was difficult to detect the fraud, though the statements were regularly checked”.***

Mr. Mwanza argued that although PW1 had admitted to only 4 cheque books having been in use over the period, the Plaintiffs Bundle of Documents containing copies of cheques reveals that in fact there were 8 cheque books over that period. These are in the series 3300, 3400, 3500, 3600, 3800, 3900, 4800 and 4900 as evidenced at pages 1,26,54,64,71 and 77 of the Bundle. Each of the cheque books contained 100 leaves. Counsel further pointed out that the fraud went as far back in time as July, 2008 when cheque No. 003976 dated 31st July, 2008 payable to DIMITA B. PHIRI in the sum of K5,000,000 was written (page 32 of Plaintiff's Bundle). The fraud was only discovered and reported to the Police and to the Bank in August, 2010. Mr. Mwanza referred to PW1's evidence when the witness said that the Plaintiff's accounting systems were corrupted by thieves although it had been run professionally by external accountants who did not detect the fraud either in the two years it had been going on. The gist of Mr. Mwanza's argument was that in effect PW1's evidence was that it was the Plaintiff's employees who perpetrated and concealed the fraud without participation from the Bank's employees. Hence no Bank employee was charged let alone prosecuted therefor.

From the evidence of PW1, Mr. Mwanza argued that there was no arrangement between the Plaintiff and the Bank for the latter to alert the Plaintiff of every cheque presented for payment; that the Bank was not instructed on the limits as to amounts payable on each cheque or the number of payments per period; that there was no

evidence that the Plaintiff had written to the Bank to stop payment of any of the 54 cheques; and that there had been no report to the police or to the Bank of any missing cheque leaves or cheque books even following the break-in at the Plaintiff's Offices until after August, 2010. It was Counsel's submission that the Plaintiff's claims of fraud and negligence against the Bank cannot be supported by the evidence on the record.

Mr. Mwanza also attacked the evidence and conclusions of PW2, the Forensic Handwriting Expert as having been flawed. The view I take is that PW2's evidence and conclusions cannot be seriously faulted. There is overwhelming evidence that the cheques in issue were forged. I accordingly do not propose to delve further in Counsel's submissions on the point.

Last but not the least, Mr. Mwanza cited the case of INDO-ZAMBIA BANK LIMITED v. LUSAKA CHEMIST (2003) Z.R. 32 which I propose to refer to later in this judgment. Counsel concluded by submitting that the Plaintiff is precluded from setting up forgery, fraud or negligence against the Bank. He submitted that the Plaintiff had failed to prove its case on a balance of probabilities.

The Law

Under paragraph 6 of its statement of claim, the Plaintiff had pleaded thus;

“Further the plaintiff will at the trial aver that the Defendant was grossly negligent in clearing the forged cheques and debiting the plaintiff's account of the stated amount, and alternatively plead the principle of res ipsa loquitur”.

On the facts of this case, I do not think the plaintiff is entitled to invoke the doctrine or maxim of “res ipsa loquitur” or “the thing speaks for itself”. That maxim, which is discouraged in modern pleadings, is best suited in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence. The learned authors of OSBORN'S CONCISE LAW DICTIONARY, 11th Edition state that;

“The doctrine applicable in cases where there is prima facie evidence of negligence, the precise cause of the incident cannot be shown, but it is more probable than not that an act or omission of the defendant caused it and the act or omission arose from a failure to take proper care for the claimant’s safety”.

Further the learned authors of CHARLESWORTH & PERCY ON NEGLIGENCE 12th Edition prefer to call it “a prima facie case” and state;

“It means essentially a case which calls for some answer from the defendant and will arise upon proof of : (1). The happening of some unexplained occurrence; (2). Which would not have happened in the ordinary course of things without negligence on the part of somebody other than the claimant; and (3) the circumstances point to the negligence in question being that of the defendant, rather than that of any other person.” (Paragraph 6-103).

In the instant case, the facts are known and, in my view, there can be no speculation or presumptions for or against any party. The circumstances leading to the debiting of the Plaintiff’s account are well known and the case can be resolved on the facts before Court. In my view the doctrine is inapplicable.

As already stated, the Plaintiff alleged negligence on the part of the Bank in the discharge of its duties to the customer. In CHARLESWORTH’S BUSINESS LAW by PAUL SOMSON, 7th Edition the learned author states;

“What amounts to negligence depends on the facts of the particular case and the practice of bankers”. (page 534).

The learned authors of CHARLESWORTH & PERCY ON NEGLIGENCE define the duty of care of a banker thus;

“A banker must exercise due care and skill in the business of banking, but the scope of the duty to a customer or a third party is highly sensitive to the particular factual background”(paragraph 9-80).

As for the standard of care, the learned authors state;

“The standard of care which the law requires of a bank with regard to the collection of a check is that shown in the ordinary practice of careful bankers,..... it does not constitute any lack of reasonable care to refrain from making inquiries of a customer....”.

In the case of MARFANI & CO LIMITED v. MIDLAND BANK LIMITED (1968) 2 ALL E.R. 573, the English Court of Appeal formulated four principles which should guide a court in such case, namely;

1. The standard of care required of bankers is that to be derived from the ordinary practice of careful bankers;
2. The standard of care required of bankers does not include the duty to subject an account to microscopic examination;
3. In considering whether a bank has been negligent in receiving a cheque and collecting the money for it, a Court has to scrutinise the circumstances in which a bank accepts a new customer and opens a new account; and
4. The onus is on the defendant to show that he acted without negligence.

The principles that should guide a Court in deciding whether a bank was negligent were further expounded by HUTCHINSON, J. In THACKWELL v. BARCLAYS BANK PLC (1986) 1 ALL E.R. 676.

1. It was reaffirmed that in order for a bank to establish a defence under Section 4 of the Cheques Act 1957, the bank must show that it received payment of the cheque in good faith and without negligence; the onus being on the bank to establish this. Section 5 of the Cheques Act Chapter 424 of the Laws of Zambia is a replica of Section 4 of the British Cheques Act 1957 and reads;

“(1). Where a banker, in good faith and without negligence –

(a). Receives payment for a customer of an instrument to which this section applies; or

- (b). *Having credited a customers' account with the amount of such instrument, receives payment thereof himself; and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.*
- (2). *This section applies to the following instruments, namely;*
- (a). *Cheques.....”*

2. Under the principles in THACKWELL, in deciding whether a bank has acted negligently, there were two tests that have been applied by the Courts.
3. The first test is that based on the ordinary practice of banks. The Court must look at the transaction and decide whether the circumstances surrounding the paying in of the cheque in question would have aroused suspicion in a banker's mind so that the bank in question would have made further inquiry. The test is an objective one.
5. Furthermore, it is no defence to a bank, which has been guilty of negligence in the collection of a cheque, to show that had they made further inquiries, then a reassuring answer would have been given to them.
6. The second test is that based on the practice of the banks to protect themselves and others against fraud. A bank should act in a way which furthers this aim.

My findings

I propose to first deal with cheque no 003976 dated 31st July, 2008 issued to DIMITA B. PHIRI in the sum of K5,000,000. That cheque was presented for payment at the Defendant's Branch at Kitwe on 5th August, 2009, more than one year later. On the face of it, the cheque was clearly stale and, by the evidence from Defendant's own witness Mr. Mwape, it ought not to have been paid. There was no explanation as to why it was paid at all against the Bank's own regulations. It is my finding that the Bank was negligent in respect of that particular cheque. I further find that the Bank had wrongfully debited the Plaintiff's account with that amount. I therefore enter judgment for the Plaintiff in the sum of K5,000,000.

Regarding the balance of the claim, I have further considered the evidence on the record and the submissions by Counsel together with the authorities cited.

In the circumstances of this case as described in the summary of the evidence, can it be right to demand that the Bank ought to have paused for thought and looked very carefully at each cheque?; and had they done so, would the Bank have asked some serious questions of each cheque? In other words, were the circumstances in which the cheques in issue were presented so unusual and out of the ordinary course that they ought to have put the Bank on inquiry and that it ought, as a result to have made further inquiries with the Plaintiff?

I think that this case is on all fours with the case of INDO-ZAMBIA BANK LIMITED v. LUSAKA CHEMIST LIMITED. The facts in that case were that the respondent company maintained a business account with the appellant. There were three signatories to the account all of whom were Directors of the respondent company. During the material time, the procedure which was maintained at the respondent company was that the accountant was responsible for writing the cheques which he then referred to any of the signatories for signature. Between December, 1999 and 29th January, 2000 one of the signatories was out of the country. On 29th December, 1999 another of the signatories received information from the bank to the effect that the company account had a negative balance and some cheques had been returned unpaid. When he probed the matter, he found that a number of forged cheques prepared by the accountant had been paid out on the account. After evaluating the evidence on the record the learned trial Judge found that the forgeries started in June, 1999 and continued unabated until the end of December, 1999. He also found that both the appellant and the respondent were not aware of the forgeries. The trial Judge concluded that although the appellant was not negligent, it was liable because it paid out the cheques without the mandate of the respondent. The bank appealed that decision.

In allowing the appeal the Supreme Court held ;

- “1. 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;***

2. ***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 caused doubts in the banker's mind and caused them to make inquiry;***
3. ***Merely by honouring an undetectably forged cheque, a bank did not represent that the cheque was genuine and in the absence of negligence, no estoppel by representation could arise on the bank clearing such a cheque".***

Mr. Chalenga had submitted that the Bank ought to have been on inquiry because too many cheques were paid to the same persons; this, he said, should have aroused doubts in the Bank's employees.

In the INDO-ZAMBIA BANK Case, a similar argument was raised by Counsel for the respondent company. The Supreme Court observed thus (Mambilima, JS at pages 39 to 40 of the Report);

"We find this argument to be self-defeating because the transactions in question went on for more than six months, during which statements were being sent to the respondent who did not notice the running down of the account. Also, it is not usual for banks to query the expenditure on an account for as long as there are sufficient funds to meet the documents. It goes without saying that every cheque issued against money held in an account will be honoured because that is the mandate given to the bank".

I find that to be exactly the position in this case. The transactions go as far back as January, 2008 to August, 2010. PW1 did not notice the transactions even though he received statements from the Bank. Had PW1 examined those statements he could have uncovered the irregularities through those statements and properly reconciled their account. There were indeed sufficient funds in the Plaintiff's account to meet those cheques. The forgeries appear to have been perfect and could not be detected by the Bank which, I find, applied the ordinary standard of verification, not that of handwriting experts.

The forgeries were also perpetrated by the Plaintiff's employees, unknown to PW1 and to the Bank. The Plaintiff even had external accounting firms and tax consultants who, in my view, were even better placed to detect the fraud, but they did not either. To paraphrase Mambilima's J.S. in the INDO-ZAMBIA BANK Case, **“For (close to two years) cheques were presented and no query or complaint was raised by the (Plaintiff) as obviously they were not aware of the fraud but if anyone could have been put on inquiry, it was the (Plaintiff)”**.

The Supreme Court in the INDO-ZAMBIA BANK Case referred to Section 21 of the Bills of Exchange Act 1882 which provides;

“Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up forgery or want of authority.....”

In my opinion, on the facts of this case, the Plaintiff is precluded from setting up forgery.

Lastly, it will be recalled that the Defendant had counter-claimed damages for negligence on the part of the Plaintiff. It is my finding on the facts before me that the Plaintiff was indeed negligent in the manner it kept it operated its account, and in particular in the handling of its cheque books. Hence my absolving the Bank of any blame save for the one stale cheque that was passed for payment.

However, I did not receive any evidence of any injury suffered by the Defendant as a result of the Plaintiff's negligence. In the case of MICHAEL CHILUFYA SATA v. ZAMBIA BOTTLERS LIMITED (2003) Z.R. 1, the Supreme Court said;

“For the (claimant) to be entitled to damages in the tort of negligence, it has to be established that he or she has suffered some injury, failure to which damages will not be awarded”.

In the SATA Case, the Plaintiff had sued for damages for personal injuries and consequential loss and damage caused by the negligence and/or breach of statutory duty by the defendant in the manufacture and bottling of one bottle of sprite beverage. The bottle was found to contain a dead cockroach. Neither the plaintiff nor any other member of his family had consumed the contents. On seeing the Cockroach in the bottle, the plaintiff alleged that he and his children fell sick and went to see a private medical practitioner who treated them for nausea. The learned trial Judge took the view that as the plaintiff and his children did not consume the adulterated drink and did not suffer injury therefrom, the claim could not succeed. The Supreme Court agreed with the decision of the trial Judge and dismissed the appeal. The Court said;

“There was no injury or damage caused to the (plaintiff) by the adulterated drink as he did not consume any part of it”

The Court further said at page 8 of the report;

“.....negligence is only actionable if actual damage is proved, there is no right of action for nominal damages”.

The Court cited with approval the words of Lord Reading, C.J. in the case of E. SUFFOLK RIVERS CATCHMENT BOARD v. KENT (1941) A.C. 74 when he said;

“Negligence alone does not give rise to a cause of action, damage alone does not give a cause of action; the two must Co-exist”.

On these authorities the counter claim is dismissed for lack of merit.

Conclusion

In the result, on the basis of the findings I have already made, there is judgment for the Plaintiff in the sum of K5,000,000 only. The said sum shall carry interest at the rate of 15% per annum from the date of this judgments, and thereafter at the rate of 10% per annum till full payment. I order that each party shall bear its own costs.

Leave to appeal is granted.

Delivered in Open Court the 11th day of January, 2013

I.C.T. Chali
JUDGE