

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2008/HPC/0304**

*(Civil Jurisdiction)*

**BETWEEN:**

**B.Y. ENTERPRISES LIMITED**

**PLAINTIFF**

**AND**

**INDO-ZAMBIA BANK LIMITED**

**DEFENDANT**

**BEFORE HON. JUSTICE NIGEL K. MUTUNA THIS 25TH DAY OF  
FEBRUARY, 2013**

For the Plaintiff : Mr. Chitambala, of Messrs Lukoma Chambers  
For the Defendant : Mrs. A.S. Ahluwalia of Messrs Patmat Legal  
Practitioners

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## **J U D G M E N T**

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*Cases referred to:*

- (1) *Tai Hing Cotton Mill Limited vs Liu Chong Hing Bank Limited and others (1985) 3 WLR page 317***
- (2) *Emily Llyod vs Grace Smith and Company (1912) UK HLC page 2***
- (3) *Indo Zambia Bank Limited vs Lusaka Chemist Limited (2003) ZR page 32***
- (4) *London Chartered Bank of Australia vs McMillan (1892) AC 292***
- (5) *Mazoka and others vs Mwanawasa and others (2005) ZR page 140***

*Others authorities referred to:*

- (1) *Chitty on Contracts: Specific Contracts, volume 2, 28<sup>th</sup> edition, Sweet and Maxwell, 1999, London***

**J1**

**(2) Halsburys Laws of England, by Lord Hailsham of St. Marylebone, 4<sup>th</sup> Edition, volume 3(1), London**

**(3) Law Reform (Miscellaneous Provisions) Act, cap 74**

**(4) Odgers on Civil Court Actions, by Simon Goulding, 24<sup>th</sup> edition, 1996, Sweet and Maxwell, London.**

**(5) Bullen and Leake and Jacob's Precedents of Pleadings, by lord Brenna Q.C. and William Blair QC, volume 1, fifteenth edition.**

**(6) Clerk and Lindsell on Tort, by Anthony M. Dugdale and Micheal Jones, nineteenth edition, Sweet and Maxwell, London 2006.**

The Plaintiff, B.Y. Enterprises Limited commenced this action against the Defendant, Indo-Zambia Bank Limited on 11th August, 2008. This was my way of writ of summons and statement of claim. The Defendant's response was by way of memorandum of appearance and defence filed on 26<sup>th</sup> August, 2008.

The claim as it is endorsed in the writ of summons and statement of claim is for the following relief:

- (i) "Payment of the said sum of K688,000.000.00 deposited by the Plaintiff in its account No. 110345003 which the Defendant failed and/or neglected to credit to the said account.*
- (ii) Interest on the said sum of K688,000,000.00 from the dates of the deposit to date of judgement. (iii)*
- (iii) Damages for negligence and/or breach of care for failing to credit the said money to the Plaintiff's account.*
- (iv) Interest*
- (v) Costs"*

The facts of this case as they are revealed in the pleading and evidence are as follows. The Plaintiff is a holder of a current account number 110345003 at the Defendant's branch at Kabwe. On divers days but between 18<sup>th</sup> April, 2006 and 3<sup>rd</sup> April, 2008 the Plaintiff deposited into its

account certain sums of money. Of the said sums of money the sum of K1,452,722,300.00 was credited to the Plaintiff's account. When the deposits of the various amounts were made, they were accompanied by deposit slips which were duly signed by the Defendant.

## **J2**

Arising from the foregoing facts, it was contended by the Plaintiff in the statement of claim that the Plaintiff deposited the sum of K2,140,722,300.00 and the Defendant acknowledge receipt of the said sum by signing the deposit K1,452,722,300.00 to the Plaintiff's amount and omitted to credit the sum of K688,000,000.00. Further that, the Defendant and reasonable grounds for believing that the Plaintiff had not been correctly credited with all the moneys deposited and was negligent in failing to credit the Plaintiff's account with the said sum of k688,000,000.00. As a consequence of the foregoing, the Plaintiff suffered damages for the negligence and breach of care due to the Defendant's failure to credit the said moneys to the Plaintiff's account.

The contentions of the Defendant as they are contained in the defence are as follows. The Plaintiff only deposited the sum of K1,452,300.00 and not K2,140,722,300.00. Further that, if the Plaintiff had conducted its business in a vigilant manner it would have discovered that its own employees were conducting irregular bank transactions.

When the matter came up for trial, the parties called a witness each.

The Plaintiff's witness was Bhakesh Y. Deasi, PW, the managing director of the Plaintiff. His testimony was as follows. He was the managing director of the Plaintiff during the period April, 2006 and April, 2008, when the events from which this action arises took place. On various dates between 18<sup>th</sup> April, 2006 and 3<sup>rd</sup> April, 2008, the Plaintiff deposited into its account number 110345003, held at the Defendant's Kabwe branch, the sum of K2,140,722,300.00. At the time the said moneys were deposited, the Defendant's servants and or agents acknowledged receipt by signing and stamping each copy of the deposit slips.

Following the deposits, the sums of money were not fully credited to the Plaintiff's account and were suppressed which resulted in the account being under credited. As a consequence of this, PW discovered that the Defendant only credited the sum of K1,452,722,300.00 and neglected to deposit the balance of K688,000,000.00. These actions by the Defendant were

### **J3**

notwithstanding the fact that as a banker in had the responsibility to ensure that the Plaintiff's account was credited with the correct amount. The Defendant was therefore negligent and is liable.

Under cross examination PW's evidence was as follows. The amounts in figures and amounts in words on some of the deposit slips produced in the Plaintiff's bundle of documents differ. That the said deposit slips were all prepared by the Plaintiff's employee and that he only noticed the discrepancy after two years. Further that, during the period when the discrepancies were occurring he did receive bank statements from the Defendant.

In re-examination PW's evidence revealed that the amounts in words on the deposit slips were the actual deposited into the account. That on the actual day that the amounts were deposited into the account the amounts do not tally now because they were tampered with at a much later date. Further that, if there were any discrepancies at the time the deposits were being made the Defendant should not have received the deposits.

The evidence went on to reveal that the deposit slips were prepared by the directors or the other two employees of the Plaintiff and verified by PW. The verification was done by PW before and after the deposits were made and that the amounts in words and figures always tallied. Since he was verifying the deposits on a daily basis he saw no reason to verify the deposits against the bank statements. Further that, he trusted the Defendant to deposit the moneys as per the deposit slips, as such there was no obligation placed on the Plaintiff to verify the accuracy of the bank statement.

The Plaintiff proceeded to close its case.

The Defendant's witness was Peter Mubita Imakando, DW, manager inspections in the Defendant. His evidence was as follows. The Plaintiff holds a current account number 11345003 at the Defendant's Kabwe branch. He conducted investigations on the account regarding allegations that some fraudulent transactions had been committed. His discovery was that the Plaintiff's agents came to the Defendant bank from time to time to deposit cash. In

#### **J4**

the Defendant's branch there was prominently displayed a notice to customers to the effect that when a customer comes to deposit cash, he or she must first report to the receipt scroll counter. At the said counter the clerk would record the deposit in the receipt scroll register, indicate the receipt scroll number on the original deposit slips and affix a receipt scroll stamp thereon. The clerk would also initial and sign on the original deposit slips.

DW testified further that following from the foregoing, a customer would then proceed to the receiving cashier to effect the deposit, who would record it in his or her receipt scroll register. At the close of business the receiving cashier's records are required to tally with the records of the receipt scroll clerk. Where there are discrepancies between the two, efforts are made to trace where the discrepancy arises from. In the present case the Plaintiff's employees brought cash in bulk for depositing into the Plaintiff's account on various days and approached the cashiers directly. The cashiers would then return the Plaintiff's deposit book containing the counterfoil to the Plaintiff's employee and retain the original deposit slips without recording them in their receipt scroll register. The cashiers would hold onto both the deposit slips and cash for some time, while the Plaintiff's employees would fill out fresh deposit slips without counterfoils for lesser amounts, and hand them over to the cashiers personally. These would have stamped by the cashiers and substitute the earlier deposit slips. This would have the effect of suppressing the cash actually deposited into the account. The cashier would then handover the freshly completed deposit slips to the scrolls clerk for recording in the receipt scroll book and posting in the computer system.

DW's testimony also revealed that by depositing the cash directly with the cashier's, the Plaintiff's employees did not comply with the Defendant's directive and had the Plaintiff been vigilant in the conduct of its business it would have discovered that its own employees were conducting irregular bank transactions. He stated further that it was difficult for the Defendant to detect the fraud because the initial cash deposits were not being scrolled before the cash was deposited with the cashiers by the Plaintiff's employees. The Plaintiff however would have detected the fraud through regular reconciliation

### **J5**

of the account whose statements were provided to it by the Defendant regularly.

In cross examination DW testified as follows. He joined the Defendant bank in April, 2003 and that between April, 2006 and May, 2008, he did not hold any position at the Defendant's Kabwe branch. This fact notwithstanding he had personal knowledge of the Plaintiff's account by virtue of his position as inspector. As such inspector he and the other inspectors visited the Defendant's branches on a yearly basis and studied the accounts and knew how they were run. He personally conducted the investigation of the fraud in respect of the Plaintiff's account and prepared a report. However, the report he prepared was not before the court.

The evidence revealed further that the Defendant had issued an instruction manual to all its branches setting out how cash deposits were to be made. That the said instructions manuals were not given to each customer personally but that the attention of the Plaintiff's employees was drawn to the manuals by virtue of the notices that the Defendant put in its banking halls. A copy of one such notice is produced at page 14 of the Defendant's bundle of documents. Further that the scroll register was maintained at the Kabwe branch but that it is not produced before court because it is bulky. The scroll register was the property of the Defendant a such it was the Defendant's responsibility to ensure that it was properly used.

DW went on to confirm that a cashier is obliged to scrutinize a deposit slip to ensure that there no discrepancies between the amount in words and amount in figures. That cashiers had an obligations not to receive any deposit slip with discrepancies on them. Further that, the deposit slips at pages 1 to 30,32 to 36 and 37 to 80 of the Plaintiffs bundle of documents were issued by the Defendant. They were also stamped with the Defendant's stamp and that they are on controlled stationary belonging to the Defendant. That, the stamps on the slips were managed by individuals who

## **J6**

were supervised by the Defendant and therefore the Defendant had an obligation to ensure that the controlled stationary was not abused.

DW clarified further that the cashiers kept both the deposit slips and cash for some time and that the said cashiers were employees of the Defendant working at the Kabwe branch. However, it was not the Defendant who had the obligation to ensure that the cashiers did not hold onto the deposit slips and cash for a long time. He stated that the Defendant was responsible for ensuring that the deposits were done up to the point of balancing the transactions at the close of business. However, between the time the cash is deposited and the transactions balanced it was the cashier's responsibility.

DW went on to state if there had been no active and direct involvement by the Plaintiff's employees the fraud would not have been committed on the Plaintiff's account. Further that the possibility is that it would have been detected at its earliest stage. He also stated that he was aware that one of the Defendant's employees called L.Kabonda was charged with the offence of suppression of seventy cash deposits on the Plaintiff's account. That the total amount involved for the two employees of the Defendant is K688,000,000.00 and that the Defendant established that the suppression of the deposits resulted in a loss by the Plaintiff of K642,000,000.00. Further that, at the time the two employees were suppressing the deposits they were in the employ of the Defendant and

that they were using deposit slips that are controlled stationary belonging to the Defendant. However, the control of the deposit slips is up to the point that they are stamped and signed by the Defendant's employees. Prior to that the Defendant's customers are at liberty to carry the deposit slips to their business premises for purposes of filling in the details of the deposit slip is in the hands of a customer it cannot be termed controlled stationary.

DW ended by testifying that the documents at page 82 to 2002 of the Plaintiff's bundle of documents are bank statements issued by Defendant to the Plaintiff. That the documents do not specifically required the Plaintiff to

### **J7**

verify and report back to the Defendant if there are discrepancies, but that

the need to verify is implied in the submission of the statements to the customer.

In re-examination DW testified as follows: the initial deposits made by the Plaintiff were not registered in the scroll register; later there was however connivance between the Defendant's employees and the Plaintiff's employees and that the controls that the Defendant had put in place would have highlighted the discrepancy if the initial deposits were scrolled; the Defendant ensured that the scroll stamp and cashier's cash received stamps were properly used; the Defendant had no obligation to refuse to receive deposit slips in the Defendant's supplementary bundle of documents have amounts that tally therefore, the Defendant did not find any discrepancies in those deposit slips especially that they were completed by the Plaintiff's employees; and the deposit slips in the Defendant's supplementary bundle of documents were taken to the Defendant's bank to replace the one completed earlier.

The Defendant proceeded to close its case.

At the close of the hearing I directed the parties to file submissions twenty-one days apart. Pursuant to the said directive, the Plaintiff's



submissions were filed on 22<sup>nd</sup> January, 2013, whilst the Defendant's submissions were filed on 27<sup>th</sup> December, 2012.

The Plaintiff's submissions are a twelve page documents. Pages 1 to 4 comprise a recital of the background to the case and the evidence. I have not summarized this portion of the submissions because I have already given the background to the case and the evidence. The submissions proper begin from page 5. Mr Chitambala argued that by failing to ensure that the Plaintiff's K688,000,000.00 presented to it and acknowledged, the Defendant breached its duty of care to the Plaintiff. It is therefore liable for damages. Counsel argued that a perusal of the evidence on record shows that the Defendant was negligent in failing to prevent the use of its restricted stationary, being the cash deposit stamps. This resulted in the Defendant's

### **J8**

employees conducting fraudulent bank transactions resulting in the loss of the sum of K688,000,000.00 by the Plaintiff. Further that the Defendant acted negligently in failing to ensure that its agents and or employees followed established banking practices when they stamped some of the deposit slips whose amounts in figures and in words did not tally. In articulating the foregoing argument counsel relied on ***Chitty on Contracts, Specific Contracts, volume 2, 28<sup>th</sup> edition*** which he argued explains the duty that a bank such as the Defendant owes to its customers. It was argued that the Defendant's witness did admit that the Defendant's employees, Lazarous Kabanda and Brain Sambwa conducted fraudulent activities. The fraud related to various sums totalling K2,140,722,300.00 deposited by the Plaintiff into its account over the period between 18<sup>th</sup> April, 2006 and 3<sup>rd</sup> April, 2008, which amount was acknowledged as received by the Defendant. This, it was argued, is evidenced by documents at page 213 to 216 of the Plaintiffs bundle of documents.

Counsel went on to out the duty that a customer owes a bank in respect of drawing cheques. It was argued that a customer has the duty to exercise due care so as not to facilitate fraud or forgery and to notify the bank immediately of any unauthorised cheques. He referred to the

case of ***Tax Hing Cotton Mill Limited vs Liu Chong Hing Bank Limited and Others (1)*** and ***Halsbury's Laws of England, 4<sup>th</sup> edition, Volume 3 (1)***. It was argued that despite DW's evidence that the fraud could not have been perpetrated without the Plaintiff's employees involvement, the record revealed that there is no evidence to identify the Plaintiff's employees alleged to have actively participated in the fraud.

Counsel argued further that where a bank stamps a deposit a deposit slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoil. He referred to ***Halsbury's Laws of England 4th edition, volume 3(1)*** in making the said argument. It was argued that the evidence shows that the Defendant between 18<sup>th</sup> April, 2006 and 3<sup>rd</sup> April, 2008 did record and acknowledge receipt of deposits into the Plaintiff's account. The said deposits were suppressed, counsel argued, by the Defendant's employees, Brain Sambwa and Lazarous Kabanda, from

#### J9

K2,140,722,300.00 to K1,452,722,300.00. This, he argued resulted in the Plaintiff suffering a loss of K688,800,000.00. It was argued that the authorities of ***Halsbury's Laws of England*** and ***Emily Llyod vs Grace Smith Company (2)*** indicted that a bank is liable for the wrongs committed by its agents or employees. He argued further that according to the case of ***Tai Hing Cotton Mill Limited vs Liu Chong Hing Bank Limited and Other (1)*** there is no obligation placed on the customer to examine his bank statement. Therefore, the argument by DW that the fraud would have been detected through regular perusal of the bank statement has no basis. Counsel argued that in order for a bank to impose an obligation upon the customer to examine his bank statements, the burden of objection and sanction must be brought home to the customer. He referred to ***Halsbury's Laws of England*** in articulating the foregoing argument. It was argued further that a perusal of the bank statements that the Defendant sent to the Plaintiff that are at page 82 to 196 indicate that there was no obligation placed upon the Plaintiff to verify the statements. Counsel argued that the Defendant could not rely on the case of ***Indo Zambia Bank Limited vs Lusaka Chemist Limited (3)*** in which the court held that if the customer was prudent

enough to check its statements the fraud would have been detected, because in that case as opposed to this case, the court found that the customer did not manage its cheques in such a manner as to prevent the fraud. Further that, in that case, the court found that the customer's employees perpetrated the fraud, unlike in this case where it was the Defendant's employees. Counsel also referred to the case of **London Chartered Bank of Australia vs McMillan (4)** without elaborating.

Counsel ended his submissions by arguing that the Defendant is liable for the damages suffered by the Plaintiff and referred to section 10 (1) of the **Law Reforms (Miscellaneous Provisions) Act** and **Odgers on Civil Court Actions**.

In the Defendant's submissions, counsel for the Defendant Mrs. A.S. Ahluwalia began by restating the evidence of the witnesses. She went on to submit that the evidence shows that the fraud that the Plaintiff has alleged would not have taken place if the Plaintiff's employees were not directly involved. It

#### **J10**

was argued that the Plaintiff's employees deliberately circumvented the procedure put in place by the Defendant to avoid such kind of fraud. This, it was argued, was by virtue of the fact that the Plaintiff's employees did not scroll the deposit slips with the receipt scroll clerk but instead went straight to the cashiers to make their deposits. The said employees, it was argued further, would then fill out fresh deposit slips which did not have counterfoils for lesser amounts and hand them to the cashiers to replace them with the earlier ones.

Counsel argued further that the relationship of banker and customer is contractual and not fiduciary as such, obligations are owed on both sides of the contractual arrangement. In articulating the said argument counsel referred to **Bullen and Leake and Jacobs, Precedents of Pleadings**.

Counsel went on to argue that because of the active participation of the Plaintiff's employees in the fraud, the Defendant is entitled to set up the defence of contributory negligence. Further that the evidence indicating that the Plaintiff's own negligence contributed to the damage to the

degree of fault on either side. Counsel referred to ***Clerk and Lindsell on Torts*** in articulating the foregoing arguments. It was also argued that the bulk of the negligence must fall on the Plaintiff which should have been prudent in checking and reconciling its account. Reference was made to the case of ***Lusaka Chemist (3)***. She therefore prayed for a fair appointment of each party's liability.

I have considered the evidence and submissions by counsel for the parties. Before I determine this matter it is important that I reinact the events that led to the fraud on the Plaintiff's account. The evidence tendered in this case indicates that on divers dates but between 18<sup>th</sup> April, 2006 and 3<sup>rd</sup> April, 2008 PW sent the Plaintiff's Kabwe branch. The Defendant had put in place a system whereby all customers depositing cash were supposed to report to the scrolls clerk first for purposes of depositing the cash. In this case, the Plaintiff's employees did not first stop at the scrolls cashier's desk for the initial deposits relating to some of the deposit slips in the Plaintiff's bundle of documents but they went straight to the cashiers who stamped

### **J11**

the deposit slips and retained the bank copy and the cash and gave the Plaintiff's employees a copy of the deposit slips. These deposit slips were later handed over to PW and are the ones at page 1 to 80 of the Plaintiff's employees would return to the Defendant's branch with fresh deposit slips duly completed by them and bearing amounts less than the amounts indicated on the deposit slips initially left with the cashiers. It would appear that this time the Plaintiff's employees would first present themselves to the scrolls cashiers who stamped these fresh deposit slips, following which the Plaintiff's employees would approach the Defendant's cashiers and give them the fresh deposit slips and retrieve the earlier deposit slips. At this stage the cashiers would then process the deposits in the lesser amounts reflected on the fresh deposit slips. These fresh deposit slips are the ones at page 1 to 70 of the Defendant's supplementary bundle of documents and the amounts reflected on them are the amounts that appear in the Plaintiff's bank statement.

The foregoing narration of events is discerned from the evidence of DW, which was by and large not shaken in cross examination.

The crucial portion of PW's evidence as it relates to the deposit slips is that he checked the deposit slips before the Plaintiff's employees left for the Defendant's bank and immediately upon their return from the Defendant's bank. In doing so he testified under cross examination and re-examination that the preparation of the deposit slips was assigned to the directors or other two employees of the Plaintiff. Further that, he personally verified the deposit slips before and after the deposits were made. He also stated that on each material date the amounts in words and in figure tallied before and after the deposits were made. Further that, the amounts in figures and words on some of the deposit slips do not now tally because they were tampered with at a much later date and that the amounts that were deposited were those appearing in words on the particular deposit slips. The allegation that he was making by this testimony is that the Defendant's cashiers tampered with the deposit slips and that the Defendant was negligent because it did not deposit all the moneys it acknowledged

## **J12**

receiving from the Plaintiff.

Arising from the foregoing the issue I have to determine is whether or not the Plaintiff has proved that the Defendant's employees tampered with the initial deposit slips presented to the Defendant, Copies of which are in the Plaintiff's custody. These deposit slips are some of the ones that appear at pages 1 to 80 of the Plaintiff's bundle of documents and a perusal of the said slips indicates that there is a difference in amounts in figures and words in some of them. It is also clear that the difference in the amounts in figures have been altered. It is the Plaintiff's contention that the suppression of the deposits was a result of the tampering with the said deposit slips by the Defendant's employees.

The determination of this issue lies in the interpretation that has to be given to the evidence of PW. This evidence as I have explained in the

preceding paragraphs reveals that PW checked the deposit slips before and after they were presented to the Defendant and the amounts in words and figures tallied. Further that the amounts in figures were altered at a later stage. From this evidence one can discern that before and after the deposit slips were presented to the Defendant, they were checked by PW and as such at the crucial point when they were delivered, from the Defendant bank to him by his employees, they were in order. Since they were placed in this custody in such good order one can safely conclude that the alteration of the said deposit slips happened when they were in his custody. I have arrived at this conclusion because PW has produced the altered deposit slips in the Plaintiff's bundle of documents and has not produced the deposit slips that he claims he checked and were in order when the Plaintiff's employees returned from the Defendant bank. He has also not led evidence to show at what point the deposit slips were altered. All he has said is that he noticed slips. This testimony clearly contradicts his earlier statement that when the deposit slips were handed to him upon the employees' return from Defendant bank, they were in order.

I therefore find that the Plaintiff has not proved to my satisfaction that the Defendant's employees were the ones who tampered with the deposit slips in

### **J13**

the batch at pages 1 to 80 of the Plaintiff bundle of documents. The argument by counsel for the Plaintiff that the Defendant was negligent in stamping deposit slips which has different amounts in words and number is also untenable. This is because it is clear from the evidence of PW and my findings that at the point the initial deposit slips were present to the Defendant bank and returned to him after the deposits, they were in good order and not altered. I also reject the argument that the Defendant was negligent because it failed to prevent the use of restricted stationary, being the deposit slips. As DW testified, to the extent that the bank customer is at liberty to take away bank deposit slips and fill them in at his premises, they are not restricted stationary. In any event I have found in the earlier part of this judgement that the alteration of the deposit slips in issue was not done by the Defendant's employees. To this extent,

although I endorse, the principle in the authority cited by counsel for the Plaintiff in support of his argument of **Chitty On Contracts, Specific Contracts**, I find that it does not aid the Plaintiff's case. The said authority is at paragraph 34-265 and it seems and it states as follows:

***“ In its ordinary dealings, the bank need not be unduly suspicious and cannot, for instance, be expected to initiate enquiries about the motive behind a payment instruction given to it by the customer's duly authorised agent unless there are some very clear indications that ought to alert the bank about the agent's fraudulent design. Usually, all that is to be expected of a bank is the exercise of reasonable care in the discharge of its duties to customers. In determining whether a bank has acted negligently, regard must be had to all relevant circumstances as well as to standard banking practice.”***

Clearly the foregoing passage has no relevance to this case and does not aid the Plaintiff.

I have also considered the authorities that counsel for the Plaintiff has cited of **Tia Hing Cotton Mill Limited vs Lin Chong Hing Bank Limited and others (1)** and **Halsbury's laws of England**. The holding in the said case

J14

is as follows at page 80-

***“.....as established by authority, the only duties in connection with the operations of a current bank account that a customer owed to his bank, in the absence of express agreement, were a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery, and a duty to notify the bank immediately of any unauthorised cheques of which he became aware; that no wider duty requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payments, or to take such steps as a reasonable***

**customer would to check the periodic bank statements in order to be notify the bank of any items which were not, or might not have been authorised, could be implied into banking contracts as a necessary incident of the relationship of banker and customer.”**

On the other hand **Halsbury’s** states as follows at paragraph 161.

**“ In operating his current account the customer owes his bank two duties (i) to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery (ii) to inform a bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer becomes aware.”**

In my considered view, these two authorities are good authorities in so far as they explained the customer’s duty in operating a current account. However, they are not relevant to this case because the duties they set out relate to the duty of care placed on a customer in drawing cheques and the customer’s duty where its cheque is forged. They do not apply in cash transactions as was the case in this matter. This is evident from the facts of the **Tai Hing Cotton Mill Limited (1)** case which are as follows. A company with current accounts at three banks authorised the banks to pay cheques drawn on behalf of the company signed by the managing director or nominated signatories. The express terms of the company’s contracts with the banks included a requirement that the company should notify the banks

#### **J15**

within a specified time of any errors in its monthly bank statements, which would otherwise be deemed to be correct. Between November 1974 and May 1978 an accounts clerk forged the managing director’s signature on about 300 cheques purporting to be drawn by the company totalling approximately HK\$5.5 million. The banks honoured the cheques on presentation and debited them against the company’s accounts. The company’s system of internal financial control was not adequate to prevent or detect forgery and so the forgeries were not discovered until May 1978, when the company then issued a writ in the High Court of



Hong Kong against, inter-alia, the three defendant banks claiming declarations that they were not entitled to debit the company's accounts with the amounts of the forged cheques, and payment of such sums.

These facts clearly show that the principle in the said case relates to a customer's duty of care in drawing cheques and not cash transactions. To this extent it is distinguished from this case.

I have also considered the other passage of **Halsbury's** cited by counsel for the Plaintiff at paragraph 204 which states as follows.

***“Where a bank stamps a paying in slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoil.”***

In referring to the foregoing passage counsel for the Plaintiff argued that the evidence shows that the Defendant received and acknowledged receipt of the sum of K2,140,722,300.00 as being deposited into the Plaintiff's account. The onus therefore on the Defendant to prove otherwise.

The circumstances of this case are such that, although the authority is relevant, it does not assist the Plaintiff's case in view of my findings in view of my findings in respect of the alternations done to the initial deposit slips.

The matter however does not end here because I have already demonstrated

#### **J16**

in the narrative. I have given in the earlier part of this judgement how the fraudulent transactions were done on the Plaintiff's accounts. The narrative shows that initially the cash and deposit slips were presented to the Defendant's cashiers directly without being scrolled. The original deposit slips and the cash were then kept by the cashier until the Plaintiff's employees brought fresh deposit slips with lesser amounts indicated on them which were first presented to the scrolls clerk and then given to the cashiers who processed them. These are the deposit slips

that appear at pages 1 to 70 of the Defendant's supplementary bundle of documents. It was contended by the Defendant that by virtue of the said deposit slip it deposited all the moneys that the Plaintiff's employees presented. In doing so it denied that the Plaintiff deposited the sum of K2,140,722,300.00 and averred that the Plaintiff only deposited the sum of K1,452,722,300.00 as reflected by the deposit slips in its supplementary bundle of documents. However, DW testified that the fraud on the Plaintiff's account was discovered after he and another employee carried out investigations on the Plaintiff's account. He also explained how the Plaintiff's employees presented cash and deposit slips directly to the Defendant's cashier's who accepted them. Further that the said cashier's held onto the deposit slips and the cash until the Plaintiff's employees brought the fresh deposit slips. These events, in my considered view, are what led to the fraud on the Plaintiff's account and to the extent that the Defendant's employees participated in the perpetration of the fraud, the Defendant was negligent and breached the duty of care that it owed to the Plaintiff and it is liable. My findings that the Defendant is liable for the acts of its employees stems from the principle of vicarious liability which ***Clerk and Lindsell on Tort*** at pages 369 to 370 describes as follows:

***“where the relationship of employer and employee exists, the employer is liable for the torts of the employee so long as they are committed in the course of the employee's employment.”***

To this extent I do not accept the evidence of DW to the extent that the Defendant did not have an obligation to ensure that its cashier did not hold on the cash and deposit slips. The cashiers committed these negligent acts whilst performing their duties in the course of their employment, as

**J17**

such the Defendant is liable.

I also do not accept the argument by counsel for the Defendant that had the Plaintiff been vigilant and checked its bank statements, the fraud would have been discovered earlier. In advancing the said argument

counsel was suggesting that there was an obligation on the part of the Plaintiff to check its bank statements. She relied on the case of **Indo Zambia Bank Limited vs Lusaka Chemists Limited (3)**. The holdings by the Supreme Court in the said case as follows at page 32.

**“ (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 bankers mind and caused them to make inquiry.**

**(3) Merely by honouring on undetectably forged cheque, a bank did not represent that the cheque was genuine and in the absence of negligence, no estoppels by representation could arise on the bank clearing such as cheque.**

It is clear from the foregoing holdings that the Supreme Court did not find that there was an obligation on the part of the customer, being the Respondent to check its bank statements for purposes of preventing the occurrence of fraudulent activities. As such the argument by counsel for the Defendant to this effect is not acceptable. The only reference made to bank statements is at Page 40 of the judgment where the Supreme Court had this to say:

**“It is on record that the respondent had employed an Accountant Consultant, Mr. Joseph Moonjelly, whose functions included verification of all sales, records, depositing of cash cheques at**

**J18**

**the bank and obtaining bank statement. Mr. Ndhlovu also referred us to the evidence of PW2 on page 364 of the record of appeal to the effect that irregular payments could**

**be uncovered by looking at the details on the counterfoils. We therefore agree with Mr. Ndhlovu that had the respondent been prudent in checking and reconciling their account, the fraud in this case could have been discovered much earlier.**

In my considered view, that Supreme Court was not by any stretch of imagination stating that a customer of a bank is obliged to check his bank statements and reconcile his account frequently for purpose of preventing a fraud. It was merely making an observation that if that the Respondent's accountant had been vigilant the fraud would have been uncovered earlier. To this extent the authority does not aid the Defendant.

Further, the undisputed facts as revealed by the evidence of DW also indicate that the Plaintiff's employees were complicit in the fraud. The evidence in this regard relates to the revelation that despite there being a notice in the Defendant's banking hall directing customers to scroll the cash deposits, the Plaintiff's employees presented the moneys and deposit slips directly to the cashiers. They therefore, ignored the procedures put in place by the Defendant, as DW testified, to prevent such frauds from occurring. There was also evidence led to the effect that the Plaintiff's employees filled in fresh deposit slips to mirror the earlier ones, which fresh deposits are the one that appear at pages 1 to 70 of the Defendant's supplementary bundle of documents. To the extent that the Plaintiff did not properly control its employees to ensure that they did not engage in the said activities, it was also negligent. The Plaintiff, as counsel for the Defendant argued, is culpable for contributory negligence. I make this findings notwithstanding that the Defendant did not specially plead contributory negligence, because evidence was led by the Defendant and not objected to by the Plaintiff showing the said negligence. I am obliged to consider this evidence despite the fact that it was not pleaded in accordance with the decision in the case **Mazoka and Others and Mwanawasa and Others (5)** which held as follows at pages 140 to 141.

**J19**

***"Where any matter not pleaded is let in evidence, and not objected to by the other side, the Court is not and should***

***not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of unpleaded issues.”***

Having found that there was negligence on the part of the Defendant, the Plaintiff, as counsel for the Plaintiff argued is entitled to damages. However, the said damages will be apportioned in accordance with the degree of negligence by the Plaintiff’s employees as counsel for the Defendant argued. In arriving at the foregoing finding I have considered the passage in ***Clerk and Lindsell on Tort*** referred to me by counsel for the Defendant which states as follows at page 171.

***“ Thus evidence that claimant’s own negligence contributed to t the damage in question will result in an apportionment of damages according to the degree of the fault on their said.”***

Applying the following principle to this case, the degree of negligence by both parties’ employee’s has been highlighted in the narrative I have given in the earlier part of this judgement as to how the fraud unfolded. From the said narrative it is safe to concluded that the two sets of employees played equal roles in the fraud. It is therefore fair and just to apportion damages due to the Plaintiff on a fifty percent basis.

Therefore since the claim for funds lost in the fraud amounts to K688,000,000.00, I find that the Plaintiff is only entitled to half of that amount being K34,000,000.00. I therefore enter judgment in favour of the Plaintiff against the Defendant in the said sum of K344,000,000.00. These are the only damages the Plaintiff is entitled to because in matters such as this one where the loss is in monetary terms, the award of damages must be monetary to the extent of the loss. This is course is subject to my finding on contributory negligence. I am compelled to make this clarification because, in my considered view, the claims as endorsed under claim (i) and (iii) on the writ of summons are repetitive.

**J20**

As regards interest, the Plaintiff has claimed interest but has not stated the rate claimed or how much interest it would have earned on the lost

funds. The discretion is therefore mine to determine the said interest and I Put it at the short term bank deposit rate from date of writ to date of judgement, therefore at the current bank lending rate as determined by Bank of Zambia till date of payment.

As regards costs, in view of my findings that both parties are equally to blame for the fraud. I find that this is a proper case to order that each party will bear their respective costs, and I so order.

**DELIVERED THIS 25TH DAY OF FEBRUARY, 2013.**

.....  
**NIGEL K. MUTUNA**  
**HIGH COURT JUDGE**

