IN THE HIGH FOR ZAMBIA **2012/HP/267**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

AVIL-KRAM INDUSTRIAL SUPPLIES LIMITED **PLAINTIFF**

AND

STANBIC BANK ZAMBIA LIMITED **DEFENDANT**

BEFORE HONOURABLE MR. JUSTICE MUBANGA. M. KONDOLO SC

For the Plaintiff : Mr. H. Ndlovu SC & Mr. T. Chali of H. H. Ndlovu & Company
For the Defendant : Ms. Joy- Rachael Mutemi of Mesdames Theotis Mataka & Sampa & Company

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J U D G M E N T

CASES REFERRED TO:

1. **Shreeji Investments Limited v Zambia National Commercial Bank PLC SCZ Judgment No. 3/2013**
2. **Indo Zambia Bank v Lusaka Chemist (2003) ZR 32**
3. **Grindlays Bank International (Z) Limited v Nahar Investment (1990-1992) ZR 86**
4. **Attorney General v D.G. Mpundu (1984) ZR 6.**
5. **Bank of Zambia v The Attorney General (1974) Z.R. 24**
6. **Barclays Bank v Sky FM and Another (2006) Z.R. 51**
7. **Fluid Base v Barclays Bank SCZ Appeal 13/2013**

8. **Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa Selected Judgment No. 16 of 2017**

LEGISLATION REFERRED TO:

1. **The Bill of Exchange Act, 1882**
2. **The English Law (Extent of Application) Act, Chapter 11, Laws of Zambia**
3. **The Stamp Act, 1853**

TEXT REFERRED TO:

1. **Halsbury's Laws of England. 4th Edition (reissue) Volume 3(1) Butterworths: London (1989)**
2. **Pagets Law of Banking 6th edition, by Maurice H. Megrah: London (1961)**

The delay in delivering this Judgment is deeply regretted

The Plaintiff on 13th March, 2012 filed a Writ of Summons and Statement of Claim alleging that the Defendant ("the **Bank**"), between 27th July, 2011 and 3rd October 2011 made unauthorised payments to Caroline Mwela in the sum of K280,000 (rebased). It was further alleged that the Defendant failed to exercise due care and skill by negligently disbursing the said sums on the strength of forged letters. The Plaintiff accused the Defendant of failing to obtain confirmation or clearance from the Plaintiff in view of the fact that the withdrawals were made by using letters instead cheques provided by the Defendant bank. That as a result, the Plaintiff suffered a loss of

K280,000 and seeks repayment of the said amount together with damages for inconvenience and loss of business as well as interest and costs.

The Defendant Bank filed its Defence on 1st August, 2012 averring that Caroline Mwela, who was paid on the strength of the subject letters, was an employee of the Plaintiff Company and duly authorized to make withdrawals and transact on the Plaintiff's account. The Defendant further averred that the amount withdrawn was K165,850.

The Defendant alleged that the Plaintiff expressly waived any rights that it may have against it from losses or damages which it may suffer as a result of the Defendant allowing the agent to transact on the Plaintiff's behalf. According to the Defendant, the Plaintiff undertook to indemnify the Defendant in respect of any claims that may arise as a result of the Defendant acting on the instructions of the Plaintiff. The Plaintiff duly appointed Caroline Mwela as its agent and as such the Defendant was under no obligation to verify and/or confirm the Plaintiff's valid instructions in relation to the withdrawal made.

Trial commenced on 5th November, 2013 with the Plaintiff calling 3 witnesses, PW1 to PW3 and the Defendant only called 1 witness.

PW1 was Giobatta Liva, Executive Director of Avil -Kram Industrial Supplies Limited, the Plaintiff. He testified that there were two other Directors, Jennifer Margaret Liva and Stunt Mark O'Danial. It was his evidence that the Plaintiff had one bank account at Stanbic Cairo Road which account was opened in August-September, 1995. It was a current/checking account no. 0140030841200. He stated that the signatories to the account were the 3 Directors and any payment instruction required 2 signatories.

PW1 testified that international payments were paid to suppliers by completing the appropriate transfer forms which were signed by 2 signatories. Local bills on the other hand, were all paid by cheque and cheque payments over K5, 000 required telephone confirmation by the Bank.

It was his evidence that most of the Plaintiff's business was with the Mines so most payments into the account were electronic. Payments out of the account for salaries and petty cash, Zambia

Revenue Authority ("**ZRA**") and other local payments were done by his assistant, Caroline Mwela. She used to withdraw money by open cheques cut in her name but she was not a signatory to the account.

The Plaintiff stated that the bank-issued cheque books were signed and paid for and that cheque activity would reflect on the bank statements. He referred to the instruction documents (the alleged forged letters) in the Plaintiff's Bundle of Documents[1] of which the payee was Caroline Mwela. He noted that the letters were signed with the full names John Liva and Jennifer Liva as opposed to initials and surname J. Liva and J. M. Liva as they would normally sign. He added that they would only use the proper instrument, which was a cheque and never write instructions on a letter to pay cash to somebody over the counter.

PW1's evidence was that the letters were not genuine and involved huge sums which were much larger than their normal payments. Despite that, the Bank did not make a single request to confirm any of these payment instructions. He denied making any arrangement with the Bank to pay in this manner and for such

[1] Plaintiff's Bundle of Documents, page 3-10

amounts. PW1 became aware of these payments on 4th October, 2011 when he went to the Bank to withdraw money and asked the cashier to give him the balance.

Shocked by the balance, PW1 queried the cashier who pulled out the last of the letters received by the Bank and asked if it was his and he denied. He said the letters were over the period of July to October, 2011 and during that period the Bank made no query at all. The following day, PW1 took Caroline to the Bank and told them that the letters were forgeries. He wrote to the Bank asking for an explanation and he was given a verbal response denying any responsibility.

PW1 was referred to an earlier incident involving a cheque in the sum of K23,500[2] dated 5th April, 2011. Caroline admitted forging the cheque with herself as payee and it was paid by the Bank. The Plaintiff forgave her because she had been with the company for over 10 years and they believed she deserved another chance.

Coming back to the forged letters, he stated that the sums indicated on them were withdrawn and reflected on the bank

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[2] Plaintiff's Bundle of Documents, page 2

statements. He said the illegal withdrawals had a disastrous effect as the account was cleaned out and the Company has not recovered since. He said the incident had made him uncertain about the banking procedures in that money held in trust by the Bank, could be withdrawn so easily by unauthorised people.

He said the matter was reported to the Police that same day, 5th October, 2011 and the Bank's CCTV records showed Caroline withdrawing money using the same letters. That the Bank still hadn't explained why she was allowed to withdraw by letter. By way of proving that such payments were only made by cheque, he referred to page 1 of the Plaintiff's Supplementary Bundle of documents which showed a cheque in sum of K17,000 granted to Caroline as a loan by the Plaintiff Company. He observed that the Bank even endorsed the cheque with the words "confirmed by Mr. Liva".

He admitted that Caroline Mwela was their agent but the Bank would phone PW1 to confirm any cheque she presented to them. He was thus seeking that the Court orders a refund of the unauthorised

payments and that he be compensated for loss of business on account of the fraud.

Under cross examination, PW1 was shown a letter[3] from the Plaintiff's authorized signatories to the Defendant Bank introducing Caroline Mwela as the Plaintiff's agent and authorising her to, *inter alia,* withdraw money from the Plaintiff's account.

PW1 was then referred to the Indemnity Form[4] and asked if the Plaintiff had specified, to the Bank, the procedure the agent would use when making withdrawals. He responded by saying that it was the Bank that had specified the procedure which was that withdrawals would be by the use of cheque books. He then confirmed that the signature on the Indemnity Form was his.

PW1 agreed that the Plaintiff had signed a document[5] authorising the Defendant to honour cheques signed by two signatories but it did not include the agent who was not a signatory. It was pointed out to him that the alleged forged letters used by

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[3] Defendant's Bundle of Documents, page 10
[4] Defendant's Bundle of Documents, page 12
[5] Defendant's Bundle of Documents, page 1

Caroline were on the Plaintiff's headed paper and he said that she had access to the stamps and letter heads of the Company.

PW1 stated that he signed the letter, to the Bank, dated 5th October, 2011[6] and admitted that the signature on that letter looked similar to that on the alleged forged letters but he denied having signed them. PW1 agreed that it was possible for a lay person to mistake the forged signature but he maintained that the amounts on the forged letters were above what the Plaintiff normally paid out. He reiterated that the Plaintiff had retained Caroline in employment after the incident involving the forged cheque in the sum of K23,500[7] but that she now had no access to the cheque book. He said when that incident occurred he had informed the Defendant within a week of discovering that a cheque was missing from the cheque book. He went on to aver that the forgeries were not reported by their accountants, Moores Rowland. PW1 ended his testimony by stating that he was also claiming the amount of the cheque bringing his total claim to K280, 000 as per Statement of Claim.

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[6] Defendant's Bundle of Documents, page 19
[7] Plaintiff's Bundle of Documents, page 2

In re-examination, PW1 stated that he did not mandate the Bank to pay out on letters nor to pay any amount even if it was not authorised by the Company. According to him, the forged cheque amount was to be deducted from Caroline's long service bonus.

Jennifer Margret Liva was PW2, a Director at the Plaintiff Company and PW1's wife. She was a signatory to the Plaintiff's checking account at Stanbic Bank, main Branch. When shown the alleged forged letters she denied having signed them or authorising the payments and she was seeing them for the first time[8]. She further denied giving the Bank the mandate to honour letters and that she had only ever signed cheques for cashing over the counter.

During cross-examination, PW2 stated that the Plaintiff still maintained an account with the Defendant. She was not aware that the Plaintiff, at any time, was running out of cheque books and was unable to confirm how many times the Plaintiff Company withdraw money from the Defendant Bank.

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[8] Plaintiff's Bundle of Documents, page 3-10

When referred to paragraph 3 of the Account Opening Form[9] she agreed that a cheque signed by 2 authorised signatories should be accepted and that the authorisation covered bills of exchange and Promissory notes but said she did not know what a bill of exchange was. With the aid of Counsel's explanation as to what a bill of exchange was, PW2 agreed that the letters in the Defendant's Bundle of Documents constituted bills of exchange.

When pressed, PW2 stated that Caroline used to withdraw money from the Bank on instructions from PW1 and she was not aware of any limit on the sums Caroline could withdraw. She further stated that Caroline no longer worked for the Plaintiff and had disappeared shortly after this case.

PW2 agreed that the account opening form instructed the Bank to act on any instructions whatsoever signed by two signatories and that the Indemnity Form authorized Caroline to withdraw cash at the Bank. She however stated that the Bank should have been placed on alert because Caroline had never presented a letter of that kind to the Bank as she had always used cheques. She insisted that the

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[9] Defendant's Bundle of Documents, page 1

Defendant should have been alerted despite the letters constituting bills of exchange and the provision that it should act on any instruction whatsoever if it was signed by two signatories.

PW2 insisted that even though the Indemnity Form provided that the Plaintiff was responsible for the actions of Caroline, in this instance the Defendant was responsible because prior to the incident, the Bank always verified by telephone directly to Mr. Liva on huge sums of money. This was the largest sum that had ever been drawn by Caroline and it was the first time a payment was requested by a letter and not a cheque. According to her, the sum was larger than they would have written on a cheque. When asked why the Bank would query small cheques and not that letter, PW2 responded by saying that Mr. Liva (PW1) told her that the Bank used to phone him to query.

On the issue of the forged cheque of K23,500 most of her testimony was the same as that of PW1. She added that she had no idea how Caroline got hold of the cheque leaf she had pre-signed. She agreed that the matter was not reported to the police and neither did they tell the Bank to stop dealing with Caroline. She accepted that

retaining her in employment perhaps contributed to the incident involving the alleged forged letters.

PW2 admitted that her signature was not consistent when various documents she had signed were compared and she explained that was why the police handwriting expert took several sample signatures from her. She denied that she had signed any of the alleged forged letters. PW2 went on to state that the two specimens in the Forensic Report[10] were not similar to those on the Indemnity Form and Introduction of the Agent letter but that all 4 signatures were hers.

It was pointed out to PW2 and she agreed that the footnote on the bank statements says that discrepancies must be reported failing of which the statements will be considered correct. She admitted that had PW1 been reading the bank statements he would have noticed and reported the discrepancies in April, within 30 days, right after the first theft and the amount being claimed would not have escalated.

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[10] Photographic Album

PW2 in re-examination mostly reiterated her evidence in chief and emphasized that in as much as the agent was authorised to transact, it did not mean that cash could be withdrawn by letters.

PW3 was Superintendent David Zulu of Zambia Police Headquarters Forensic Services Department. He stated that on 28th November, 2011 PW1 handed him some documents, namely; a Stanbic cheque No. 001955 bearing 2 sets of signatures in dispute and; 7 separate letters of transfer addressed to the Manager at Stanbic Bank, on Avil-Kram letter heads. The letters were in dispute and each bore 2 disputed signatures purporting to be for Mr. John Liva and Mrs. Jennifer Liva's signatures. He stated that they were accompanied by random specimen signatures of Mr. John Liva and Mrs. Jennifer Liva.

The purpose of submitting the documents to the Forensic Lab was to ascertain whether or not the signatories to the account appended their signatures to the documents in dispute. After examining all 8 documents in dispute, he concluded that Mr. John Liva did not append his signature on any of the letters nor the cheque while Mrs.

Jennifer Liva appended her signature on the cheque but not on the letters. His findings are contained in the Forensic Report[11].

In cross-examination PW3 informed the Court that there were various methods for verification of signatures and the methods he used were very accurate. Contrary to popular belief, signatures are the same but only have variations. He agreed that all signatures depend on external factors such as the emotional situation or writing surface and that he had taken those factors into account but saw no need to include them in his Report.

PW3's findings were elaborate and addressed the purpose of his assignment which was to ascertain whether or not the signatures belonged to the signatories. He testified that the major differences in Mr. Liva's signature were in alignment. He however stated that he was unable to compare the photocopies of the Letters in the Defendant's Bundle of Documents because he needed the originals.

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[11] Photographic Album

In conclusion, PW3 stated that a signature can appear the same or different to the naked eye but under a microscope, one can see the constriction order, the pen direction, the pen stroke and the pen pressure.

The Plaintiff closed its case and the Defence called Martin Kabanda as DW1. He was employed as the Defendant Bank's Head of Service Support. His job entailed supporting the Bank Manager, providing effective Customer Service by managing routine Compliance, Physical Security of the Bank and Bank Assets, Query and Problem Resolution.

When this incident occurred, he was working at Lusaka Main Branch where the Plaintiff held an account. He explained the procedure from the account opening forms, Certificate of incorporation and the other incorporation documents. It was his testimony that the significance of the account opening forms was to provide the names of the signatories and to indicate how the account would be operated. In this case the signatories were Giobatta Liva, Jennifer Liva and Stuart Mark O'Donnell. The signatures on the

alleged forged cheque as well as the letters[12] instructing payment belonged to the signatories Jennifer Liva and John Liva.

DW1 explained that depending on the situation, instructions from clients to the Bank could either be written or given by issuing a cheque. He stated that instructions by written letter was ordinary Bank practice and the letter would be accepted provided it was signed and this case the Plaintiff used both methods.

DW1 further stated that only the signatories to the account or an agent, duly appointed by completing a standard form for the purpose, were authorized to transact on an account. He added that the form should be accompanied with a copy of the Agent's National Registration Card (NRC), a passport size photo and the Agent's signature. Subsequently, the customer is then required to sign an Indemnity Form. The Plaintiff company, in this case, appointed Caroline Mwela as its Agent and the necessary forms were completed.

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[12] Plaintiff's Bundle of Documents, pages 3-6

He stated that where written instructions were used, an Agent would hand over the written instructions to the officer at the enquiries desk who is required to identify the person as the authorized Agent. Once that is done, the documents are put onto the shared computer system and relevant departments are able to view them while the physical documents are filed in a secure place. The instructions are then referred to the relevant department. Where a cheque is used, the Agent goes straight to the counter and the identification is done by an officer looking at the system.

Where a letter is used, after the identification process is completed, the letter receives an acknowledgement stamp and another one showing who has delivered it. The system will then show the identifying officer, the name of the Company, the name of the Agent and the NRC number of the Agent. Where the identifying officer is unsure, a comparison would be made with the physical copies. In this this case the relevant department was the cash department where an officer would verify the customer's signatures and depending on the limit, would authorize the payment or send it to the

next in line. He said that in this particular case the process was complied with.

DW1 testified that the alleged forged cheque was presented to the cashier and endorsed with the word Agent to signify that the Agent was identified and so were the signatories' signatures. The dealing officer confirmed by signature that it was within the officer's authorised limit.

In relation to the written instruction dated 27th July, 2011[13] DW1 explained that it was stamped by the cashier service consultant, it also bore a stamp identifying the agent and the limit signature was appended. In this instance the signatures on the letter were physically compared with the specimens on the signature cards of the signatories. He added that this particular Agent did not have a limit on the number of withdrawals she could make.

DW1 testified that the Defendant was not required to obtain confirmation from signatories prior to withdrawal by an Agent

[13] Plaintiff's Bundle of Documents, page 3

because Agents were duly authorized to conduct any transactions on the customer's account. He stated that in this particular case, the Defendant was not negligent because it carried out the instruction as mandated by the Plaintiff. Lastly, he stated that the instructions card brought to the Bank fell under the authority provided in account opening form.

Under cross examination, DW1 stated that the Plaintiff opened a Current Account for the Company and was entitled to a cheque book. He confirmed that Current Accounts are also referred to as Checking Accounts. When asked what happens when one forgets their cheques, he said money could be withdrawn by putting in a written request and which request cannot be made by an agent.

DW1 stated that he was not aware as to whether or not the Plaintiff had, before this case, written any letter to the Bank signed by Mr. Liva. He was asked to look at the letters written by Mr. Liva dated 21st September, 2007 and 7th April, 2009 and compare them to the alleged forged letters[14]. DW1 agreed that the names were typed

[14] Defendant's Bundle of Documents, pages 14-18

differently as the names were typed in full on the alleged forged letters whilst the other two letters bore only initials and the surname.

DW1 was referred to the Agent Authorisation Form[15]. He said it authorized the agent to encash 3rd party cheques from the cheque book issued by the Bank. He admitted that there was no provision that the Agent was authorized to draw money by letter.

Under further cross examination, DW1 denied the assertion that because of the Agent Authorisation Form[16], even if the alleged forged letters had been genuine, the Defendant could not have acted on them. He further stated that the letter [Agent Authorization Form] allowed the Agent to conduct business such as collection of statements, cheque books, Bank enquiries etc. on the Plaintiff's behalf including cash withdrawals, in that, a letter is not a cheque but an instruction to pay that cash. He however stated that where a cheque was written and it had the name of Mr. Liva on it or of any of the signatories, it was deemed a 3rd party cheque which could not be cashed by the Agent. According to him, the import of the letter was

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[15] Defendant's Bundle of Documents, pages 10
[16] Defendant's Bundle of Documents, pages 10

that it was possible to draw cash by a written instruction but not necessarily a cheque.

DW1 further explained that when a cheque was issued to the Agent it became a 3rd party cheque and was described as 'furthermore' because 3rd party cheques are not normally allowed but on the whole, an agent could withdraw from any written instruction.

DW1 was referred to the Indemnity Form and he stated that withdrawing money was not limited to Cheques but also as prescribed in the account opening form.[17] He added that there was no limit on the amount the agent could withdraw and there was no need for confirmation with the signatories.

DW1's attention was drawn to the cheque in the sum of K17, 000 and asked why it was endorsed showing that Mr. Liva had confirmed it. DW1 insisted that there was no need for confirmation but in that instance, the Defendant had just gone an extra mile. When asked why they didn't go an extra mile for, say, the alleged forged letter instructing payment of K61,000,[18] DW1 said there was

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[17] Defendant's Bundle of Documents, pages 1-4
[18] Defendant's Bundle of Documents, page 15

no need to do so because the documents that authorized the Agent were already in place.

DW1 admitted that from the time the account was opened in 1995, the Plaintiff had never made a withdrawal by letter. When asked why the alleged forged letters[19] did not raise any suspicion, DW1 said it was because the instructions were duly signed by the signatories and the Agent and they were brought by the duly authorized Agent.

When pressed further DW1 admitted that the Bank would not act on suspicious things brought by an Agent but was adamant that even though only cheques had been used for the past 16 years on this account, the sudden use of instructions by letter did not raise suspicion. He admitted that the Bank Manager Lusaka- Head Office to whom the letters in question were addressed did not receive them and when asked who made the decision to pay, he said it was the supervisor in the cash department. When asked who was senior between the two, DW1 said it was the Bank Manager.

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[19] Defendant's Bundle of Documents, pages 14-18

DW1 stated that he was not aware whether the Plaintiff had its cheque books when the letters were written or whether the Plaintiff continued using cheques after the said letters. With regard to bank statements, DW1 stated that they were produced on a monthly basis but interim statements could be made at the request of the customer. In this instance, the bank statements in the Plaintiff's Bundle of Documents[20], were not given on the actual month end because Banks are a day behind.

In re-examination, DW1 stated that the letters were authored by the Plaintiff and not by the Agent and that the use of full names or initials were not major discrepancies and not part of the verification process. That the Indemnity Form did not restrict withdrawals to Cheques only. He said only the Agent and signatories were authorized to collect bank statements.

The letters in question were not out of the ordinary because the Bank could accept any instructions signed by the signatories and none of the instructions looked suspicious to the Bank. He clarified that the alleged forged letters were never received by the Bank

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[20] Plaintiff's Bundle of Documents, page 11-29

Manager but by the supervisor who with delegated authority authorized payment. Lastly, DW1 confirmed that the Bank was obligated to give the client bank statements on a monthly basis.

The Parties filed their respective submissions which I have considered.

The gist of the Plaintiff's arguments was that the Parties had agreed that no amount above K5,000 could be withdrawn from the Plaintiff's account, not even by the agent, without the Plaintiff's confirmation. The Plaintiff submitted that it did not, at any time, inform the Defendant that it would start withdrawing cash by writing letters. That the Defendant paid Caroline Mwela on the basis of forged letters despite the Plaintiff being in possession of a cheque book.

The Plaintiff submitted that never had a letter been used to withdraw money for a period of 16 years and given the short intervals between the letters, the Bank ought to have placed itself on inquiry. The case of **Shreeji Investments Limited v Zambia National**

Commercial Bank PLC[21] was cited to show that the Bank was liable on account of money being paid out without the customers authority. It was further argued that there was no evidence that the Plaintiff had run out of cheque leaf's and that no evidence was advanced showing that the Defendant had authority to pay on the basis of letters addressed to the Brach Manager.

The case of **Indo Zambia Bank v Lusaka Chemist**[22] was called to aid wherein it was held that banks were not expected to be experts at detecting forgeries but were expected to exercise a degree of knowledge ordinarily required for the discharge of their duties. The Supreme Court further stated that the need to microscopically examine a cheque will only arise if there are circumstances which ought to put the bank on inquiry with regard to the authenticity of the cheque.

Counsel argued that the Defendant should have been put on inquiry by the mere fact that the Agent produced letters instead of cheques and that there was no evidence that the Branch Manager

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[21] Shreeji Investments Limited v Zambia National Commercial Bank PLC SCZ Judgment No. 3/2013

[22] Indo Zambia Bank v Lusaka Chemist (2003) ZR 32

had received or authorised the payments. Further, that there was no evidence showing that the Plaintiff's signatories' confirmation was sought as to why letters and not cheques were being used. All in all, it was submitted that these acts of negligence on the part of the Bank resulted in loss of the Plaintiff's money.

In response, the Defendant submitted that the issue for determination was negligence and breach of duty of care by allowing Caroline Mwela to make cash withdrawals from the Plaintiff's account on the strength of letters and not a Cheque. Arguments on the tort of negligence were advanced and the Defendant argued that indeed there was a duty of care but that duty was not breached and therefore there was no negligence.

In support of the above proposition, the Defendant cited the learned Authors of **Halsbury's Laws of England** that for a banker to be classified as negligent, the standard required to be met is that of the ordinary skilled man and that an error of judgment will not amount to negligence unless it is one that would not have been made by a reasonably competent professional with the standard and type of skill of the defendant acting with ordinary care.

Also cited was the case of **Indo Zambia Bank Limited v Lusaka Chemist Limited** (supra) in which the Court held, inter alia, that the test for negligence was whether paying on any given cheque was so out of the ordinary course that it ought to have caused doubt and put the bank on inquiry. That merely honoring an undetectably forged cheque did not mean that the Bank represented that the cheque was genuine and in the absence of negligence, no estoppel by representation could arise on account of the bank clearing such a cheque.

It was therefore argued that the payments in this case were made on the strength of letters signed by the account signatories and the Defendant could not, on face value, detect that the signatures on the letters presented were forged. They pointed out that PW3, a handwriting expert testified that he was unable to tell that the signatures were forgeries by merely looking at them and that he needed to conduct a microscopic examination.

With regard to the mode of instruction to pay, the Defendant argued that it had authority to make payments on any instrument that qualified as a bill of exchange and reinforced the argument by

relying on the definition of a bill of exchange provided in the **Bill of Exchange Act 1882** applicable to Zambia by virtue of the **English Law (Extent of Application) Act**, as follows:

> ***"An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer..."***

The above definition coupled with the Bank's authority to act on negotiable instruments signed by any two officials of the Company, the letters qualified as bills of exchange to pay Caroline Mwela. Further, it was submitted that the Indemnity Form and the appointment of agency letter allowed the Agent to transact on the Plaintiff's account. The evidence by the Plaintiff that the Defendant was not allowed to make payments on the strength of a letter was tantamount to using oral evidence to vary the terms of the agreements.

The Defendant argued that the agent was authorised to transact on the account and the authorisation letter was not limited to withdrawing cash and in the event of cash withdrawals did not indicate the form of withdrawal. Counsel argued that as an agent, Caroline Mwela was authorized to transact and the Plaintiff could not distance itself from the fraudulent acts committed by her. The principles of agency were called to aid to buttress the argument that a principal was responsible for the act of an agent within the actual or ostensible authority of the agent, whether contractual or tortuous. The case of **Grindlays Bank International (Z) Limited v Nahar Investment**[23] was cited to further reinforce this principle. The Plaintiff made no query within the 4 months that the transactions were going on despite obtaining bank statements.

In the event that the Court accepted that the Defendant was negligent, it was submitted that the amount claimed as damages ought to be reduced as the Plaintiff contributed to the loss when it retained Caroline Mwela as an agent and employee notwithstanding that she had committed an earlier fraud in a similar fashion. With

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[23] Grindlays Bank International (Z) Limited v Nahar Investment (1990-1992) ZR 86

regard to damages for destruction of business and mental anguish, it was submitted that the particulars of the same were not provided in the Statement of Claim contrary to **Order 18 of the Rules of the Supreme Court 1999 Edition** ("**White Book**"). The Plaintiff did not adduce any evidence to show any destruction of business by producing documents to support their claim as was held in the case of **Attorney General v D.G. Mpundu**[24]. I was urged to dismiss the Plaintiff's claim for not proving its case on a balance of probabilities.

I have considered the evidence and the arguments advanced by Counsel. It is not disputed that the Plaintiff held an account with the Defendant Bank and between 27th July, 2011 and 3rd October, 2011 the Plaintiff's account was debited of a total of K280,100 as verified by the Plaintiff's bank statements. The debits were initiated by letters of instruction authorising counter cash payments to Caroline Mwela, a duly appointed agent of the Plaintiff. The said letters showed that they were countersigned by the 2 signatories to the account i.e. John and Jennifer Liva and addressed to the Manger- Head Office- Stanbic Bank, Lusaka main.

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[24] Attorney General v D.G. Mpundu (1984) ZR 6.

It is also not disputed that these letters underwent the Banks verification process. This is evidenced by the number of stamps on the letters showing amongst other things, an agent verification stamp and in some instances a signature verification stamp.

With regard to establishing whether or not the alleged forged letters were indeed forged, PW3 the forensic handwriting expert confirmed that the signatures of the said letters were not appended by Jennifer Liva and John Liva. I therefore find as a fact that the subject letters were indeed forged.

In my view, the only issue for determination is whether the Defendant Bank paid out money without the Plaintiff's authority.

The relationship between a Banker and a customer as illustrated by the learned authors of the **Halsbury's Laws of England Vol. 3(1)**[25], is one where the bank receives money from or on account of his customer and undertakes to pay the person from whom he receives the money upon payment being demanded or to pay any part of the amount due against the written orders of the customer. This

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[25] Halsbury's Laws of England. 4th Edition (reissue) Volume 3(1) Butterworths: London (1989), paragraph 149.

relationship then constitutes one of principal and agent, a cheque being a principal's order to his agent to pay out the principal's money, the amount on the cheque, to the payee.

The relationship between the Plaintiff and the Defendant Bank is as described above and the Defendant had a duty to pay on demand the amounts ordered to be paid out by the Plaintiff Company on the strength of written instructions. The facts show that the Bank obliged but the Plaintiff has advanced an argument that the payment was unauthorised and the Bank ought to have spotted the anomalies in the instruction to withdraw cash.

According to **Halsbury's Laws of England**[26] (supra) a customer has a duty to refrain from drawing a cheque in a manner that facilitates fraud or forgery and has a further duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. However, no wider duty is placed on a customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented such as checking one's periodic bank statements, as

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[26] Halsbury's Laws of England. 4th Edition (reissue) Volume 3(1) Butterworths: London (1989), paragraph 161

a reasonable customer might take to enable him to notify the bank of any debit items in the account which he has not authorized.

The banker, on the other hand has a duty[27] to pay cheques drawn on him by a customer in legal form provided he has the funds. However:

> **"a banker must not continue to pay cheques without inquiry if a reasonable and honest banker with the knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that moneys were being misappropriated."**

The evidence on Record shows that this was a current account or otherwise known as a checking account which entitled the Plaintiff to a cheque book which was duly issued. The cheques at pages 2 of the Plaintiff's Bundle of Documents and page 1 of the Plaintiff's Supplementary Bundle of Documents both prove that the Plaintiff had a cheque book from which these leaflets were plucked, issued

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[27] Halsbury's Laws of England. 4th Edition (reissue) Volume 3(1) Butterworths: London (1989), paragraph 163

and subsequently encashed. The duties described in the cited authorities all make reference to cheques. In this case the instruments used to withdraw cash were letters which by extension goes to the duty of the Bank to pay on demand the person named in an instruction to pay. I am also guided by the case of **Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa**[28] in which the Supreme Court applied the principles in relation to Cheques to Electronic Transfer at Point of Sale (EFTPOS) transactions.

The Bank has admitted to no wrongdoing and in fact has argued that the money was paid out to the duly appointed agent of the Plaintiff pursuant to the letter authorising Caroline Mwela as an Agent. Following this introduction of the agent, the Plaintiff executed an Indemnity Form absolving the Bank of any liability arising from the actions or instructions of the agent which purport to be made on the Plaintiff's behalf. The Defendant argues that the letters constituted a bill of exchange as provided in the account opening form, and having satisfied the requirement to have 2 signatories

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[28] **Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa Selected Judgment No. 16 of 2017**

append their signatures, the letters were valid instruments upon which the Bank acted.

Conversely, the Plaintiff argues that the letters had never been used as a mode of encashment in the 16 -year relationship it enjoyed with the Defendant bank until 2011. The Plaintiff vowed that when the alleged forged letters were written, it still had leaflets capable of being enchased. There is, however, no doubt in my mind that the letters instructing the Bank to pay out money are valid bills of exchange as envisaged by the **Bill of Exchange Act 1882**.

The law on whether Banks are liable for paying out on forged cheques [Bills] was espoused in the case of **Bank of Zambia v The Attorney General**[29] in which a cheque belonging to the Ministry of Health was forged and paid to a fictitious payee. In that case the Supreme Court held that the real basis of a bank's liability was not negligence but that money had been paid out without the authority of the customer. The Court further held that negligence at best could only be relevant if the Bank set out a *prima facie* case of estoppel or adoption has been made out against the customer.

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[29] Bank of Zambia v The Attorney General (1974) Z.R. 24

The Court did not end there but proceeded to cite the works of the learned authors of **Pagets Law of Banking** [30] and stated that it was well settled that a customer must warn the bank if he knows or has reason to believe that a forged instrument, purported to be his is likely to be presented for payment. His silence will estop him from disputing the signature on such bill or cheque and he will be bound if the silence precludes the bank from protecting itself against subsequent forgeries or from taking out proceedings against the forger. In the cited case, the Court also dealt with the defence of estoppel and adoption on the part of the bank, and stated that in order for the Defence to succeed, there must be a detriment to the bank and in that case they had seen no evidence that the Bank's position was altered for the worse and as such, the defence was not available.

The Supreme Court further held that assuming negligence without actual knowledge was sufficient, the customer's conduct must be shown to be negligent. The Court also found that, in any event, there was no rule or obligation requiring a customer to check

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[30] Pagets Law of Banking 6th Edition, by Maurice H. Megrah: London (1961)

or examine statements for the purpose of discovering forgeries such that the said failure to do so was not negligent. The appeal failed and the Bank was held liable.

Later on, in 2003, in the case of **Indo-Zambia Bank Limited v Lusaka Chemist Limited**[31] cited by both Parties in their submissions, the Supreme Court had another opportunity to address what is required of a bank when presented with forged instruments and had this to say:

> ***"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. In our view, 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. As Bailhache J. put it in the case of Ross v Lord on County Westminister and Parrs Bank (3); "it is therefore necessary to consider whether a bank cashier***

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[31] Indo-Zambia Bank Limited v Lusaka Chemist Limited (2003) ZR 32

of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them". It would of course be negligent for any bank to honour a cheque if the circumstances are such that they ought to be put on inquiry."

The import of this case as rightly pointed out by both Counsel is that the bank does not have to be an expert to detect forgeries but where circumstances exist that call for the Bank to take a closer look at the instrument or a closer examination or inquiry, the Bank has an obligation not to honour such an instrument because doing so will be negligent.

In yet another case dealing with the mandate of an agent, **Barclays Bank v Sky FM and Another**[32], the Bank was introduced to an accountant whose mandate did not include issuing or signing cheques. Cheques were forged and money withdrawn and this

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[32] Barclays Bank v Sky FM and Another (2006) Z.R. 51

accountant disappeared and destroyed evidence. The Supreme Court was alive to the fact that the accountant's mandate was limited.

In the cited case, the facts before the High Court were that the respondents instructed the Bank to transfer funds to one of its suppliers by telegraphic transfer but the instruction was not carried out on account of what the Bank described as a *'communication breakdown'*. The respondents tried to transfer funds a second time but by using an internal money order which the supplier rejected because this mode of payment carried a 21-day delay on payment. The respondents reverted to instructing the Bank to issue another telegraphic transfer but it turned out that the account was overdrawn and at the time the instructions were being received, the account was not funded. That was when the fraud was discovered.

The trial Judge found that since the accountant had no authority to issue or sign cheques, it logically followed that the defendant had no authority to honour the cheques with the forged signature of the 2nd Respondent. The trial Judge consequently found that money had been paid without authority. The Supreme Court upheld the finding.

The Supreme Court revisited the cases of **Bank of Zambia v The Attorney General**[33] and **Barclays Bank v Sky FM**[34] in the case of **Shreeji Investments Limited v Zambia National Commercial Bank.** The brief facts of that case are similar to the other cases in that the Appellant's accountant, Brian Mtonga, was in charge of cashing cheques, collecting bank statements and making deposits. Between April 2006 and November 2007, the accountant had been paid about K1,200,000 on 109 forged cheques some of which had confirmation letters given to the Appellant by the Bank on request.

The Director of the Appellant company did not examine or see the bank statements or the accompanying cancelled cheques because the accountant was in charge. The forgeries were discovered 17 months later and when the Bank was notified, it refused to refund the Appellant because money was paid out on instructions i.e. cheques were to be paid on receipt of confirmation letters, payable to Brian Mtonga and on verification of signatures.

The Bank pleaded special defences and claimed the cheques were paid in good faith and applied the standard of verification on

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[33] Bank of Zambia v The Attorney General (1974) Z.R. 24
[34] Barclays Bank v Sky FM and Another (2006) Z.R. 51

undetectable forgeries. The Bank argued that the Appellant received bank statements, returned cheques, paid their tax obligations but did not notify the Bank of any anomalies. After trial, the Judge relied on **Section 19** of the **Stamp Act 1853, Section 60** of the **Bill of Exchange Act 1882** and the case of **Indo Zambia Bank v Lusaka Chemist** among other authorities and concluded that the forgery was committed by the agent, transactions were undetected for 17 months, bank statements and returned cheques were sent but the Appellant did not notice any anomalies. Further a handwriting expert conceded that the naked eye was unable to detect the forgery and as such the bank paid in due course.

On appeal the Supreme Court agreed that where cheques are duly signed, no reasonable ground for suspicion and signatures tally, the bank must honour the cheques. They confirmed the principles in **Bank of Zambia v The Attorney General** and **Barclays Bank v Sky FM** (supra) that the basis of liability is paying without authority. The Court explained as follows;

> **"What this means is that a bank pays a forged cheque at its peril; and in such event, payment will be considered**

to have been made from the bank's own funds so that it has no right to charge the customer's account with the amount paid contrary to his legitimate order."

Further, the Supreme Court found that there was nothing before it to show that the bank failed to comply with instructions. Even though the agent had no written authority, he was introduced to the bank by the appellant. It was found that he had actual and ostensible authority of a kind which in the ordinary course of an everyday transaction was not going to lead third persons, on the faith of that authority, to change their position. The appellant did not stop being bound merely because there was no written authority or introduction.

With regard to inquiries, the Court noted that a banker must not continue to pay if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real probability that the monies were being misappropriated. The Supreme Court on the basis of its holding in **Indo Zambia Bank v Lusaka Chemist** found that there was nothing in this case to put the bank on inquiry and the trial Court could not be faulted for finding

that the bank applied the ordinary standard of verification and there was no proof of bad faith.

The Supreme Court went on to deal with the defence of estoppel and conceded that indeed the banker is under a duty to use care in examining cheques presented in order to detect forgeries and to render its accounts to prevent the commissions of fraud upon its customers. Therefore, if a bank in exercise of proper care could have discovered the forgery, it cannot throw the loss caused by paying out on the customer merely because the customer was negligent in failing to examine bank statements or returned cheques. A bank pays because on its own negligent inspection it supposed the cheques were genuine. Estoppel would only be available if the bank shows that due diligence was conducted but there was misleading conduct or negligence by the customer which made the bank pay, then the defence can succeed.

In the cited case, the Court confirmed what it said in the case of **Bank of Zambia v The Attorney General** that even gross carelessness by the customer in the care of its cheque forms and stamp is too remote to found a defence of estoppel on the basis of

conduct inducing the bank to pay, and that there is no obligation on a customer to examine the paid cheques returned to him by his bank in order to discover whether there has been a forgery. However, the facts in that appeal revealed that for a period of 17 months the appellant's authorised agent had access to 109 cheques, made withdrawals and returned cheques and bank statements but no issue was raised despite the fact that the agent had a supervisor to monitor his actions.

Having expressed its views, the Supreme Court held that:

> ***"It is well settled that when the agent who is entrusted with the duty of examination is a dishonest employee who by forgery has obtained funds of his employer from the bank, and whose consequent adverse interest causes him to hide from his employer the facts which would naturally have been disclosed in the course of a proper verification, the employer, though not imputed with knowledge of the fraud of his disloyal agent, is, as principal, chargeable with such information as an honest employee, unaware of the wrongdoing, would***

have acquired from the inspection of the cancelled cheques and bank statements.

In our view, the customer has the duty of properly supervising the conduct of his trusted employee, for apart from its own diligence, a bank's only protection against forgeries by an agent to whom the business of the bank account has been entrusted is verification of statements by the customer, who in such case is clearly responsible for the acts and omissions of his agent in the course of duties with which he had entrusted him.

(emphasis mine)

The Bank in the cited case was absolved of liability because there was nothing suspicious to cause it to inquire and it paid out with ostensible authority and the Appellant was found to have been negligent.

In **Fluid Base v Barclays Bank**[35] one of the signatories pre-signed the cheques and introduced 2 agents to the bank who used forged cheques to withdraw money. The Bank pleaded negligence on the part of the Appellant and the Supreme Court confirmed its

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[35] Fluid Base v Barclays Bank SCZ Appeal 13/2013

decision in the case of **Shreeji Investments Limited v Zambia National Commercial Bank PLC**. Similarly, it found that the Appellant in this case was negligent by failing to exercise ordinary care and prudence in supervising its employees and as such was precluded from setting up forgery.

Lastly, in the case of **Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa**[36] the Supreme Court held that:

> **"in carrying out the customer's instructions, the bank does so with reasonable care and skill, as is the case when it is presented with a customer's cheque. The bank must, therefore, be alert to ensure that prior to debiting its customer's account, the authority or mandate is in order or appears on its face to have been given by the customer.**

From the forgoing authorities, the Bank will be liable to refund the Plaintiff if there was something out of the ordinary to put it on inquiry and if by paying on the instructions in contention, it paid out without authority. From the onset, the principles applicable to Cheques are, in my view, applicable to letters such as those in this

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[36] Barclays Bank Zambia Plc v Patricia Leah Chatta Chipepa Selected Judgment No. 16 of 2017

case that instructed the Bank to carry out a customer's instruction by moving funds from its account and paying the said funds to Caroline Mwela.

The Record shows that the Plaintiff insisted throughout the proceedings that in the 16 years of their relationship with the Defendant Bank, prior to the incident of the alleged forged letters, they had in the past, only used cheques and not letters for the purpose of withdrawing money. DW1 confirmed this position during cross examination and it was put to him that the Plaintiff still had its cheque book and continued using its cheques after the incident. DW1 said he would need to verify that fact.

Learned counsel for the Defendant considered this to be a material point and asked that the Defendant be allowed to call an additional witness. This is what she said;

> ***"I would request a short adjournment to call one more witness to come and clarify on the issue of the Plaintiff having used the cheque book for a period of 16 years before the written letters*** **[the alleged forged letters]** ***were issued. The other issue is whether the Plaintiff issued***

any cheques after the letters **[the alleged forged letters]** ***were written ..... The documents on pages 28-29*** **[cheques issued after the alleged forged letters were received and paid by the Defendant]** ***do not clarify the first issue whether the Plaintiff had prior to the letters*** **[the alleged forged letters]** ***only given instruction by cheque. There is also no such evidence from the Plaintiff. It would be in the best interests of justice for the court to make such a determination."***

I allowed the application but at the next sitting, Counsel for the Defendant did not produce any witnesses and closed the Defendant's case.

Other than asserting that letters were valid bills of exchange there is nothing on Record to show that the Plaintiff had ever used letters to withdraw money from its account. Further, the Plaintiff's letter authorising Caroline Mwela as an agent was a document that DW1 stated was put on a shared system meaning authorised individuals could view the information thereon. DW1 admitted that there was no provision that the Agent was authorized to draw money

by letter and that the authorisation letter was clear and only authorised encashment of third party cheques.

It is not disputed that Plaintiff gave the bank a written mandate on how it was to interact with the Plaintiff's agent. The body of the letter was couched as follows:

"Dear Sir

OUR AUTHORISED AGENT ON THE FOLLOWING ACCOUNT

ACCOUNT NO. 0140030841200

ACOUNT NAME: AVIL KRAM INDUSTRIAL SUPPLIES

This is to introduce to you our Agent Caroline Mwela holder of NRC no. 754263/11/1 who signs thus.....

Please allow her to conduct such bank business as collection of statements, cheque book, balance inquiries, etc. on our behalf.

Furthermore, we confirm that she/he is expressly authorised to encash third party cheques drawn on the same account payable to her. (my emphasis)

Should the agency cease, we shall endeavor to inform you accordingly. Until then please give him/her your full co-operation.

Yours faithfully,

AUTHORISED SIGNATORIES"

In my view, the mandate is expressly allowing only one mode of payment, third party cheques to the agent. According to the **Halsbury's Laws of England**, where an account is not that of an individual, as was the case here, it is customary to take a mandate setting out the parties authorised to draw and the form in which they shall sign and the mandate must be strictly followed[37].

The information that the Agent had express authority to encash only third party cheques payable to her was on the Bank's shared system. This means that the staff that authorised the numerous payments had or should have had access to it. The instructions of the customer are paramount in a banker-customer relationship, especially given the fact that the Bank is an agent of the customer and only pays out of the customer's account with authorisation.

As defined by the **Bill of Exchange Act,** the alleged forged letters fall within the definition of bills of exchange and the Bank was under an obligation, all things being equal, to honour them. However, the Plaintiff had given the Bank express instructions with respect to

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[37] Halsbury's Laws of England. 4th Edition (reissue) Volume 3(1) Butterworths: London (1989), paragraph 164

dealings with its agent *vis a vis* cash transactions, which limited the Defendant's authority to only encashing third party, cheques in the agent's name. I am of the considered view that the production of letters as instruments on which cash was being withdrawn in this case, should have put the Bank on inquiry. Had they inquired on the novel method of withdrawal, they would have protected not only themselves but the customer from the subsequent fraudulent transactions. The omission by the Bank, through its officers was a negligent inspection of the customer's mandate.

The Bank has however argued that the Plaintiff company was negligent when it retained the services of Caroline Mwela who was a dubious employee, a fact that the Plaintiff alluded to, such that the amount claimed as loss, should be reduced. The Defendant did not plead any of the special defences available to it and I shall therefore not delve into the merits of demerits of this argument.

Finding as I have, it is abundantly clear that the Bank did not act in good faith or in the ordinary course of business. Through its own negligent inspection of the bill of exchange they paid out monies without authority and that is where the liability resides. Evidently,

unlike the authorities I have cited, the Agent in this case did not have actual or ostensible authority to act and at no point, from the evidence adduced before me by the witnesses, did the Plaintiff hold out Caroline Mwela as having authority to alter the mandate for cash withdrawals from cheques to letters. Caroline Mwela, having no authority could not bind her employer for her fraudulent actions.

I hold the view that the Bank paid the sum of K280,100 to Caroline Mwela, without the authority of the customer and on the basis of instructions contained in forged letters. The Plaintiff in this case was not precluded from setting up forgery. Had the Bank taken due care and inquired into the forged letters, a method of payment quite outside the mandate in the letter introducing the Agent, it would have been absolved of any liability arising from dishonoring the instruction. I therefore find the Defendant Bank liable to refund the Plaintiff the lost sum of K280,100 together with interest at the average of the short-term deposit-rate per annum prevailing from the date of the Writ to the date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia until payment.

With regard to damages, the Defendant argued that damages for loss of business and mental anguish were not pleaded. I observe that the Plaintiff in the Statement of Claim claimed damages for loss of business and inconvenience. **Order 18 rule 12 of the White Book** does not require particularity in a claim for general damages which were a direct consequence or immediate result of a wrongful act by the Defendant and therefore the argument has no merit. The Plaintiff suffered a loss and it is for them to prove the loss of business and the inconvenience suffered. The Plaintiff is awarded damages as claimed to be assessed by the District Registrar.

Costs for the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 13th day of May, 2020

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M.M. KONDOLO, SC

JUDGE