IN THE HIGH COURT FOR ZAMBIA **2013/HP/1388**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PERFECT POOLS LIMITED **PLAINTIFF**

AND

BARCLAYS BANK ZAMBIA PLC **DEFENDANT**

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 28TH MAY, 2020 - IN CHAMBERS

For the Plaintiff : *Ms. T. Libali - Messrs Dzekedzeke*
For the Defendant : *Robert & Partners – Mr. R. Mukuka*

JUDGMENT

CASES REFERRED TO:

1. *Oversees Task Ship (UK) Limited v. Morts Dock & Engineering Co., The Wagon Mound Rule (1961) ALL ER 404 at P 413*
2. *Caparo Industries PLC V. Dickman 1990 WLR 605: 617 – 618*
3. *Wilster V. Essex Area Health Authority (1988) A.C 174*
4. *Taxation Commissioners v. English Scotish & Australian Bank LTD (1920) AC 683*
5. *London Joint Stack Bank Limited v. Macmillian & Arthur (1918) AC 77*
6. *Bank of New South Wales v. Walter Richard James Laing (1954) AC page 135*
7. *Barclays Bank PLC V Quincecare Limited & Another (1992) 4 ALL ER the Queen's Bench Division (Commercial Court*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England – Banking, Barristers (1989) London, Butterworth's V3 (1) 4th edition*
2. *W V H Roges, Winfied and Jolowikz on tort at page 132*
3. *Halsbury's Law of England, by Lord Hailsham of St Marylebone states in this respect at page 131*
4. *Ross Cranston, Principles of Banking Law at page 141*

The Plaintiff commenced this action by way of writ of summons and statement of claim. The endorsement in the said writ of summons is for the following claims:-

1) *An order for damages for embarrassment and injury to the business reputation that the Plaintiff has built over the years.*
2) *An order that the Defendant should issue an apology for referring the Plaintiff's cheque back to drawer due to insufficient funds when in fact their account had been sufficiently funded.*
3) *Exemplary damages*
4) *Costs*
5) *Any other reliefs that the court may deem fit and equitable.*

The Defendant's response was by way of an appearance and amended defence filed on the 27th September, 2013 and an amended one filed on the 28th September, 2015.

In the statement of claim the Plaintiff averred that on 2nd February, 2013, the Plaintiff issued cheque number 10061172 in the sum of K3,800.00 from their First Alliance Bank Account to their Supplier MCFI who holds an account with the Defendants. The Plaintiff learnt that the cheque was returned to drawer on the 27th February, 2013 due to insufficient funds in the Plaintiff's First Alliance Bank Account. However, the account had been sufficiently funded from 2nd February, 2013 up to the 27th

February, to secure and clear the supplier's cheque. The Plaintiff's bankers later advised the Plaintiff that the reason why the cheque was not paid was because the Defendant had not stamped the cheque before sending it to the Plaintiff's bankers. By returning the cheque it purported that the Plaintiff had no money in their no money in their account which was highly negligent and has caused embarrassment to the Plaintiff.

Furthermore, the Plaintiff is now viewed with a degree of notoriety causing extensive damage to the business reputation and the Plaintiff. In addition, the Plaintiff's business has continued to suffer as its clients are now skeptical to receive cheques. The Defendant have refused, neglected and have ignored demands to offer an apology and compensate by way of damages.

Arising from the same, the Plaintiff has suffered damages, embarrassment and injury to their business and reputation.

In its defence the Defendant averred that there was no negligence as claimed and that the negligence claim being one involving a duty; the Defendant owes no duty statutory or otherwise to the Plaintiff upon which the Plaintiff can purport to found such a claim as the Plaintiff was not a customer of the Defendant. The Defendant has no record of processing the alleged cheque and to date has not been availed an image of the cheque. The

Defendant denied having access to the Plaintiff's account at First Alliance Bank and never having been the paying bank could not have made any endorsement suggesting insufficiency of funds in the Plaintiff's account nor could they return the Plaintiff's cheque purporting the Plaintiff had no money.

Further that the Plaintiff's claim is not only baseless but an abuse of court process in that in an email correspondence on the 24th June, 2015 from the Plaintiff's bank, First Alliance shows that the reason given for returning the cheque in issue was Bank stamp required in file 02 BBZZM – 201302270161 –Ejh -34 FABZM which should have had 53 as a code. For the bank stamp, the raw data (extract) from the system retrieved by the Defendant reflects that the actual code received was 13 – refer to drawer.

The Defendant further stated that it never had and does not now have any basis on which to apologize to the Plaintiff and denies that on the facts of this case, the Plaintiff has suffered or merits damages of any description or indeed any other relief. The matter came up for hearing on the 1st of June, 2017.

The Plaintiff's witness ***PW1*** was Robert Broom the Managing Director of Perfect Pools LTD, the Plaintiff herein.

It was his testimony that he did not have a direct relationship with the Defendants. His relationship is through a third party.

He further informed the court that he paid MCFI a company that supplies the Plaintiff with chemicals via a cheque something that he had done for a number of years. He recalled receiving a phone call from a Mr. Ashok from MCFI informing him that the cheque had bounced.

It was his testimony that he made a follow up the next day. He was informed by his bank that the cheque had been returned to Barclays because the bank teller had not stamped it. The witness was shown a document as proof of this. According to him his bank told him that they could not pay until the cheque was stamped and further confirmed that he had sufficient funds in his account. Mr. Broom instructed his lawyers to write to Barclays Bank requesting that they apologize as the error was theirs. The apology was not forth coming.

The court was referred to the cheque that was made out to MCFI whose date was 2nd February, 2013 in the sum of three thousand eight hundred kwacha (K3,800=00). The cheque was not stamped. When cross examined ***PW1*** informed the court that the Plaintiff does not have an account with the Defendant. He agreed that the obligation to pay lay with First Alliance Bank and that

the Defendant could not pay without receiving money from First Alliance Bank.

He stated that this writ was not supposed to go to First Alliance because it was the Defendant that did not stamp the cheque. He admitted that he was not aware that a cheque could be paid even when it was not stamped. The witness testified that he has never transferred money online. In respect of the extract report it was his testimony that it may have come from Mr. Ashok.

According to ***PW1***, the document was written refer to drawer due to lack of funds. He further informed the court that First Alliance Bank did not write to him telling him that the cheque was not stamped. Furthermore, that he did not find it strange that his Bank did not give him something in writing.

PW1 admitted that he was not familiar with the way cheques are transacted between banks nor was he aware of new regulations that were introduced in February by the Bankers Association of Zambia called Cheque Transactions Regulated Interbank Clearance of Banks.

PW1 informed the court that he was not aware that there was a Zambia Electronic Clearing House charged with clearing cheques. He denied that the Defendant was told that his account

had insufficient funds by the clearing house because as far as he knew he had sufficient funds.

He conceded that if the position had been that he did not have funds he would not expect the Defendant to pay, that he would expect them to stamp and return the cheque.

When referred to the plaintiff's bundle the second exhibit, it was his testimony that he did not check how 013 is generated. He indirectly agreed that there was nowhere on the document where it stated that the cheque was not stamped. He however, seemed to know that the code used when a cheque is not stamped is 053, this he learnt from his Personal Bank Manager.

PW1 denied being told by his Personal Bank Manager neither that the codes are generated by the interbank system nor that they cannot be manipulated. When shown the row number 2 on the document he agreed that the row contained information relating to his cheque. He also noted that the code reflected was 013. This is also in accordance with the documents from the Defendant. It was his testimony that he was stressed for one year and was not trusted by his supplier for some time.

PW1 stated that he did not think of suing his bank even though the primary obligation lay with them to pay.

Mr. Henry Mwewa gave evidence on behalf of the Defendant (DW1). **DW1** a banker holds the position of Systems Administrator in the Defendant bank; a position he has held from 2013. He however has worked for the defendant company for nine years that is from 2008. Mr. Mwewa is in charge of incoming payments and out bound payments.

It was his testimony that computers are used in performing his function. The software used for payments was Sybrin. According to ***DW1*** all data is saved on the server which stores all information relating to payments.

That the server is linked to the Zambia Electronic Clearing House at Bank of Zambia.

He described the role of Zambia Electronic Clearing House as to mediate the payment to ensure that all payments that are submitted to them by the commercial banks are distributed to recipient commercial banks. Further that the Bank of Zambia is the supervisory bank in terms of how all payments are made.

In respect of this case ***DW1*** received a call towards the end of February, 2013 from his colleagues based at the Corporate Service Centre, one of the defendant's branches. He learnt of a complaint concerning a customer. The complainant was that the drawer of a cheque he had received was dishonored by First

Alliance Bank. It was referred to drawer for insufficient funds despite there being sufficient funds in the account. Investigations revealed that the cheque in question was unpaid by First Alliance Bank and marked 'refer to drawer'.

Part of his investigations was to contact the drawers bank First Alliance Bank. He learnt that the cheque was not supposed to be unpaid with 'refer to drawer' but 'unpaid for bank stamp'.

DW1 informed the court that this incident occurred at the time when there was a transaction from physical inter change of cheques to cheque image clearing.

DW1 further stated that he verified the system and checked on the server that receives payments from the Zambia Electronic Clearing House. His findings were that the journal used to transmit payments was sent with data such that the cheque was sent and that the cheque was unpaid for insufficient funds.

According to the witness the data that came from the server was given to them via the Zambia Clearing House. What he did was to interpret the data by the use of a code. In this case the code from First alliance bank through Zambia Electronic Clearing house was code 13.

The Plaintiff in this case does not have an account with the Defendant. The bank's customer was MCFI who is the Plaintiffs supplier. The Plaintiff issued a cheque drawn on First alliance bank.

Once the witness retrieved data from the server the cheque for the Plaintiff was sent back to the Defendant unpaid with the reason 'refer to drawer'. According to the witness refer to drawer means the account was insufficiently funded at the time. The cheque and all relevant documents pertaining to this matter were identified.

The witness testified that Bank of Zambia regulations are that any cheque that is unpaid with refer to drawer should not be put back in circulation. For this reason, the Plaintiff's cheque was not put in circulation. He went on to explain that for any payment to be made to a customer who has an account with them, they have to receive cover from the drawer's bank. He further explained that the Defendant could not honour the cheque because of information received from the drawer's bank that their account was insufficiently funded.

According to the rules given to banks by the clearing house regarding cheques, cheques should first be failed for a technical reason such as bank stamp or date missing. Further where the

cheque is not signed. Further still where the cheque bears refer to drawer.

When cross examined ***DW1*** informed the court that all commercial banks are connected to the clearing house that is how they get information. It was his testimony that information sent by a bank cannot be altered once sent.

That a cheque 'refer to drawer' will have code 13 whose indication lies with the drawer's bank. The same will be indicated on the face of the cheque. When shown the cheque, the witness stated that code 13 was not indicated on the cheque nor did it bear a stamp. He admitted that if a cheque is dishonored it would bear a code. Further that the system they were using was a cheque image clearing, the cheque was not presented. It was his testimony that when he asked a certain lady called Victoria why the cheque was not honored, she informed him that it was because the cheque was not stamped. Further that the cheque remained with the Defendant.

The court is grateful to counsel for submissions filed.

In terms of the law counsel for the Plaintiff submitted that the Plaintiff claim results from the negligence of the Defendant in handling the transaction giving rise to this suit. Counsel referred the court to the principles governing the tort of negligence. The

court was referred to the definition of Negligence as "breach of a legal duty to take care which results in damage," undesired by the defendant to the plaintiff (***M. Woodley Osborne's Concise Law Dictionary (2005) 10th Edition London, Sweet & Maxwell at page 274).*** The court was further referred to the case of ***Oversees Task Ship (UK) Limited v. Morts Dock and Engineering Co. The Wagon Mound Rule (1961) ALL ER 404 at P 413***[1] where Lord Viscount Simonds stated:

> ***"It is a principle of a civil liability that a man must be considered to be responsible for the provable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that the civilized order requires the observance of a minimum standard of behaviour."***

In referring to the three elements that must be prevalent before one may claim damages counsel contends that the intention of the law is not to explicitly put individual or indeed companies out of the realm of claims under negligence based entirely on the lack of a prevailing relationship. For this the court was referred to the case of ***Caparo Industries PLC V Dickman 1990 WLR 605: 617 – 618***[2] where the court opined.

> ***"........Any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to who it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other. Focus must be placed on the relationship between the parties***

and, in particular, the proportionality, or the weight of the burden of liability in relation to the nature of the conduct."

On whether or not the Defendant owed a duty of care to the Plaintiff the court was referred to ***W.V.H Rodger Winfield and Jolowkz on Tort 13th Edition (Lord Sweet and Maxwell LTD 1979) 1979 P. 102***. According to ***Wilster V. Essex Area Health Authority (1988) A.C 174***[3] the court held that:

"………. standard of care expected is directly related to the type of activity in which the defendant belongs"

Halsbury's Laws of England – Banking, Barristers (1989) London, Butterworth's V3 (1) 4th edition elucidates further the characteristics usually found in bankers are:

(I) *"That they accept money from, and collect cheques for, their customers and place them to their credit.*

(II) *That they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly.*

(III) *That they keep current accounts in their books in which the credits and debits are entered."*

Counsel further submitted that the Defendant like any other banking institution must at all times make the relevant and necessary inquiries when handling cheque transactions.

In their submissions the Defendants denied ever acting negligently in processing the alleged cheque. The court was

asked to consider whether there was a statutory duty that was owed to the Plaintiff by the Defendant and if there was whether such a duty had been breached to warrant the damages that the Plaintiff is seeking. Secondly whether negligence can be imputed on the Defendant bank for refusing to honor a cheque which had no credit to cover from the issuing bank.

In addressing the above the court was referred to the case of ***Marfani and Company LTD v. Midland Bank LTD (1968) 1 WLR 956 or 1967 (3) ALL ER 967 where Riplock LJ*** observed that the standard of care imposed on a collecting bank has to be interpreted with regard to current banking practice. Another case I was referred to was the case of ***Taxation Commissioners v. English Scotish and Australian Bank LTD (1920) AC 683***[4] where the court made the following observations:

> ***"The question whether or not the evidence establishes that a person acts without negligence is a question of fact and should be determined separately with regard to each cheque and that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused to make inquiry."***

Further the court was referred to ***Ellinger and Lomnicka on Modern Banking Law 2nd Edition on page 334*** has stated that:

> *"The bank's duty to pay cheques depends on the availability of adequate funds on which the customer is entitled to draw. These may accrue either on*

the basis of an actual credit balance standing to the credit of the account or on the basis of an arrangement for an overdraft."

Further still I was referred to Pagers law of Banking 6th Edition, by Manice Megraph at page 231 has argued that – (page 7 def submissions). And the case of ***London Joint Stack Bank Limited v. Macmillian and Arthur (1918) AC 77***[5] where Lord Findlay LC held that:

> ***"The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customers' cheque when the account is in credit."***

Lastly, the court was referred to the case of ***Bank of New South Wales v Walter Richard James Laing (1954) AC page 135***[6] where the court observed as follows:

> ***"Whether or not an indebitatus count was used to recover money lent, where the Creditor was a customer and the debtor a bank an current account the "peculiar incidents" of that relationship governed the legal position and required that to succeed, the Plaintiff must prove a demand and also that that "balance" outstanding to his credit at time of demand suffice to pay his demand. If the balance fell short of doing so, even by one penny, he failed altogether."***

I have considered the pleadings, the evidence and submissions in this case. The evidence tendered suggests that there is confusion as to who should take the blame for the predicament that the Plaintiff found itself in. On one hand the Plaintiff by suing the Defendants are saying that the Defendants are to blame. On the

other hand, the Defendants are suggesting that the blame ought to squarely lay on the shoulders of the Plaintiff's bank, First Alliance Bank.

It has been argued by counsel for the Plaintiff that the Defendant's liability is based on the fact that the Defendant's action was highly negligent. The Defendant denied being negligent and pointed out that the negligence claim involves a duty which duty the Defendant states they did not owe to the Plaintiff. The definition of the tort of negligence as per ***W V H Roges, Winfied and Jolowikz on tort at page 132*** is as follows:

> *"Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant. Thus its ingredients are (1) a legal duty on the part of D towards C to exercise care in such conduct of D as falls within the scope of the duty (2) breach of that duty i.e a failure to come up to the standard required by law and (3) consequential damage to C which can be attributed to D's conduct."*

The authority goes further on page 133 and states as follows:

> *"It is not for every careless act that a person maybe held responsible in tort, nor even for every careless act that causes damage. He will only be liable in negligence if he be under a legal duty to take care."*

Duty of care is therefore to be considered where there is a claim for damages in negligence, and it is one of the ingredients used to establish the tort. There is a claim for damages in negligence in

the pleadings in this matter. However, before I make a determination on whether or not this duty existed between the Plaintiff and the Defendant, It is important to highlight the features of the relationship between banker and customer and its effects and also between banker and second parties.

Halsbury's Law of England, by Lord Hailsham of St Marylebone states in this respect at page 131 as follows:-

> *"The receipt of money by a banker from or on account of his customer constitutes him the debtor of the customer. The banker is normally liable to repay only the person from whom he received the money. The bank borrows the money and undertakes to repay it or any part of it at the branch of the bank where the account is kept during banking hours; and upon payment being demanded moreover the bank undertakes to pay any part of the amount due against the written order of the customer. The banker is not a trustee for the customer; who has no right to inquire into, or question the use of, the money by the banker, but the position is otherwise if the banker assumes the office of trustee...*
>
> *The receipt of money on deposit account constitutes the bank a debtor to the depositor but not a trustee thereof for him."*

It is evident that the banker is merely a custodian of the customer's funds and it should pay the customer funds held as such on demand. ***Ross Cranston, Principles of Banking Law at page 141*** highlights one of the central features of the relationship of banker and customer. It states in this respect as follows:

"Central to the banker-customer relationship is contract. The banker customer relationship is rarely reduced to the one document, however, but instead it comprises a variety of written forms, supplemented by terms implied by law, often a standard form contract will govern specific aspects of the banker-customer relationship, whether it be the account payment, borrowing security including guarantees and derivatives."

In the case of ***Barclays Bank PLC V Quincecare Limited & Another (1992) 4 ALL ER the Queen's Bench Division (Commercial Court***[7] it was held as follows:-

"The relationship between a banker and a customer quoad the drawing and payment of the customer's cheques against the money of the customer's in the banker's hands was that of principal and agent and as an agent the bank owed fiduciary duties to the customer and prima facie was also bound to exercise reasonable care and skill in carrying out the instructions of its principal. Accordingly, it was an implied term of the contract between the bank and the customer that the bank would observe reasonable skill and care in and about executing the customer's orders but generally that duty was subordinate to the bank's other conflicting contractual duties, such as its prima facie duty when it received a valid and proper order to execute the order promptly on pain of incurring liability for consequential loss to the customer. If the bank executed the order knowing it to be honestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make, the bank would plainly be liable.

Furthermore, a banker was under a duty to refrain from executing an order if and for as long as he was put on inquiry in the sense that he had reasonable grounds (although not necessarily proof) for believing

that the order was an attempt to misappropriate funds. On the facts, and having regard to the fact that the basis of the banker/customer relationship had to be trust rather than distrust, there was nothing in the history of the loan transaction which should have put the bank on inquiry as to S's honesty. In any event any inquiries made by the bank of the firm of solicitors nominated by S to receive the money would not have revealed the fraud as they were unaware of the loan transaction. At all material times the money transferred was in an ordinary current account and therefore no question of trust moneys was involved and no issue of knowing receipt arose nor any question of assisting a breach of trust since there was no want of probity on the part of the bank. It followed that the bank was entitled to judgment against the defendants."

I find that the relationship between the Plaintiff and the Defendant was not of banker and customer. The relationship however between the Plaintiff and First Alliance Bank is that of customer and banker requiring First Alliance Bank to pay on demand. The bank at which the Plaintiff's money is kept is First Alliance Bank. Payment being demanded to pay MCFI against the written orders of the Plaintiff is directed at a First Alliance Bank.

Having stated that one of the central features of the relationship of banker and customer is a contract. The contract in this case was between the Plaintiff and First Alliance Bank.

I have considered the case of ***Caparo Industries PLC V Dickman*** which Counsel to the Plaintiff referred me to. Whilst one can attempt to

argued that there was a duty of care that might have existed between the Plaintiff and the Defendant, further that the standard of care expected is directly related to the type of activity in which the Defendant belongs, I find in this case that it would not be fair, just and reasonable that I should impose a duty of care on the Defendants. ***(Wilster V Ezrene Area Health Authority).***

If at all the Defendants were careless using the words of ***W V H Rogers, Winfiled & Jolowicz on Tort at page 133***,

> ***"It is not for every careless act that a person may be held responsible in tort law, nor even for every careless act that causes damage. He will only be liable in negligence if he under a legal duty to take care."***

The Defendant did not have a legal duty to take care. I must hasten to add that the Plaintiff's bank First Alliance Bank would be better placed to know whether or not the Plaintiff had sufficient funds in their account.

I have carefully perused the documents before me namely the Defendant's bundles whose documents are at pages 1 to 4. Further I have perused the document in the Plaintiff's bundle a return cheque advice. I agree with the Defendant that First Alliance Bank the (Plaintiff's bank) gave the reason for returning the cheque in issue was because the bank stamp was required, which should have had code 53. The extract from the system retrieved by the Defendants reflects that the actual code received

was 13 – 'refer to drawer' which in the banking circles is an inward unpaid reason code. I have noted that at page 2 of the Defendant's bundle the depositor for account 016-6741750 indicator is unpaid.

The Plaintiff's claim has failed. I accordingly dismiss it with costs. The same to be agreed in default taxed.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 28TH DAY OF MAY, 2020.

G.C. CHAWATAMA
JUDGE