INFORMATICS LIMITED AND ORS
v
STANBIC BANK ZAMBIA LIMITED

SUPREME COURT
MAMBILIMA, D.C.J, CHIBESAKUNDA AND CHIBOMBA, JJS.,
22nd September, 2009 AND 23rd February, 2011
(S.C.Z. judgment No. 2 of 2011)

[1] Banking Law - Bills of Exchange Act 1882 - When a bill must be presented for payment.

This is an appeal from the decision of the High Court, in which the appellants were found liable and ordered to pay certain sums to the respondent. In the judgment, the trial judge accepted the evidence that the appellants applied for an overdraft as a result of which they drew money from their account even when there was a debit balance.

The appellants appealed and advanced four grounds of appeal. Namely:

1. that the trial judge in the Court below misdirected himself in law when he applied and decided the appellants liability on the law relating to Sale of Goods, Act, 1893, instead of that relating to the Bills of Exchange Act 1882;
2. that the trial judge in the Court below misdirected himself in law when he ordered foreclosure on the appellant's property when the respondent never prayed for such relief;
3. that the trial judge in the Court below misdirected himself in law and fact when he held the respondents were not negligent in handling the appellant's bills and that the appellants were fraudstars; and
4. the judge in the Court below misdirected himself when he held that the appellant's withdrew money from the account without any evidence to show that they actually did.

Held:

1. That the proper context of the words should be ascertained from the entire sentence. Any person properly directing themselves to the ordinary meaning of the sentence cannot by any stretch of imagination read into it that the Court equated the transactions to that dealing with the sale of goods.
2. This was not mortgage action. It was an ordinary debt recovery action. Mortgage actions are brought under Order 30, Rule 4, of the High Court Rules.
3. Under section 45 of the Bills Exchange Act 1882, a Bill must be presented for payment within a reasonable time after issue, otherwise the drawer and endorser of the Bill are discharged.

Cases referred to:

1. A L Urderwood Limited v Barclay Bank [1924] I. K. B. 776.

2. Yeoman Credit Limited v Gregory [1963] 1 ALL E.R. 245.
3. Mundia v Sentor Motors Limited (1982) Z.R. 66.
4. Mutale v Zambia Consolidated Copper Mines Limited (1993-1994) Z.R. 94

Legislation referred to:

1. High Court Act, cap 27, Order 30, Rule 14,
2. Bills of Exchange Act, 1882. s.45
3. Sale of Goods Act, 1893.

For the appellant: No appearance
S. Siwila of Messrs Mambwe Siwila and Partners for the respondent.

MAMBILIMA, D.C.J.: delivered the judgement of the Court. This is an appeal from the decision of the High Court, in which the appellants were found liable and ordered to pay to the respondent an amount of K65,237,476.81, and US$24,461.55 with interest. The amount of K65,237,476.81, arose out of an over draft facility that was offered to the 1st appellant, and guaranteed by the 2nd and 3rd appellants. The US$ 24,461.35, was in respect of amounts that the 1st appellant was found owing to the respondent on its dollar account, after bank drafts that were deposited in the account were returned unpaid.

The documents and evidence on record show that on 26th August, 1996, the 1st appellant applied for a "...stand by facility of K10 m" on its Kwacha current account based on its "...monthly operational needs or basically for working capital purposes." A business plan and a budget for the period July, 1996, to June, 1997, were submitted with the application. The respondent favourably responded and on 11th September, 1996, it offered the 1st appellant credit facilities subject to, among others, the following conditions:-

The over draft facility was to be repaid on demand but not later than 30th September, 1997;

It was to be secured by director's guarantee in the sum of K10 m each and a legal mortgage over stand No. 786 Avondale, Lusaka.

The appellants accepted the conditions. The record also shows the 2nd and 3rd appellants as directors of the 1st appellant company, on 11th September, 1996, each personally executed a guarantee in the sum of K10 million. On 17th October, 1996, the board of the 1st appellant accepted the terms and conditions set out in the letter of approval from the respondent.

It is on record that the overdraft was not serviced. There were no deposits made on the account resulting in the amount owing accumulating and accruing interest. According to the respondent, this amount accrued to a sum of K65,237,476 which was now being claimed from the appellants.

Evidence and documents on record further show that on 6th April, 1997, the 1st appellant applied for bridging finance in the sum of US$18,004.00 for two weeks, against an international draft of

US$ 20,000, which was to be paid to them in respect of computers and printers that they had supplied to a company in Benin. The application letter, under the hand of Mr. Joe Shiku, the 2nd appellant, stated inter alia:-

"I refer to the T/T payment order faxed to you by Standard Commercial Bank of Cotonou in Benin regarding the amount they are holding in our favour for the supply of computers and printers to the Federal Government of Benin. We have finally entered into a formal contract amounting to USS2,665,950.00, for the supply of 600 computer systems, 200 printers, and 400 professional video cameras. Our return now on this amount is 10% of the full order amount which works out to be US$266,595.00. Obviously when we do get this payment it is going to stay within Stanbic Bank. Additionally, we will be establishing a Letter of Credit through you in favour of the computer manufacturer in the USA. Again, Stanbic Bank will gain by way of LC commissions.

However, for all this to become a reality we need to remit immediately the sum of US$18,004.00, to the manufacturer who is right now standing by with the samples to Benin. We do not have much time as the execution of the main order is defendant, upon Informatics swiftly air freighting the samples to Benin.

The bridging finance we are requesting for is for two weeks against an international bank draft of US$20,000, which has been sent to us from the client vis the registered postal airmail. This draft is expected within the next 10 days. This arrangement is similar to the earlier request for US$4,500, which has now been covered with the arrival of the draft for US$8,000, which has already been passed on to you to offset the earlier bridging finance."

The respondent acceded to the request.

In May, 1997, the appellant deposited a bank draft in the amount of US$20,000 in its Kwacha current account. The Bank draft was given a minimum value date of nine days. The respondent allowed the 1st appellant to draw against the Bank draft before it was cleared. It is common cause that the draft was returned unpaid in July, 1997, and consequently, the respondent reversed the credit made to the account. As a result of the withdrawals that were made on the account, as well as the application of interest and bank charges, the debit balance accrued to K65,237,476.81. It was also on record that the appellants deposited another draft in the sum of US $125,000, in their dollar account and it was also returned unpaid. The respondent reversed the credit entries on the account, and this resulted in a debit balance of US$24,000.

The appellants' position in the Court below was that the respondent Bank was negligent because it presented the bank drafts and cheques late, resulting in the instruments being returned unpaid. It was submitted that because of the said negligence, the respondent Bank could not now profit from its own default.

In his judgment, the learned trial judge accepted the evidence that the appellants applied for an over draft as a result of which they drew money from their account even when there was a debit balance. The judge further stated that there were odd coincidences in the case, amounting to supporting evidence that the appellants were being paid by dishonorable instruments. His inference

from the odd coincidences was that the appellants “carefully planned and neatly executed the defrauding” of the respondent.

The learned trial judge found the evidence of DW 1 to have been evasive, inconsistent, and designed to mislead the Court. According to the judge, the witness obsessively tried to traverse the reasons why the instruments were dishonored. After scrutinizing the bank statements that were on record, he found no suspicious transactions. He therefore found as a fact, that the appellants were liable in the sums that the respondent was claiming from them and entered judgment in its favour. He ordered the appellants to pay the money with interest, and in the event of default to pay within 60 days, the Bank would be at liberty to foreclose on the security.

The appellants have now appealed to this Court advancing four grounds of appeal:-

“1. that the learned judge in the Court below misdirected himself in law when he applied and decided the appellants' liability on the law relating to sale of goods instead of that relating to Bills of Exchange Act 1882;

2. that the learned judge in the Court below misdirected himself in law when he ordered foreclosure on the appellant's property when the respondents never prayed for such relief;

3. that the learned judge in the Court below misdirected himself in law and fact when he held that the respondents were not negligent in handling the appellants' Bills, and that the appellants were fraudsters; and

4. the judge in the Court below misdirected himself when he held that the appellants withdrew money from Account No. 01400/30736/00 (Dollar Account) without any evidence to show that they actually did.”

The learned counsel for the respondent filed a Notice of Non-appearance. He thus did not appear to argue the appeal but filed written heads of argumentss for the consideration of the Court.

In support of the first ground of appeal, the learned counsel for the appellant quoted an extract from the judgment of the Court below in which the learned trial judged stated;

“If one supplies goods, and he is paid a fictitious instrument, he has not gotten consideration for the goods and be apologetic to those that gave him value based on the dishonourable instrument.” (sic).

After alluding to the provisions of the Bills of Exchange Act 1882, with regard to cheques, counsel submitted that notice of dishonor of the bank draft and the cheque was not conveyed to them within a reasonable time. He relied on the case of Yeoman Credit Limited v Gregory (2), in which a party was excused from liability on bill, on account of late presentation. He submitted that in this case, there was a period of 75 days in case of the bank draft, and 15 days, with regard to the cheque, before it was known that both instruments had been dishonoured. According to counsel, these periods were unreasonably long. He contended that had the respondent handled the transactions with due care and

diligence, the instrument could not have been dishonoured.

In the alternative, the learned counsel for the appellants has argued that even if the respondent had presented the bills within a reasonable time, the delay would still discharge the 1st appellant from liability because the draft was returned too late for the respondent to accept. The respondent could have instead sued the drawer bank in its capacity as holder for value. counsel further submitted that it is the drawer Bank that misled the respondent into believing that the bank draft shall be honoured prompting them to give the 1st appellant access to the account. He argued that it is the drawer bank that is liable on the draft because it failed to give notice in good time. counsel also disputed the evidence of Peter Kunda (PW 2), that in international banking, a draft can take up to six months to clear. He contended that it is the respondent who gave a value date of nine days for the draft and in reliance on this period, the appellant, in good faith, made withdrawals on the account.He submitted that the respondents were now estopped from shifting from their initial period of nine days.

In response to the appellants' submissions on the first ground of appeal, Mr. Siwila, for the respondent submitted that nowhere, in the judgment of the Court below, does the judge refer to the law relating to the sale of goods in arriving at his conclusion that the appellants were liable to the respondent. That reference to 'goods', in the portion of the judgment cited by the appellants, was given as an example to illustrate a point. That in arriving at his conclusion, the judge relied on bank practice and custom.

According to counsel, the trial judge properly directed himself in holding in favour of the respondent. He stated that the uncontested facts before the Court show that the 1st appellant applied for an overdraft. It was approved and guaranteed by the 2nd and 3rd appellants. As at the time of trial, the debt had not been repaid. That bank drafts in the sum of US$20,000 and US$125,000 were deposited in the 1st appellant's accounts but they were both returned unpaid. That the appellant applied, and was granted bridging finance in the sum of US$18,000, against the bank draft of US$20,000.

Mr. Siwila submitted that by giving value to the 1st appellant before the draft and the cheque were cleared, the respondent became a holder for value. In support of his submission, counsel cited the case of A.L. Underwood Limited v Barclays (1), in which it was stated, inter alia that:

"The mere fact that bankers credit a customer with the amounts of cheques before they are cleared does not make them holders for value. In order to entitle them to that character, there must have been an agreement express or implied that the customer should be allowed to draw against the cheques before clearance, and that agreement must have been acted upon."

Counsel also relied on paragraph 338 of Vol. 2, 3rd Edition of Halsbury's Laws of England, in which it is stated, inter alia, that a banker who is a holder for value can sue the parties to a cheque in his own name. He submitted that the application for a bridging finance, and the evidence of the 2nd appellant confirmed that there was an agreement constituting the respondent as a holder for value. He contended that even if it was to be assumed that there was no express agreement, there was an implied

one, going by the application for bridging finance and the evidence of the 1st appellant confirming that in a similar transaction, the respondent gave the 1st appellant immediate value, as reflected on documents appearing on pages 28 and 35 of the record of appeal. He referred to paragraph 2 of the document on page 35, in which the 2nd appellant stated:

"We are quite aware that our account has had no movement from us in the last one and half months and for reasons that we explained to your Mr. Chirwa during the meeting of 24th September,, 1997. For your information, we did not expressly promise when we were to resolve this matter suffice to say we are looking at measures to correct the position."

On the submission that the respondent was negligent in the presentation of the bills, Mr. Siwila submitted that the appellants did not adduce any evidence to show that the respondent acted negligently.

As to the notice of dishonor, Mr. Siwila submitted that no evidence was adduced to show that the period within which the notice of dishonor was given to the appellants was unreasonable. He stated that the 2nd appellant in his evidence, did concede that the respondent's manager had informed them that the cheque that they had deposited in their account had bounced. He prayed that this ground of appeal should be dismissed.

We have considered the first ground of appeal and the submissions by counsel. From the wording of this ground, the kernel of the argument is that the Court below applied and decided the appellants' liability on the law relating to sale of goods instead of the law relating to the Bills of Exchange Act 1882. It is anchored on the observation by the judge in the Court below quoted in the following terms:-

"...if one supplies goods, and he is paid a fictitious instrument, he has not gotten consideration for the goods..." (sic)

The learned counsel for the appellant has submitted at length in support of the first ground of appeal. He stated that the respondent was negligent, and that the notice of dishonor was not given within a reasonable time. In the way that this ground of appeal is couched, it will be resolved simply by ascertaining the context in which the words referred to were used. The words of the judge referred to were plucked out of a long sentence in which some words have been left out. It is our view that the proper context of the words should be ascertained from the entire sentence. After observing that the appellants had applied for an overdraft which could allow them to draw money even if they had a debit balance, the full sentence read:-

"They approached the bank to draw from uncleared effects, which the bank allowed them to do as a business entity and they could not expect them to deposit dishonourable cheques if one supplies goods, and he is paid a fictitious instrument, he has not gotten consideration for the goods and should pursue the purchaser of goods and be apologetic to those that gave him value on the dishonourable instrument." (Words not in italics left out)

It is clear to us that taken as a whole, the words complained of were used to illustrate the point

that the 1st appellant, as a business entity, was allowed to draw against uncleared effects. The reference to 'supply of goods' was used as an example that if one supplies goods and the instrument for paying for the said goods is not valid, then, the seller has not gotten consideration for the goods. We do not read into this sentence, any insinuation that the judge applied the law relating to the sale of goods to the transactions in this case. Any person, properly directing themselves to the ordinary meaning of this sentence, cannot by any stretch of imagination, read into it that the Court equated the transactions in this case to that dealing with sale of goods. The subject matter was 'dishonourable cheques' against which the appellants were allowed to draw.

Having found that the learned trial judge did not apply and decide the appellants' liability on the law relating to the sale of goods, the first ground of appeal is effectively disposed off. It is otiose for us to deal with the other arguments advanced in support of this ground. Consequently, the first ground of appeal is dismissed.

The second ground of appeal is that the judge in the Court below misdirected himself when he ordered foreclosure on the appellants' property when the respondents never prayed for such relief. The learned counsel for the appellants submitted that this matter was commenced by way of a writ of summons on which there is no prayer for foreclosure. counsel submitted that a mortgage action is commenced by way of originating summons taken under Order 30 of the High Court Rules, cap 27 of the laws of Zambia.

counsel argued that parties are bound by their pleadings. He referred us to a portion of the judgment in the case of Christopher Lubasi Mundia v Sentor Motors Ltd (3), where we said:-

"Any departure from the cause of action alleged, or relief claimed in the pleadings should be preceeded, or at all events, accompanied by the relevant amendments so that the exact cause of action alleged and relief claimed shall form part of the Court's record....Pleadings should not be 'deemed to be amended.' They should be amended in fact."

counsel further submitted that the directors' guarantees are to the extent of K10,000,000. He contended that the liability of the directors should therefore be limited to this amount.

In response, Mr. Siwila conceded that the judge misdirected himself when he ordered foreclosure, because the respondent did not pray for the remedy in the writ of summons and the statement of claim. He submitted that while the 2nd and 3rd appellants cannot be liable for the sums of K65,237,476.81, and US$24,461.55, they are liable for the sums of K10 million each respectively, together with interest from the date of demand, to the date of payment in their capacity as guarantors of the overdraft.

We have considered the argument of counsel with respect to the second ground of appeal. It is not in dispute that the 2nd and 3rd appellants each executed a guarantee in the sum not exceeding K10,000,000.00 "together with interest thereon at your then current rate from the date of your demand until payment..." For as long as the 1st respondent defaulted on the repayment of the over draft, the

two appellants are liable as afore said. It is also not in dispute that the respondent did not claim the remedy of foreclosure in its pleadings, but the payment of the sums of K68,237,476.81, and US$24,261.55, both together with interest. The respondent's witness told the Court below that there was no activity on the account, meaning that the over draft was not cleared. The 2nd and 3rd appellants therefore owe the respondent to the extent of the overdraft together with interest.

We agree with the learned counsel for the appellants that this was not a mortgage but an ordinary debt recovery action. Mortgage actions are brought under Order 30, Rule 14, of the High Court Act. In this case the respondent took out a specially endorsed writ to claim a liquidated amount; thus seeking repayment of a debt. The second ground of appeal therefore succeeds. For avoidance of doubt, we hold that the 2nd and 3rd appellants are only liable to the extent of the amount of the guarantees they executed together with interest.

In the third ground of appeal, it is the contention of the appellants that the Court below misdirected itself in law and fact when it held that the respondent was not negligent in handling the appellants' bills and that the appellants were fraudsters. They have referred us to a portion of the judgment of the Court in which the learned trial judge inferred from what he termed as 'odd coincidences' that the appellants “carefully planned and neatly executed the defrauding of the plaintiff.” The judge found no suspicious transactions after scrutinizing the bank statements that were before him. According to the appellants, the holding by the judge was a clear misdirection, because there was nothing evasive or inconsistent in the evidence of DW 1. While conceding the judge made a finding of fact, counsel has submitted that the finding is not supported by the evidence on record. In support of his submission, counsel referred us to the case of Zambia Consolidated Copper Mines Limited v Mutale (4), in which it was stated, inter alia, that, “….a finding of fact becomes a question of law when it is a finding which is not supported by evidence, or when it is one made on a view of the facts which cannot reasonably be entertained.” Consequently, counsel has urged us to reverse the finding.

In response to the third ground of appeal, the learned counsel for the respondent submitted that the appellants failed to establish through the evidence of the 2nd appellant, both in chief and cross examination, that the respondent was negligent in the handling of the appellants' bills. That what is on record is that the appellants deposited a cheque and a bank draft to which the respondent gave some value date and allowed them to access the funds. That the instruments were sent for clearing but were subsequently dishonoured and this fact was brought to their attention. According to counsel, there was therefore no basis on which the trial judge could have held that the respondent was negligent.

We have considered the submissions of the parties on the third ground of appeal. It would appear that the negligence that the appellants allege on the part of the respondent is with regard to the time that the instruments were presented for payment to the issuing bank after they were deposited, and the time that it took the respondent to inform them that the said instruments had been dishonoured. Under section 45 of the Bills of Exchange Act 1882, a bill must be presented for payment within a reasonable time after issue otherwise the drawer and endorsers of the bill are discharged from liability.

According to the evidence of DW 2, the bank draft and the cheque were deposited in March and April, 1997, respectively and given value dates after which the 1st appellant was allowed to draw against them. DW2 told the Court they inquired from the Bank as to why they had not given them a clearing date and they were told that "these things happen, under normal circumstances a foreign cheque is given 21 days to allow the ascertainment of availability of funds."

The respondent's witness, Peter Kunda testified that the draft was presented for payment but was brought back unpaid on 22nd July, 1997. According to this witness, there is no normal clearing period for a draft which is not controlled by the banking system in Zambia. He stated that for such drafts, clearing could take as long as six months. They, however, allowed the appellant to draw on uncleared effects because of the trust that they had for them. No evidence was solicited from the witnesses as to the time lapse between the depositing of the instruments, and their presentment to the paying bank. The dates of their return unpaid is known but by that time, the 1st appellant had already been given access to the funds.

There was therefore no proof that the respondents held on to the instruments, and did not present them to the paying bank within reasonable time. The instruments presented were returned unpaid. This was after they were dishonoured. We do not find any evidence of negligence. It was not proved that the respondent breached any duty.

The learned trial judge alluded to the fact that the appellants were allowed, as a business entity, to draw funds on uncleared instruments. Witnesses on both sides agreed that there was mutual trust between the parties. According to the judge, the appellants were not apologetic to those who gave them 'value based on dishonourable instruments.'

It is without doubt that the appellants got the money on dishonoured instruments. The Bank lost money. The appellants did promise, in their letter of 17th October, 1997, appearing on page 35 of the record of appeal that they were 'working at measures to correct the situation.' Instead of correcting the situation, they are now alleging negligence to evade paying the debt. That, in our view, is a complete betrayal of the trust that existed between the parties. We cannot therefore fault the judge in the Court below for concluding that the appellants had 'carefully planned and neatly executed the defrauding of the plaintiff.' The third ground of appeal therefore fails.

The fourth and last ground of appeal is that the judge in the Court below misdirected himself when he held that the appellants withdrew money from the dollar account number 01400/30736/00, without any evidence to show that they actually did. In support of this ground, the appellants have uplifted a portion of the judgment in which the judge stated:-

"Further, on or about 8th May, 1977, the 1st defendant deposited a Bank draft in the sum of US$20,000, in their Kwacha Account No. 01400/307536/00 which draft was given minimum value date of nine (9) days and as a consequence of which the defendant's debit dropped from K36,652,025.37 dr. to K10,6662,025.37 dr on the date of deposit. Further, the defendants drew some money from the

Kwacha Account as a consequence of the deposit of the draft…."

The thrust of the appellants' argument is that they did not make any withdrawals from the dollar account. They have argued, spiritedly, that the respondent must prove that they had authority to pay out the money.

The response of the respondents is that the appellants did accept that they withdrew money from their accounts. They referred to the document on page 38 of the record of appeal in which the 2nd appellant stated inter alia, that, "This is because after value, we did have access to the funds."

We are at a loss to understand the contention in the fourth ground of appeal because the passage of the judgment in question specifically refers to a US$20,000 bank draft 'deposited in their Kwacha Account No. 01400/307536/00', and not a dollar account. The judge continued to state that this is the account which was debited after the bank draft was returned unpaid, and it accumulated a debit balance of K65,237,476.81.

The learned counsel for the appellants appears to have completely misunderstood the express and clear import of the passage. Be that as it May, the appellants do admit to have had access to the funds on uncleared effects, as shown by the respondent. It is quite unbecoming that the appellants can now question the authority under which the respondent paid the money to them. We find no merit in the fourth ground of appeal.

From the foregoing, only ground three has succeeded. The order of the Court below to foreclose on the security is therefore set aside. The 2nd and 3rd appellant are liable to pay the monies pledged in the guarantees of up to K10 million each plus interest. The other three grounds of appeal have failed. This means that save as stated above, the rest of the grounds of appeal have no merit. The appeal substantially fails. In the circumstances of this case, we award costs to the respondent.

Appeal allowed.