IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: OTHMAN,C.J., RUTAKANGWA, J.A., And MANDIA ,J.A.)

CIVIL APPEAL NO. 98 OF 2008

STANDARD CHARTERED BANK TANZANIA LIMITED.....APPELLANT

VERSUS

1. **NATIONAL OIL TANZANIA LIMITED**
2. **EXIM BANK TANZANIA LIMITED..... RESPONDENTS**

(Appeal from the Judgment and decree of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Massati, J.)

Dated the 30th day of October, 2007
in
Commercial Case No. 97 of 2005

JUDGMENT OF THE COURT

15th March, 2012 & 13th February, 2013

OTHMAN, C.J.

This appeal centres on the wrongful conversion of a cheque. The Appellant, Standard Chartered Bank (T) Ltd. (S.C.B.) appeals against the judgment and decree of the High Court (Commercial Division) (Massati, J.) in Commercial Case No 97 of 2005 delivered on 30/10/2007, which held in favour of the Respondents, National Oil (T) Ltd. (Nat Oil) and Exim Bank (T) Ltd. (Exim Bank).

On this appeal, Dr. Angelo Mapunda and Mr. Duncan Mayumba represented the Appellant and Mr. Melchezedeck Lutema, represented the Respondents.

In summary, at the trial court, the Respondents case supported by Salum Kisai (PW1), Neela Shashmwari Rao (PW2), Salim Sadruden Hasham (PW3) and Bwene Liberatus Mashauri Gabriel (PW4) was that on 18/4/2005, Nat Oil had drawn a cheque, No. 815213 for Tz Shs. 175,809,754/= (Exhibit P. 1) on Exim Bank and in favour of the Commissioner for Customs and Excise (Tanzania Revenue Authority or T.R.A.). It claimed that on 16/5/2005, S.C.B. received and through the clearing house system processed the cheque for payment (Exhibit P.2). However, by 11/7/2005, T.R.A. which had no account with S.C.B had not received the funds (Exhibit P.3). Instead, S.C.B. wrongly converted the proceeds of the cheque to pay someone else not entitled to it, causing loss and damage to the Respondents.

Denying liability, the Appellant's case supported by Peter Michael Jumamosi (DW1), Said Mwamtuya (DW2), Alelio Ngoyai Lowassa (DW3), Geofrey Sigala (DW4) and DW5 (Iddrissa Mohamed Mtamike) was that it did not receive, process, collect or wrongfully convert that cheque. On the contrary, on 13/5/2005, it had collected in favour of its customer, MGS

International (T) Ltd., cheque No. 815213 for Tz shs 175,809,754/= drawn by Sky Oil Investment Ltd. (Sky Oil). That in the ordinary course of banking business, in good faith and without negligence it cleared the cheque through the clearing house system and paid that company.

The High Court entered judgment for the Respondents and ordered S.C.B. to refund them Tz shs 175,809,754/= representing the amount of the cheque. Additionally, it orded payment of Tz shs 10,000,000/= as general damages for wrongful conversion and costs.

Aggrieved, the Appellant preferred this appeal.

Having gone through the record of appeal, one of the critical issues that must be settled before the determination of the merits of the appeal is the propriety or otherwise of the admission into evidence of the documentary evidence heavily relied upon by the parties and crucial to the trial court's judgment. The precise question to be posed is whether or not the High Court complied with Order XIII Rule 4(1) of the Civil Procedure Code, Cap 33 R.E. 2002, which requires documents admitted into evidence to be endorsed by the Court.

Order XIII Rule 4(1) provides:

"4(1) subject to the provisions of the next sub-rule, there shall be ***endorsed*** *on every document which has*

been admitted in evidence in the suit the following particulars, namely-

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced;

(d) a statement of its having been so admitted;

and the ***endorsement*** *shall be signed or initiated by the judge or magistrate.*

Furthermore, Rule 7(1) of the same Order reads:

"7(1) ***Every document which has been admitted in evidence,*** *or a copy thereof where a copy has been substituted for the original under Rule 5,* ***shall form part of the record of the suit".*** *(Emphasis added).*

Both Mr. Duncan and Mr. Lutema were at one that although the documentary evidence in the case was not properly endorsed by the learned Judge as required under Order XIII Rule 4(1), the error was not substantial. That evidence constituted a proper record of the suit. Learned counsel strenuously contended that the endorsement of a document under

Order XIII Rule 4(1) was a mechanical process, which the court was required to perform. That as the non-endorsement of the documentary evidence had not caused an injustice to any of the parties and was an omission committed by the court, a liberal rather than a restrictive approach to the construction of rules of procedure was called for. They sought to distinguish **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited,** (2006) T.L.R. 343 as therein, the documents were not admitted by the trial court, while in the instant case, the documentary exhibits were tendered and properly admitted by the court.

The record bears out that the Respondents relied on three exhibits (Exhibits P.1 to P3) and the Appellant counted on six exhibits (Exhibits D1 to D6). They were all properly admitted in evidence by the High Court. However, they were not duly endorsed as is required by Order XIII rule 4(1). What then, we ask, are the consequences of the non-endorsement by the trial court of the documentary exhibits?

With respect, we think that the argument by Learned counsel that the endorsement of documents by the court under Order XIII Rule 4(1) is a mere mechanical process is flawed. That rule, like the other detailed rules governing the production and admission of documentary evidence in civil suits serve well-founded purposes. They go not only towards the

authentication of the documentary evidence, but are also meant to weed out any controversy between the parties over its genuineness and trustworthiness. As this case will confirm, the contest over documentary evidence was abound.

That apart, we agree with Learned counsel that **Japan International Cooperation Agency** case is indeed distinguishable to the instant case. There, the documentary evidence (Exhibits P.3 and D.7) was not at all produced and admitted in evidence at the trial. The Court held that this was a substantial error, which amounted to a miscarriage of justice. It ordered a retrial. In sharp contrast, the documentary evidence in the instant case was annexed to the plaint and the written statement of defence; it was properly tendered by the relevant witnesses who spoke on the exhibits; it was duly admitted by the court; no party raised any objection or challenged the authenticity or genuineness of the material; each relied on the documents in examination-in-chief and cross-examination and no prejudice or injustice was suffered by any of the parties. Considering all the above and in the exceptional circumstances of this case, we are of the respectful view that the High Court's omission to endorse the exhibits was inadvertent and does not efface them as evidence or render the record of the suit, defective.

For clarity, we are compelled to reemphasize the requirement for trial Courts to fully comply with Order XIII Rule 4(1). Any laxity in its compliance, would erase the very basis of the foundation of the admissibility of exhibits in suits. Rules of procedure must be followed by the parties, as they must be by the Court.

We advert, next, to the merits of the appeal as contained in the Appellant's 10 grounds of appeal.

Jointly argued, grounds 1, 2 and 3 of the appeal contends that the High Court erred in fact in its findings that MGS International (T) Ltd. received the proceeds of the cheque (Exhibit P.1); that that cheque was the same one which was proceeded by S.C.B. and its proceed received by MGS International (T) Ltd and finally that all the parties to the transaction were toying with the same cheque number.

Relying on **Barclays Bank Plc and Others v. Bank of England** (1985), All ER 386 where a detailed account is given of the London Interbank System for clearing cheques, Mr. Duncan's forceful contention was that S.C.B. did not receive or process Exhibit P.1. Rather, it collected and processed the cheque represented by Exhibit D.5, i.e. a bank deposit slip dated 13/05/2005 drawn by Sky Oil Investment Ltd, in favour of MGS International (T) Ltd, for Tz shs 175,809,754/=. That no way could S.C.B.

have received the cheque, payable to T.R.A. which did not have an account with it. He submitted that as the cheque contained a number of endorsements reflecting mandates used in special and other clearance procedures and as there were also material differences in the stamp of S.C.B. Bank Teller No 83R who is said to have received it and in that of S.C.B. Bank Teller No 83K, who collected Exhibit D.5., S.C.B could not have dealt with Exhibit P.1. Cheque substitution fraud, he said, had taken place, which the Respondents were painly responsible for.

On his part, Mr Lutema submitted that Exhibit P.1 was a genuine cheque which was collected and processed by S.C.B. through the Magnetic Ink Character Recognition Process (MICR) as evidenced by Exhibit P.2. That the only cheque that could have enabled MGS International (T) Ltd. to be paid by S.C.B. was Exhibit P1, because if it had processed a forged cheque through the MICR process and the same had been delivered to Exim Bank, it could not have been cashed as Sky Oil Investment Ltd. had no account with it. That on the basket of evidence, Exhibit D.5 was a fictitious cheque. Furthermore, no one had testified to have seen it. The learned judge was therefore correct in holding that the parties were toying with the same cheque number as reflected in both Exhibit P1 and Exhibit D.5.

It was the learned Judge's finding that Exhibit P1, a leaf from Exim Bank's cheque book, had been affirmatively established. He opined that the alleged cheque in Exhibit D5, did not exist. He also found out that Exhibit P1 had been processed by S.C.B. for clearance and that it was the same cheque represented in Exhibit D.5. Furthermore, that the parties were toying with the same cheque number, i.e. 815213, whose proceeds, i.e. Tz shs 175,809,704/= were credited by S.C.B. in the account of MGS International (T) Ltd. He considered it pertinent that Sky Oil Investment Ltd. did not have an account with Exim Bank and could thus not have drawn a cheque on it. The learned Judge also considered the issue of discrepancies in the endorsements and stamps on Exhibit P1, which he did not consider material and reached his decision on the basis of the onus of proof.

The law is well established that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial Court should stand (**Peters v Sunday Post, 1958 E.A. 424; William Diamonds Ltd and Another V R 1970 E.A.1; Okeno V.R. 1972 E.A. 32**).

On a consideration of the totality of the evidence, there is no doubt in our minds that Exhibit P.1 read together with the electronic journal entry (Exhibit P.2), undeniably generated by S.C.B. on 16/5/2005, is a genuine cheque that was collected and processed by it for payment. Said differently, it is not the existence and processing of Exhibit P 1 which is in doubt, that which seriously is, is the purported cheque in Exhibit D.5. It is common ground that Exhibit P.2 does not reveal the names of the drawer and the drawee. However, the cheque number :815213, the Exim Bank code: 67130107 and account number of the customer: 0300346014 are the same in Exhibit P.1 and Exhibit P.2. PW3 identified the signature on Exhibit P.1 as his. DW2 also acknowledged that Exim Bank were the owners of that cheque leaf. The learned Judge had correctly found that Exhibit D.5 did not disclose other details (e.g. Bank Branch Code) to reveal the identity of that alleged cheque. To the extent that Exhibit P1 and the alleged cheque in Exhibit D5 had the same cheque number: 815213, we do not see how the High Court can be impeached for holding that the parties were toying with the same cheque number.

Much as Exhibit P1 contained disputed endorsements and stamps, this should be considered in the light of the whole evidence on record and the onus of proof in the case, as correctly reasoned by the learned Judge.

In our respectful view, these do not shake the genuineness of Exhibit P.1. Moreover, there was no dispute that T.R.A., the drawee of the cheque (Exhibit P1) did not receive its proceeds. We are satisfied, as was the High Court, that they could only have been received by MGS International Ltd, S.C.B's customer, on the purported cheque in Exhibit D.5. Its alleged drawer, Sky Oil Investment Ltd. had no account with Exim Bank. James Mollel who deposited it with S.C.B. was not even called to testify on its existence, origin or whereabouts. All considered, we find no merits in grounds 1, 2, and 3 of the appeal.

Ground 4 of the appeal faults the High Court in erroneously shifting the burden of proof upon S.C.B. to produce the alleged cheque in Exhibit D5.

Mr. Duncan contended that Exhibit D5 was sufficient proof of the existence of that cheque. S.C.B. had no duty at law or otherwise to keep a copy or maintain an electronic image of the cheque.

Disagreeing, Mr. Lutema submitted that the learned Judge had properly placed the burden of proof on the appellant to produce the cheque in Exhibit D.5. It was a matter within S.C.B's knowledge. The cheque was alleged by S.C.B. and its existence should in law be proved by it. There was also no primary evidence to show that it properly went

through the clearing house process for any querries to have been raised by Exim Bank. Furthermore, DW2, DW3 and DW4 did not say that it was bank practice to destroy all processed and cleared cheques. A prudent banker, he submitted, would have kept a copy in the course of normal banking business.

The learned Judge opined that under section 115 of the Evidence Act, Cap 6, R.E. 2002 the burden of proof of the existence of the cheque in Exhibit D5 was on S.C.B. He found out that it had failed to discharge that burden. He reasoned:

> *"On the basis of onus, I think the Plaintiff (i.e. Respondents) have discharged their burden of proof and shown that most probably the Defendant must have dealt with the same cheque; while the Defendant has failed to prove that there was any other cheque other than Exhibit P1, which was deposited through Exh D5 and which they cleared in favour of their customer, MGS International (T) Ltd. And since they were the last to handle the cheque deposited by Sky Oil, they were in a better position to know where it is, but have failed to*

produce even a copy of the cheque.

.....

I endorse the opinion of PW2 that it was a matter of banking practice and prudence to do so. The Defendant's failure to keep a copy of the cheque deposited by Sky Oil or to produce it if they have it, works adversely against them".

Section 115 of the Evidence Act provides:

"115. In civil proceedings where any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

In our view, bearing in mind the evidence, the strength or otherwise of the parties case to a reasonable extent rested on the competing evidence between Exhibits P1 and Exhibit D5. The existence of the cheque in Exhibit D.5 was alleged by S.C.B. The High Court validly framed as an issue for its determination, whether the cheque drawn by Sky Oil Investment Ltd. ever existed. It answered the question in the negative.

The record is clear that neither primary nor secondary evidence of the alleged cheque in Exhibit D5 was tendered and admitted in court. The person who deposited it, (i.e. James Mollel) was not produced and

examined by S.C.B. The bank teller, 83k who received it on 13/5/2005 was also not called to testify by S.C.B. Furthermore, DW 5 the Sales and Marketing Manager of MGS International (T) Ltd had not even seen that cheque. That cheque could not have been in possession of Exim Bank given that its drawer, Sky Oil Investment Ltd. was not its customer. Exim Bank produced Exhibit P.1 drawn by its customer, Nat Oil.

As opined by the learned Judge, since S.C.B. was the last to handle the cheque in Exhibit D5, they were in a better position to know where it was and had failed to produce a copy. The cheque, to say the least, was within S.C.B's special knowledge, having handled it and in its own admission, collected it for payment. While it is not our purpose in this appeal to set any banking standard, in the particular circumstances of the case, the availability of technological and archival processes and the fraudulent banking transactions revealed, we are not convinced of the reasons advanced by Mr. Duncan that for a Bank to keep a copy of that cheque would have been a monumental task. S.C.B. had a separate unit dealing with archives (DW2). Prudent banking dictated at least a copy of it to have been kept by the Appellant (PW2). The trial court agreed that it was prudent to do so, and so do we. In the result, we find no substance in this ground of appeal.

Ground 5 of the appeal faults the learned Judge in finding that the appellant acted in bad faith and was negligent in processing the cheque in Exhibit D.5.

Mr. Duncan vehemently submitted that as S.C.B. acted in good faith and without negligence in the normal course of banking business, it enjoyed the protection of section 85(1) and (2) of the Bills of Exchange Act, Cap 215 R.E. 2002. Furthermore, he contented that the true owner of Exhibit P1 was T.R.A. and not the Respondents. That much as T.R.A. did not receive Exhibit P1, it remained the true owner as the cheque was drawn in its favour for payment of a tax debt that Nat Oil owed. It was T.R.A. as true owner that had the right to an action for wrongful conversion, not the Respondents.

Mr. Duncan submitted that S.C.B. fulfilled its duty as required under section 45 the Bills of Exchange Act. Relying on **Orbit Mining and Trading Company Ltd V. West Minister Bank Ltd** (1962) 3 All ER 565, he argued that the duty of S.C.B. to make an inquiry or scrutinize the signatures of the drawers of all cheques accepted by it for collection only arose where there was something out of the ordinary. There was none in this case. S.C.B. had discharged its duty of care when it presented the cheque in Exhibit D. 5 for clearance.

Relying on **Silayo V. C.R.D.B.** (1996) Ltd, (2002),1 E.A. 288, he submitted that notice of loss or defect in the title of Exhibit P1 was only known to the Respondents and such defects according to the clearing house process were to be brought to the attention of S.C.B. by Exim Bank within four days of receipt of Exhibit P.1, which was not done. That as Exim Bank did not inform S.C.B. of the defects in MGS International (T) Ltd's title to that cheque, S.C.B. could not have known and its duty of care had been duly discharged.

In reply, Mr. Lutema submitted that S.C.B. had acted in bad faith and was negligent in processing the cheque in Exhibit D5. That as that cheque was not produced in evidence; no staff from Sky Oil Investment Ltd was called testify and S.C.B. took no action against MGS International (T) Ltd. despite acknowledging that cheque substitution fraud had taken place, no protection under section 85(1) of the Bills of Exchange Act could be enjoyed by S.C.B. In addition, Mr Lutema submitted that S.C.B. was negligent in that there was no evidence that the alleged cheque in Exhibit D5 was endorsed by the payee. The appellant, he urged, did not want to spill the beans as for unexplained reasons, it was protecting MGS International (T) Ltd, which it did not even join as a party to these proceedings.

On the question, who was the true owner of the cheque, Mr. Lutema submitted that as Exhibit P1 was fraudulently interfered with through S.C.B. to pay a different person, and did not benefit T.R.A., its true owner remained the Nat Oil, the drawer. There was no other person than Nat Oil who had been kept out of its money who could claim to be its true owner.

Relying on **Tackwell V. Barclays Bank plc** (1980) I All ER 676, the learned Judge imputed an absence of good faith on S.C.B. as it had not produced a copy of the cheque in Exhibit D.5; it had not offered another electronic journal entry to contradict Exhibit P.2 and relevant witnesses among its staff who dealt with that particular cheque had not been called to testify.

He opined that the circumstances in which the cheque in Exhibit D.5 had been presented for collection were so unusual an act of the ordinary course of banking business that S.C.B. ought to have made further inquiries of the customer and the Respondents. One such circumstance being that there was no evidence that the cheque in Exhibit D.5 was first received by M.G.S. International (T) Ltd, which would have indicated by its endorsement at the back of the non-produced cheque.

With regard to negligence, the learned Judge found out:

"So, failure to produce a copy or any record of the cheque deposited by Sky Oil or the schedule of cheque approved by the Clearance Manager other than Exhibit P.2 and the non-production of any official of the Defendant involved in the MICR processing of the alleged cheque in question as witnesses and the circumstances on which the cheque was received and processed, very strongly suggest that, if there was any such cheque the Defendant dealt with it negligently, and lost it or deliberately withheld its production.....

My view is that if they did not keep a copy of the Sky Oil cheque, it was sheer negligence. If they kept a copy and later destroyed it, or made it disappear this was evidence of want of good faith".

On the debated issue who was the cheque's true owner, the learned Judge relying on **InterCom Services Ltd and Others v Standard Chartered Bank Ltd** (2002) E. A. 391 (HC Kenya) where the court observed that where a cheque is forged, the drawer remains the owner, but where it is not forged, the payee becomes the owner, opined that the cheque did not belong to T.R.A. as it never reached it. The cheque and its

proceeds, he found out, belonged to the Respondents as persons immediately entitled to revisionary possession and who were entitled to maintain an action for wrongful conversion.

Now, section 85 (1) of the Bills of Exchange Act, which applies to cheques is pivoted to this ground of appeal. It provides:

"85-(1) Where a banker in good faith and without negligence-

(a) receives payment for a customer of an instrument to which this section applies, or

(b) having credited a witness account with the amount of an instrument to which this section applies, receives payment thereof for him, and the customer has no title, or has a defective title, to the instrument, the banker shall not incur any liability to the true owner of the instrument by reason of having received payment thereof".

The Bills of Exchange Act does not define who is to be considered the 'true owner' of a cheque under section 85(1). Bearing in mind the intended purposes of section 85, which includes the protection of bankers collecting payment of cheques and other instruments and the particular circumstances of the case, we would agree with the learned Judge that the

true owner of the cheque could not have been T.R.A., the intended drawee, who neither received it nor its proceeds. In our judgment, at the time of its conversion, the true owner remained the Respondents who had an immediate possessory right over it. Its true owner could also not have been M.G.S. International (T) Ltd as it did not have any title in the cheque (Exhibit P.1).

With regard to negligence, **Halsbury's Laws of England,** vol 3(1), para 215 states:

> *"if the banker wishes to plead statutory protection, his dealings throughout must be in good faith and without negligence. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of the true owner. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arose doubts in the banker's mind and cause him to make inquiries".*

In **Marfani and Co. Ltd. V Midland Bank Ltd** (1962) 2 All E.R. 573 at p. 579 the court stated:

> *"The onus of showing that he did take such reasonable care lies on the defendant bank. .....the usual matter with respect to which the banker must take reasonable care is to satisfy himself that his own customer's title to the cheque delivered to him for collection is not defective (i.e. that no other person is the true owner of it ".*

In **Thackwell v Barclays Bank plc's case** (*supra*) the court pertinently also stated:

> *"The standard by which negligence on the part of the bank was to be determined was whether the bank had taken reasonable care to satisfy itself that its customer's title to the cheque was not defective".*

Having closely reflected on the matter before us, with respect, contrary to what was advanced by Mr. Duncan, Exim Bank could not have informed S.C.B. of any defects in M.G.M. International (T) Ltd.'s title for the latter bank to be put on inquiry. There was no proof that Exim Bank received the cheque in Exhibit D.5. as Sky Oil Investment Ltd. was not its customer.

Moreover, in the absence of an electronic journal entry in respect of that alleged cheque, we are inclined to agree with the High Court that that instrument, if any, was not channeled through the clearing process. The evidence is that the MICR process is capable of detacting genuine from forged cheques. S.C.B., therefore, could not have discharged its duty of care when it presented the cheque in Exhibit D5 for clearance, as strenuously urged by Mr. Duncan, as in the first place, there was no sufficient proof that that cheque ever existed.

That apart, we are of the settled view that the reasons and findings of the High Court on want of good faith and negligence that we have quoted above in this ground of appeal are well founded to warrant any interference. The learned Judge's findings are reinforced when account is taken of the established fact that S.C.B. had collected and processed the cheque (Exhibit P.1) on 16/5/2005 and M.G.S. International (T) Ltd had no title in it. Accordingly, we find no merit in this ground of appeal.

Ground 6 of the appeal faults the learned Judge's finding in law and fact that the appellant had wrongly converted the proceeds of the cheque (Exhibit P.1.).

Relying on section 64(1) of the Bills of Exchange Act and **Smith and Another V LLyods TSB Bank plc, Harvey Jones Ltd v Woolwich plc**

(2001) 1 All E.R. 424, Mr. Duncan contended that the cheque (Exhibit P1), materially altered by forged endorsements and stamps, was a worthless piece of paper on which no claim for wrongful conversion could be brought.

On the other hand, Mr. Lutema submitted that the evidence fully established that the instrument (Exhibit P1) contained all the genuine facts of a cheque.

We need not be unnecessarily detained by this ground of appeal, suffiently addressed earlier. The Respondents remained the true owners of the cheque (Exhibit P.1.), which was wrongly converted to pay a person all together different from its intended drawee, the T.R.A. The endorsements and stamps on it were insufficient to shake its foundation that it was a genuine cheque that was received, collected, and processed for payment by S.C.B. Accordingly, we find no merit in this ground of appeal.

Interrelated, grounds 7,8 and 10 of the appeal can be conveniently dealt with together. The challenge mounted by the Appellant is that the learned Judge erred in law and fact, in failing to consider Nat Oil's negligence in dealing with Exhibit P1; in the non-application of the principle *commodum ex injuria non oritur* (no advantage in law arises out of a wrong) in relation to the negligent it had committed, which occasioned the

loss; and the non-consideration of the active role Nat Oil and its employees had played as the architects and organizers of the fraudulent transaction.

Mr. Duncan forcefully submitted that Nat Oil and its employees were neglight in dealing with the cheque (Exhibit P1). Public policy was against allowing PW4, a criminal culprit from benefiting out of the wrong he had committed in not delivering the cheque (Exhibit P1) to T.R.A., which was the proximate cause of the fraud. That as negligence was pleaded in the written statement of defence and proved, it ought to have constituted a defence to wrongful conversion. The trial court, he urged, had a duty to apportion the responsibility between the parties and to determine the degree of liability which fell on the Respondents.

On his part, Mr. Lutema submitted that as no vicarious liability attaches to banking law, the acts of Nat Oil employees could not be attributed to it. Relying on **Tai Cotton Mill Ltd. V. Liu Chong Hing Bank Ltd and Others** (1985) 2 All E.R. 947, p. 954 where the Court held that the customer of a bank was not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment because such duties were not necessary mandates of the bank-customer relationship since the business of banking was not the business of the customer but that of the bank and

forgeries was a risk of the service which the bank offered, he submitted that even if the acts of Nat Oil employees were negligent or fraudulent, they were not the proximate cause of the cheque substitution fraud. That in the absence of contributory negligence, there could be no sharing of liability.

In a succinct rejoinder, Mr. Duncan submitted that **Tai Cotton Mill Ltd.** case was distinguishable to the instant case, as Nat Oil was not S.C.B's customer.

To begin with, we are of the decided view that **Tai Cotton Mill Ltd case** is of no assistance to the Respondents as its facts are clearly distinguishable to the instant case. Therein, the cheques were forged by an accounts clerk of the company, while in this case the learned Judge had correctly found out that the existence of a forged cheque was a matter of speculation and conjecture.

Considering the matter *sub judice*, the learned Judge refrained from commenting on the credibility of PW4. He was facing a criminal charge in respect of Exhibit P.1. Agreeing with the legal maxin, no man can take advantage of his wrong, he was of the view that it was not applicable in the case at hand as he had already found out that fraud must have been committed in connection with the cheque (Exhibit P.1). He opined that it

was not against public policy to afford the relief sought by the Respondents and that if there was any illegality on their part, it was not proximate to the tort. He also found out that none of the commissions or omissions done by Nat Oil could have led to what took place, if S.C.B. had been on the look out, honest and prudent. He relied on **Quinn V. Leathern** (1901) A.C. 497 (1900-3) All E.R. 1 at p. 17 for the position that at common law, a plaintiff's contributory negligence is not a defence in the case of an intentional tort.

Going by S.C.B's written statement of defence (paragraph 15), it had alleged that Nat Oil and its employees had been, on all fours, negligent in not delivering Exhibit P.1 to T.R.A. and had not obtained a genuine receipt from it for the cheque. The learned Judge considered DW2, a T.R.A. official, a witness of truth. In our considered view, it was categorically proved that Exhibit P.1 was not delivered to TRA by PW4, as he had untruthfully claimed. Moreover, Exhibit D3, a receipt from T.R.A. brought back to Nat Oil by DW4, was not genuine. T.R.A. had no account with S.C.B. Exim Bank also did not raise any complaint with S.C.B. within four days of its receipt of Exhibit P.1. It only did so, on 22/07/2005.

Taking into account that the tort of wrongful conversion is one of strict liability (See, **Kuwait Airways Corp V Iraqi Airways Company**

and Others (2002) UKHL 19, para.129), in our respectful view, once it has been correctly found by the High Court that S.C.B. had wrongfully converted the cheque (Exhibit P.1) and its immediate cause being attributable to the absence of good faith and negligence in collecting and paying its proceeds to someone other than T.R.A., the intended rightful drawee, not much room is left for Nat Oil's negligence, if any, to completely offset the strict liability imposed by the action. We think that in a way, by imputing negligence on Nat Oil what the Appellant expects to achieve is to neutralize its own proved negligence in a strict liability tort. The learned Judge had correctly found out and for all the reasons afforded earlier, we agree that the immediate cause of the wrongful conversion of the cheque (Exhibit P.1) was the want of good faith and negligence on the part of the appellant.

Furthermore, it is doubtful that the defence of contributory negligence is available at common law (See, **Clark and Lindsel on Torts,** 16th Ed, para 13-156). We also stand guided by **Boma Manufacturing Ltd. V. Canadian Imperial of Commerce** (1996)3 S.C.R. 727, where the Supreme Court of Canada observed:

"the notion of strict liability involved in an action for conversion is prima facie antithetical to the concept of contributory negligence" (para. 32)

and held:

" As a matter of principle contributory negligence is not available in the context of a strict liability tort. If the contributory negligence approach is to be introduced into this area of law, it must be at the instance of the Legislative branch" (para. 35).

One more remark. On the above matter and the facts as found, we do not think that fairness and the justice of the case would be complete by leaving unattended and of no consequence all together the acts of Nat Oil and PW4 in not delivering Exhibit P1 to T.R.A., the intended payee. This matter, we think ought to have been validly visited by the trial Court in its assessment of damages.

In the result, we find no merit in grounds 7, 8 and 10 of appeal.

The remaining ground of the appeal i.e. 9 alleges that the learned Judge erred in law and fact in finding the appellant guilty of an intentional tort. Mr. Duncan submitted that the High Court was wrong in imposing a state of mind, i.e. intention, on S.C.B., a company. Intention could not

have been proved by the mere failure to produce a copy of the cheque in Exhibit D.5. The issue of intention, he urged, was never pleaded, argued or proved. It had been raised by the learned Judge, whose finding had no factual or legal basis.

Opposed, Mr. Lutema submitted that the issue was not raised *suo motu* by the learned Judge. Rather, bad faith was a state of mind and could be interpreted from acts, omissions or words. The use of the phrase 'intentional tort' by the learned Judge arose out of the clear implication of the proceedings.

Considering the judgment, we would agree with Mr. Lutema that the phrase 'intentional tort' was coined as this was an action for wrongful conversion. On that tort, **V. H. Harpwood** in **Modern Tort Law**, 7th Ed. para 17.1.2 states:

> *"It is an intentional tort that may be committed in a variety of ways".*

The learned authors **Ratanlal and Dhirajlal** in **The Law of Torts**, 26th Ed., p. 454 observe:

> *"If a person deals with a chattel in a manner which is necessarily inconsistent with the right of the plaintiff, the dealing will be intentional and will amount to conversion,*

even if he honestly belived that he was entitled to do so,

and he did not know of the right held by the plaintiff".

That said, in our respectful view, the learned Judge was entitled to infer intention on the part of S.C.B. in the way it dealt with the cheque (Exhibit P.1) and in a manner inconsistent with the right of its true owners that resulted in deprivation of the amount of the cheque.

We, therefore, find no merit in this ground of appeal.

Finally, we deal with damages. The learned Judge awarded the Respondents refund of Tz 175,809,754/= being the amount of the cheque (Exhibit P.1) with interest at 21% per annum from 16/5/2005 to the date of Judgment; Tz Shs 10,000,000/= as general damages for wrongful conversion; interest of the decretal sum at the court rate of 7% from date of judgment to that of full payment and costs.

With regard to general damages, with respect, we are of the considered view that the High Court's assessment of general damages should have taken into account the Respondents' lack of mitigation. They were under a duty to mitigate the loss resulting from the Defendant's tort (See, **Clerk and Lindsel on Torts,** *(supra,* para. 27-06.) S.C.B. had sufficiently established that PW4 did not deliver the cheque (Exhibit P.1) to the T.R.A. By not doing so, Nat Oil put that cheque at the risk of fraud. A

hazard that could have been reasonably or prudently avoided. It ended up at S.C.B., where T.R.A. had no bank account. Moreover, Exim Bank did not raise any concerns with S.C.B. on the cheque (Exhibit P1) within four working days of its receipt, on 16/5/2005. It did, only on 22/7/2005, over two months later. Much as the cheque was genuine, as the trial court had correctly found, it had endorsements for special clearance and other clearance procedures that ought to have raised a doubt. It should have alerted S.C.B. within the allotted time.

On this evidence, we think that S.C.B. had discharged the burden that the Respondents had failed to take reasonable steps to mitigate the loss occasioned. Had the High Court properly taken into account this relevant factor in its assessment of the general damages awarded, we have no doubt in our minds that it would have reduced the amount. For our part, considering mitigation of loss, fairness and the justice of the case we are constrained to reduce the amount awarded as general damages to Tz Shs 5,000,000/=.

In the result and for all the above reasons, save for the alteration of the above amount as damages, which we hereby order, the appeal, without merit, is hereby dismissed with costs.

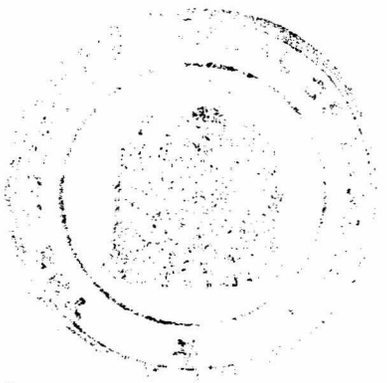
DATED at **DAR ES SALAAM** this 5th day of February, 2013.

M. C. OTHMAN
CHIEF JUSTICE

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



Z. A. MARUMA
DEPUTY REGISTRAR