IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And NDIKA, J.A.)

CIVIL APPEAL NO. 4 OF 2010

NATIONAL BANK OF COMMERCE LIMITED ..... APPELLANT

VERSUS

1. NATIONAL OIL TANZANIA LIMITED
2. STANDARD CHARTERED BANK (T) LIMITED } ..... RESPONDENTS

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

(Mruma, J.)

dated the 26th day of October, 2009
In
Commercial Case No. 120 of 2005

JUDGMENT OF THE COURT

26th October & 17th August, 2018

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania, Commercial Division (Mruma, J.) dated 26/10/2009 in Commercial Case No. 120 of 2005. In that case, the 1st respondent sued the appellant and the 2nd respondent claiming for the following reliefs:-

> *"(a) payment of Tshs 214,941,397/= per para 4 [of the plaint]*
>
> *(b) general damages*

(c) interest on (a) above at the rate of 25% p.a. from 8th April 2005 till judgment and further interest at the court's rate from the date of judgment till full payment.

(d) costs of and incidental to the suit, and

(e) any other reliefs the plaintiff may be found to be entitled."

Paragraph 4 of the plaint referred to above in item (a) of the claimed reliefs states as follows:-

"The plaintiff is claiming against the 1st and 2nd defendants jointly and severally for recovery and/or immediate refund of a sum of Tshs 241,941,397/= which amount was wrongly debited from the plaintiff's account No. 01113013404 held at the corporate branch of the 1st Defendant in Dar es Salaam City."

The facts giving rise to the suit and consequently this appeal, can be briefly stated as follows: On 21/3/2005, the 1st respondent, a company which was until the material time of the case, dealing with importation of petroleum products, drew a cheque on the appellant

bank in the sum of Tshs. 214,941,397.00. The proceeds of that cheque were to be credited in the account of the Commissioner for Customs and Excise, Tanzania Revenue Authority (hereinafter "the Commissioner"), maintained at the Bank of Tanzania (the BoT).

According to the 1st respondent's Country Manager, Salim Mohamed Hashim (PW1), who was one of the cheque signatories, the cheque which was admitted in evidence as Exhibit P.1, was delivered to the Commissioner together with the relevant Single Bill of Entry by one Mbene Mashauri Gabriel (PW2), the Import and Export Officer of the 1st respondent. However, after a period of about four months from the date of issue of the cheque, PW1 learnt that the amount had not been credited into the Commissioner's account. He learnt so because the Commissioner demanded payment on account that the tax for which the cheque was issued was still outstanding.

Upon inquiry, PW1 was informed by the appellant bank that the proceeds of the cheque had been paid through the 2nd respondent bank after clearance. Later on however, it was discovered that the proceeds were credited by the 2nd respondent into the account of a company known as MGS International Tanzania Limited (the MGS)

instead of the account of the Commissioner who was the rightful payee.

The crediting was done through another cheque which, except for the date of issue and the names of the payee and the drawer, has the same particulars contained in Exhibit P1. On that information, the 1st respondent reported the matter to the police whereby, after investigations, PW2 was charged with a criminal offence. That case was still pending at the time of the hearing of the suit. As stated above, the 1st respondent claimed that the appellant and the 2nd respondent acted negligently and thus claimed for the above stated reliefs.

The appellant's defence at the trial was that it did not act negligently in debiting the 1st respondent's account. Through the evidence of five witnesses, the appellant contended that it acted on the cheque which was issued by its customer, the 1st respondent after having been satisfied that the presented cheque (Exhibit P1) was genuine, having been cleared by the BoT's clearing house.

On its part, the 2nd respondent contended, through its three witnesses, that it acted on a genuine cheque which was presented to

it by its customer, Sky Oil Investment Limited (the Sky Oil). According to the witnesses, after receipt of the cheque, the same underwent the inward cheque clearance procedures and thereafter, it was forwarded to the clearing house where it was cleared for payment. It was its defence that the cheque was then taken to the drawee bank (the appellant bank) at Corporate Branch, Dar es Salaam whereupon, the 1st respondent's account No. 01113013404 was debited.

Having heard the evidence adduced by the parties' witnesses and after having considered the documentary evidence including exhibits P1 and another cheque, shown to have been drawn by the Sky Oil in favour of the MGS (Exhibit D6) as well as the submissions of the respective learned advocates, the trial court found that the appellant and the 2nd respondent acted negligently in debiting the 1st respondent's account and that they were, as a result, jointly and severally liable for the loss which was occasioned to the 1st respondent. They were ordered to refund the 1st respondent the claimed amount of Tshs. 214,941,397.00 with interest at the rate of 21% p.a. from the date of filling the suit to the date of payment in full. The 1st respondent was also awarded general damages of Tshs.

40,000,000.00. With regard to the costs of the suit, one of the reliefs which were claimed in the plaint, the trial court did not make any order to that effect.

The appellant was aggrieved by the decision of the trial court hence this appeal. On the other hand, the 2nd and 1st respondents have, by their notices filed on 12/2/2010 and 2/3/2010 respectively, preferred cross-appeals.

The memorandum of appeal filed by the appellant consists of three grounds. In the 1st and 2nd grounds of appeal, the appellant contends that the learned trial judge erred in deciding that the appellant acted negligently in debiting the sum of Tshs. 214,941,397.00 from the first respondent's account while in doing so, it acted according to the written instruction of its customer and in accordance with its mandate to the 1st respondent. Secondly, that the trial judge erred in finding that the appellant was jointly and severally liable with the 2nd respondent for the loss claimed by the 1st respondent.

With regard to the cross-appeals, whereas the 2nd respondent raised seven grounds, the 1st respondent raised one ground only. In

the 1st ground of the 2nd respondent's cross-appeal, it is contended that the learned trial judge erred in holding that the 2nd respondent collected the proceeds of cheque No. 000192 drawn by the 1st respondent in favour of the Commissioner while, according to the evidence, the collected proceeds belonged to the MGS, the 2nd respondent's customer. It is contended further in the 2nd and 5th grounds that the trial judge erred firstly, in failing to find that the 1st respondent could not in law maintain an action for wrongful conversion of the 1st respondent's cheque and secondly, that the 2nd respondent acted in good faith and without negligence in crediting the MGS account.

In the 3rd ground, the 2nd respondent faults the learned trial judge for holding that the cheque used to debit the 1st respondent's account in favour of the MGS was a forged cheque while there was no evidence to that effect. The decision of the High Court is further challenged in the 4th ground on the contention that the learned trial judge erred in failing to find that the 1st respondent was negligent in handling its cheque while there was sufficient evidence proving that it

played an active role in perpetrating the fraud which led to the transactions complained of.

The 6th and 7th grounds of the 2nd respondent's cross-appeal challenge the holding of the learned trial judge that the 2nd respondent and the appellant were jointly and severally liable for the 1st respondent's loss thus apportioning to them the awarded amounts. The 2nd respondent contends that the learned trial judge erred in failing to consider firstly, the degree and the extent of the 1st respondent's negligence and secondly, the fact that the 1st respondent was not a customer of the 2nd respondent and for that reason did not owe a duty of care to it.

On the part of the 1st respondent, its ground of the cross-appeal states as follows:-

> *"That the Honourable trial judge erred in law and in fact in not awarding costs of the suit to the 2nd respondent."*

At the hearing of the appeal, the appellant was represented by Mr. Dilip Kesaria, learned counsel. On their part, the 1st and 2nd respondents were represented by Mr. Melchisedeck Lutema and Mr.

Deusdedit Duncan, learned advocates, respectively. The learned counsel for the appellant had prior to the hearing date, duly filed his written submission in support of the appeal. Similarly, the learned counsel for the 2nd respondent had filed his written submission in support of the cross-appeal and therein incorporated his reply to the submission of the appellant's counsel. On his part, the learned counsel for the 1st respondent filed his written reply to both the appeal and the cross-appeal lodged by the 2nd respondent as well as his submission in support of the 1st respondent's cross-appeal.

We have given due consideration to the written as well as the oral submissions made by the learned counsel for the parties. Before we proceed to consider the grounds of appeal and the cross-appeals, we think it is apposite to state at the outset that the learned counsel for the 1st respondent did not oppose the appellant's appeal. In his written and oral submissions, Mr. Lutema supported Mr. Kesaria's arguments. At page 3 of his written submission in support of the 1st respondent's cross-appeal, Mr. Lutema states as follows:-

> *"We take the view that what happened was essentially cheque substitution fraud perpetrated*

by the second Respondent using a customer of the second Respondent who had an account with the second Respondent and who did several similar transactions to swindle funds with the aid of the second Respondent. The justice of the case thus demands that the second Respondent be condemned to solely shoulder the liabilities occasioned by the second Respondent's collusion in abating and aiding fraud."

The learned counsel concluded by expressing his agreement with the appellant that, the 2nd respondent should be held solely liable for the 1st respondent's loss under the principle of restitution as a result of having wrongly given credit to its customer, the MGS, on a forged cheque.

On his part, in his detailed written submission which he amplified in his oral arguments, Mr. Duncan opposed the appeal. His submission was preceded by a statement of facts of the case, the substantial part of it recounting that the 1st respondent issued a cheque (Exhibit P1) for payment of import duty tax to the

Commissioner in respect of imported fuel and petroleum products. He said further that according to the evidence of PW1 and PW2, Exhibit P1 together with a Single Bill of Entry was taken to the Commissioner by PW2 but it later transpired that the cheque was not received by the Commissioner.

The learned counsel then went on to submit on the applicable procedure as regards presentation of a cheques to the Commissioner and the final stage of debiting the paid amount from the drawer's account after clearance by the clearing house at the BoT. He referred to the evidence of PW2 that he left the cheque in question with an unnamed official of the TRA at the Commissioner's Office, and expressed that is where the problem leading to the dispute started.

In his submission, the learned counsel argued that the 1st respondent's cheque was not processed at the Commissioner's office because PW2 did not present it to that office. Relying on the evidence of DW9, Godfrey Nimrod Sigalla the learned counsel stated that it was at the stage of presenting the cheque to the Commissioner's office that a replica of the cheque used to debit the 1st respondent's account was made and consequently presented to

the 2nd respondent bank for payment. He stated as follows at pages 6 of his submission:-

> *"The fraudsters then changed the payee's name from the Commissioner for Customs and Excise to that of MGS International (T) Limited, a corporate customer of the 2nd Respondent, and the drawer's name was also changed from the 1st Respondent to Sky Oil Investment. This newly created cheque was then presented to the 2nd respondent bank by Sky Oil and the 2nd Respondent's bank issued a deposit slip (Exh. D7)"*

As stated above, the appellant raised three grounds of appeal. Submitting in support of the 1st and 2nd grounds, Mr. Kesaria challenged the findings of the learned trial judge that the appellant bank acted negligently in debiting the amount of Tshs. 214,941,397.00 from the account of the 1st respondent. He argued that, from the evidence of PW1 who admitted that Exhibit P.1 was drawn on the appellant bank and duly signed by the authorized signatories including PW1 and presented together with a cheque list

(Exhibit D3), the cheque paid by the appellant was a genuine one. The learned counsel states as follows in his written submission:-

> *"PW1 admits that Exhibit P1 tendered in evidence by him is the same cheque referred to in the cheque list (Exhibit – D3) and the one which was paid by NBC in compliance with NATOIL'S instructions, that the instrument which was received by NBC (from the clearing House) and paid by NBC is the genuine cheque."*

He added that, according to the evidence of DW3, Joseph Kasmir Kinabo DW4 Emmanuel Mapunda and DW5, Jonathan Ndosi, the debiting of Tshs. 214,941,397.00 from the 1st respondent's account was based on the genuine cheque (Exhibit P1). Relying on the provisions of section 60 (1) of the Bills of Exchange Act [Cap. 215 R.E. 2002] he stressed that, the appellant is protected for having proceeded to pay the cheque in compliance with the instructions of its customer contained in the cheque list (Exhibit D3) even if it transpired later, as has been the case here, that the 1st respondent's account was debited by using a forged cheque. On the contention

that the cheque (Exhibit P1) had disputed endorsements, the learned counsel argued that it was not incumbent upon the appellant to make inquiries with the Commissioner as to whether or not the endorsements were made under its authority. On the finding by the trial court that the appellant was negligent because the Commissioner did not have an account at the 2nd respondent's bank, Mr. Kesaria argued that the trial judge erred in failing to consider the evidence of DW8, Alleliyo Ngoyai Lowassa, to the effect that the TRA used to have an account at the 2nd respondent's bank which was once the agent for collection of taxes for the TRA and the evidence by the same witness that the deposit slip, which accompanied the cheque, was from the TRA.

On the other hand, in its 1st, 3rd, and 5th grounds of its cross-appeal, the 2nd respondent contends that the Sky Oil cheque is a genuine one while Exhibit P1 is a forged document and by acting on it to debit the 1st respondent's account, the appellant acted negligently. It was the learned counsel's argument that Exhibit P1 contains forged stamps and endorsements. He went on to argue that, cheque No. 000192 drawn by the 1st respondent in favour of the Commissioner is different from the one which was processed by the

2nd respondent in favour of MGS. It was his submission therefore that the MGS received the proceeds of the cheque drawn by the Sky Oil not the proceeds of Exhibit P.1. He states as follows at page 18 of his written submission:-

> *"The circumstances and factual evidence surrounding the case shows that there is another cheque Exh. D1 other than Exh P1 which was received and processed by the 2nd Respondent and whose proceeds were received by MGS International (T) Limited."*

Earlier on at page 7 of his written submission the learned counsel stated as follows;

> *"Upon its presentation, the 2nd Respondent presented the cheque for clearance through the clearing house at the Bank of Tanzania, and the Appellant cleared the cheque through the clearing process as elaborated by DW7, DW8 and DW9."*

We think the other cheque referred to by the learned counsel is exhibit D6 not D1 because exhibit D1 is a receipt which was allegedly

issued by the Commissioner to PW2 after presentation of Exhibit P1. In the circumstances we are, with respect, unable to agree with the 2nd respondents counsel that there was another cheque other than exhibits P1 and D6 which were involved in this case.

The 1st and 5th grounds of the 2nd respondent's cross-appeal were also premised on the contention that the said respondent did not act negligently in handling the cheque drawn by the Sky Oil. Mr. Duncan referred us to the evidence of DW3 and DW9 and argued that the 2nd respondent acted in good faith by debiting the 1st respondent's account through a cheque which was deposited through the pay-in slip dated 8/4/2005 (Exhibit D7). He also supported his submission by citing the case of **Barclays Bank Plc & Another v Bank of England** [1985] All ER 386.

Furthermore, in what we consider, to be an alternative argument, the learned counsel submitted that, the act of making payment could not form the basis of the 1st respondent's claim. He referred us to sections 64 and 85 of Caps. 215 and 219 respectively, the cases of **Smith & Another v Llyods TSB Bank Plc** [2001] 1 All ER 424 and **Thackwell v. Barclays Bank Plc** [1986]1 All ER 676. It

was his submission further that, since the 2nd respondent acted in good faith and without negligence, it is in law, protected from liability. He cited the decision of the High Court of Kenya in the case of **Intercom Service Ltd v. Standard Chartered Bank Ltd** [2002] 2 EA 391 in support of his argument that, as a collecting bank, the 2nd respondent acted in good faith.

Mr. Duncan argued further in the 6th ground of the 2nd respondent's cross-appeal firstly, that in apportioning the decretal sum, the trial court ought to have considered the extent of the negligence committed by the 1st respondent and secondly that, apart from negligence complained of by the 1st respondent, the 2nd respondent did not have any contractual relationship with the 1st respondent. Citing the cases of **Silayo v. CRDB** [2002] 1 EA 288 and **NBS v. Perma Shoe Company** [1988] TLR 224, the learned counsel argued that the 2nd respondent's duty to ensure the genuineness of the cheque, was only to its customer, not a third party. He contended further that, the 2nd respondent's duty ended when it delivered the cheque to the clearing house where, after clearance, that duty shifted to the paying bank.

The submission of the 2nd respondent's counsel was countered by the learned counsel for the 1st respondent. In a similarly detailed submission, Mr. Lutema contended that the trial judge was right in holding that the 2nd respondent collected the proceeds of Exhibit P1 drawn by the 1st respondent in favour of the Commissioner in the sum of Tshs. 214,941,397.00.

On grounds 1, 3, and 5 of the 2nd respondent's cross-appeal, Mr. Lutema argued that from the evidence of DW9, there was a cheque substitution whereby another cheque bearing the same particulars except the names of the drawer and the payee was substituted for cheque No.000192 (Exhibit P1). The name of the drawer was changed from the Commissioner to that of the MGS. According to the learned counsel, it was the substituted cheque which was used to debit the 1st respondent's account. He argued that, since that evidence was not disputed, the finding by the trial judge firstly, that the proceeds of cheque No. 000192 were paid to MGS and secondly, that Exhibit D6 was a forged cheque was based on admitted facts and that finding cannot be appealed against.

Furthermore, he contended that, since in his evidence DW2 agreed with the evidence of the 1st respondent's witnesses that Exhibit P1 was a genuine cheque and that to the contrary, Exhibit D6 was a forged document, it is improper in law to raise these points as grounds of appeal at this stage of the proceedings.

On the contention that the 2nd respondent acted in good faith, the 1st respondent's counsel submitted in reply that, since from the evidence of DW3, DW8 and DW9 the Sky Oil cheque did not go through a MICR reading process, the 2nd respondent was properly found liable for the loss which was occasioned to the 1st respondent. We wish to interpose here to remark that MICR stands for Magnetic Ink Character Recognition. A MICR reader is a device used by banks to read and recognise quickly and accurately the bank account number and other details painted onto cheques at the bottom in a special font with magnetic ink. This technology provides a secure and high speed method of scanning and authenticating cheques - See www.barcoderesource.com/micr.shtml accessed on 10th August, 2018).

In response to the 6th ground, Mr. Lutema's argued that, since that contention was not raised as a counter-claim, firstly, the trial court had no mandate of considering it and secondly, the point cannot in law be raised at this appellate stage of the proceedings. He stressed that, as a collecting bank, the 2nd respondent was to act in good faith and without negligence. On the contention that the 2nd respondent did not have a contractual relationship with the 1st respondent, he submitted that the nature of the 2nd respondent's liability was based on wrongful conversion, not on contractual relationship between the respondents. He submitted that the trial judge was correct in holding that the 1st respondent had a cause of action against the 2nd respondent.

To determine the issues arising from the considered grounds above, the starting point is the contention by the appellant and the 1st respondent that the Sky Oil cheque is a forged document while Exhibit P1 is a genuine cheque. In his judgment at page 214 of the record, the learned trial judge states as follows:-

"Exhibit D6 which the second defendant's bank would like this Court to believe in does not have an

outward clearance stamp which means that it was not cleared by them. This casts doubt on whether exhibit D6, a cheque purportedly issued by Sky Oil Investment Limited in favour of MGS International Tanzania Limited was ever forwarded to the clearing house at the Central Bank as required. I am saying so because the defendant did not lead any evidence to show that the said cheque was outwardly cleared."

The learned judge relied on other factors such as existence of contradiction in the evidence of DW9 and DW6 Idrisa Mohamed Mtawike as regards the person who deposited Exhibit D6 at the 2nd respondent's bank. Whereas it is the evidence of DW9, who tendered the deposit slip (Exhibit D7), that the cheque was deposited by an official of the MGS, according to DW6, the cheque was deposited by one James Mollel of the Sky Oil.

From the competing submissions of the advocates for the two parties, the issue is whether it was the appellant or the 2nd respondent which acted on a forged cheque. We need not be

detained much in determining this issue. From the facts, which were also restated by the learned counsel for the parties, it is not disputed that the 1st respondent drew a cheque, No. 000192 in the sum of Tshs. 214,947,397.00 (Exhibit P1) in favour of the Commissioner. The cheque was acted upon by the appellant after the same had been cleared at the clearing house. We therefore agree with both Mr. Kesaria and Mr. Lutema that the allegation by the 2nd respondent that Exhibit P1 is forged document is not correct. The contention was based on the allegation that the cheque has forged stamps and endorsements. The allegation was not however, substantiated by any evidence.

In the case of **Standard Chartered Bank Tanzania Limited v. National Oil Tanzania Limited and Exim Bank Tanzania Limited,** Civil Appeal No. 98 of 2008 (unreported) (hereinafter **Standard Chartered Bank case** (No. 1) cited by Mr. Kesaria, the facts of which are almost in all fours with the present case, similar argument was made; that the cheque (also Exhibit P1) was wrongly acted upon by the appellant in that case because it contained what

the appellant found to be forged stamps and endorsements. The Court disagreed with that argument in the following words:-

> *"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 TRA, the drawee of the cheque (Exhibit P.1) did not receive its proceeds."*

In the present case, there is also no dispute that Exhibit P1 was drawn by the 1st respondent in favour of the Commissioner. From the evidence of DW3, Joseph Kasmir Kinabo and DW4, Emmanuel Mapunda who dealt with inward cheques clearance procedures in their different capacities and DW5 Jonathan Ndosi, the person who conducted investigation after the 1st respondent had complained about the scam, we find that it was sufficiently established that Exhibit P.1 underwent the requisite clearance procedures at the

clearing house before the appellant acted on it to debit the 1st respondent's account. For these reasons, we agree with the learned trial judge that Exhibit P1 is a genuine cheque.

On the other hand, as correctly found by the trial court, there is no evidence showing that Exhibit D6 was cleared either at the clearing house or by the 2nd respondent. The learned trial judge stated as follows:-

> *"Exhibit D6 which the second defendant's bank would like this Court to believe in does not have an outward clearance stamp which means that it was not cleared by them. This casts doubt on whether exhibit D6, a cheque purportedly issued by Sky Oil Investment Limited in favour of MGS International Tanzania Limited was ever forwarded to the clearing house at the central Bank as required."*

He went on to state as follows:

> *"The uncontroverted testimony of DW3, that the cheque he received at the clearing house from the 2nd defendant bank is exhibit P1 coupled with the*

evidence of DW9 that exhibit D.6 is a forgery, and failure by the second defendant's bank to produce in evidence a list of cheques and deposit slips connected to this transaction, impute that some officials of the 2nd defendant bank may be part to the fraud or that they were not prudent in handling this issue."

The fact that the purported cheque was not cleared is plain on the face of that document. As stated by the learned trial judge, it does not have an outward clearance stamp. This cannot be deemed otherwise than imputation of bad intention on the part of the 2nd respondent's officials. Their omission to subject the purported cheque to the clearance process but yet used it as the basis for crediting the MGS' account is clear evidence of negligence or involvement in perpetration of the fraudulent act. This is because the perpetrators of the scam knew that the forged document would not have passed the MICR reading had the same been subjected to that process.

Apart from that finding however, the learned trial judge found both the appellant and the 2nd respondent liable for negligence. On

signatory of the plaintiff to clarify on these changes. I am saying so because the 1st defendant did not lead evidence that the plaintiff had ever paid the Commissioner through any other bank than the Central Bank so as to raise inference that this was the plaintiff's normal course of business and that is where the principle of reasonable man laid down in ***Birmingham case*** *(Supra) comes in...."*

[Emphasis added].

With due respect to the learned trial judge, we think his finding was based on misapprehension of the tendered evidence. From the undisputed evidence of DW8, the Commissioner used to have an account at the 2nd respondent when that bank used to act as the TRA agent in the collection of tax. The 2nd respondent did not lead evidence to show firstly, that the Commissioner closed that account and secondly, that the appellant was aware of the closure of the account at the time of the transaction in question.

Having re-evaluated the evidence on the record, we agree that the appellant did not act negligently in debiting the 1st respondent's account. We therefore find merit in the 1st and 2nd grounds of the appellant's appeal.

Since that finding suffices to dispose of the appellant's appeal there is no pressing need to consider the 3rd ground of its appeal. In the event, the appeal by the appellant is hereby allowed.

With regard to the 2nd respondent however, on the basis of the considerations elucidated above, like the learned trial judge, we are of the settled view that since Exhibit D6 is a forged document, a replica of Exhibit P1, which was substituted for the purpose of converting the proceeds of the genuine cheque by fraudulently crediting that amount into the account of the MGS, the 2nd respondent is liable for the occasioned loss. Although the 2nd respondent contended that it acted in good faith, it failed to lead evidence from the Sky Oil, if at all such company exists, to substantiate the contention that the purported cheque was issued by such a company and whether it was for a lawful payment. On the basis of the findings stated above, it follows that the argument in the

1st ground that the 2nd respondent did not collect the proceeds of Exhibit P1 and the contentions in the 1st, 3rd and 5th grounds of the 2nd respondent's cross-appeal lack merit.

The 2nd ground of the cross appeal raises the issue whether or not the 1st respondent had the right of action on the cheque which was drawn by it in favour of the Commissioner. Again there is no dispute that the proceeds of that cheque were not received by the Commissioner. In the circumstances, since the cheque did not reach the payee (the Commissioner), the 1st respondent remained the true owner thereof. In the **Standard Chartered Bank case** (No.1) which, as stated above, has facts, which are similar to the facts in the present case, after having considered S. 85 (1) of Cap. 215, the Court stated as follows:-

> *"The Bills of Exchange Act does not define who is to be considered the 'true owner' of a cheque under S. 85 (1). Bearing in mind the intended purpose of S.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 never 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 not have been M.G.S. International (T) Ltd as it did not have any title in the cheque (Exhibit P.1)."

The same position applies to the case at hand. We therefore find no merit in this ground as well. As for the contention in the 6th ground of the 2nd respondent's cross-appeal that it did not owe the 1st respondent a duty of care on account of absence of any contractual relationship, in our considered view, existence of that relationship is not essential because the claim was based on the tort of conversion which is a strict liability tort. – See the case of **Kuwait Airways Corporation v. Iraqi Airways Company and Others** [2002] UKAL 19 cited in the **Standard Chartered Bank case** (No.1). In the circumstances, the 1st respondent had the right of action.

On the 7th ground, the learned counsel submitted that the 1st respondent and its bank (the appellant) acted negligently, and thus they should have been found responsible on a shared liability basis. This, he argued, is because whereas through its employee, the 1st respondent perpetrated fraudulent acts leading to the forgery, its banker (the appellant) acted negligently and therefore, they ought to have been held liable against each other.

In reply, Mr. Lutema argued that according to the tendered evidence, it was not substantiated that the 1st respondent played an active role in facilitating the forgery. With regard to the acts of the 1st respondent's employee, the learned counsel argued that the principle of vicarious liability does not apply so as to exonerate the 2nd respondent from liability arising from its act of debiting the 1st respondent's account by using a forged document.

Having considered the submissions of the respective advocates for the respondents, we think the contention that the 1st respondent played a role in facilitating the forgery is not supported by evidence. The 2nd respondent's contention is, in our view based on the allegations raised against PW2 who, until the material time of the

suit, had a pending criminal case. In any case however, as submitted by Mr. Lutema, given the trite position of the law that vicarious liability principle is not applicable in the banking law, the 2nd respondent could not be exonerated on the ground of the acts committed by the 1st respondent's employee.

As stated above, the 1st respondent had also raised a cross-appeal which consists of one ground as shown above. In his submission, Mr. Lutema argued that the trial court ought to have awarded costs to the 1st respondent. The gravamen of his argument is that, being a successful party in the suit, it was entitled to be awarded costs of the suit but the learned trial judge failed to do so without assigning any reasons for the omission. He prayed for an order awarding costs to the 1st respondent.

The principle as regards costs is that a successful party is entitled to be reimbursed the expenses spent in prosecuting or defending a case. Where the court decides otherwise, it is enjoined to assign reasons for so doing. In the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** [1995] TLR 205, the Court stated as follows on that position:

"Costs follow the event, where the court directs that any costs shall not follow the event the court shall state its reasons in writing."

As stated above, the purpose of awarding costs is to reimburse the party the expenses which, but for the act of the losing party, would not have incurred. It is for this reason that in the case of **Shabani Fundi v. Leonard Clemence**, Civil Appeal No. 38 of 2014 (unreported), the Court had this to say:-

"Costs are a panacea that soothes souls of litigations that, in the absence of sound reasons, the Court will not be prepared to deprive the successful litigant of. These are the usual consequences of litigation to which the appellant is not exempt."

Guided by the above stated principle, we agree with the learned counsel for the 1st respondent that the learned trial judge erred when he failed to award costs. In the event, we allow the 1st respondent's cross-appeal. It shall have its costs of the suit.

On the basis of the foregoing, the appellant's appeal and the 1st respondent's cross-appeal are allowed with costs. On the other hand, the cross-appeal by 2nd respondent is dismissed. In the event, the 2nd respondent is solely responsible to pay to the 1st respondent, the sums of money decreed by the High Court.

DATED at **DAR ES SALAAM** this 15th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL