IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 322 OF 2019

NATIONAL BANK OF COMMERCE LIMITED.....APPELLANT

VERSUS

TANCOAL ENERGY LIMITED.....RESPONDENT

STEEL ROLLING MILLS LIMITED
(UNDER RECEIVERSHIP) .....THIRD PARTY

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

(Mwandambo, J.)

dated the 4th day of March, 2019

in

Commercial Case No. 39 of 2016

.....

JUDGMENT OF THE COURT

28th September & 15th December, 2022

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court) in Commercial Case No. 39 of 2016. In that case, the appellant sued the respondent for payment of money at a tune of USD 469,894.50 being the value of the dishonored bill of exchange (the bill) payable by the third-party herein as a drawee plus interests accruing therefrom. In its written statement of defence, the respondent disputed the appellant's claims

and the stated liability. In addition, it raised a counterclaim of USD 230, 026.90 being the amount erroneously deposited in the respondent's account maintained by the appellant. The respondent also claimed for payment of USD 700,026.00 as special and general damages for the breach of the fiduciary duty by the appellant in dealing with clear and express instructions as the banker of the respondent. The respondent further prayed for payment of interests and costs of the suit.

Additionally, the respondent preferred a third-party notice against Steel Rolling Mills Limited (the third party), the drawee of the bill, claiming for payment of a sum of USD 469,894.50 being the amount due for supply of 2,132 tons of coal by way of indemnification, in the event, the respondent would be adjudged to be liable to pay the sum claimed by the appellant.

On its part, the third-party denied both the appellant and the respondent's claims and averred that, the respondent did not supply the 2,013 tons of coal as agreed and also, it did not at all accept the bill. It thus prayed for the dismissal of the suit and all claims against the respondent. However, on 23rd August, 2016, the trial court made a direction in terms of Order 1 rule 18 of the Civil Procedure Code to the effect that the liability of the third-party shall be determined separately

after the conclusion of the trial of the suit between the appellant and the respondent.

At the trial, the following seven issues were formulated by the trial court in order to determine the dispute between the parties: **one,** whether the plaintiff was the holder of the bill drawn by the defendant on 24th October, 2013 for the amount of USD 469,894.50; **two,** whether the bill upon maturity was dishonoured for nonpayment; **three,** whether the plaintiff sent the defendant notice of dishonour of the bill; **four,** whether the plaintiff is entitled to recover the amount of the bill from the defendant; **five,** whether the plaintiff was entitled to apply the amount of USD 230,026.90 deposited in the defendant's account maintained with the plaintiff to set-off the amount payable to the bank by the defendant on the amount of the dishonoured bill; **six,** whether the plaintiff had a duty to avalise the bill as requested by the defendant; and **seven,** to what reliefs are the parties entitled.

To prove the above issues, the appellant brought only one witness Wilson Nkuzi who testified as PW1 whilst the respondent had two witnesses, namely Anael Samuel (DW1) and Benjamin August (DW2). The material facts which arose from the evidence by both parties can be recapitulated as follows.

The appellant and the respondent had a banker customer relationship. The dispute arose when the respondent requested the appellant to submit various document to the Standard Chartered Bank Uganda (SCBU) including the bill. On 17th September, 2013, the respondent had drawn the bill of the sum of USD 469,894.50 which was addressed to the third-party (the drawee) to be payable at sight. However, that was not the case as at the instance of the respondent, amendment was effected to the original documents and the bill was now to be paid 120 days upon submission.

Further, on 5th November, 2013, the appellant was informed by SCBU that the bill was accepted by the third-party and that it would mature on 13th February, 2014 being 120 days from the date of its submission. However, on 5th November, 2013 the respondent negotiated the bill for value to the appellant who agreed to discount it at the rate of 100% with 8% interest and the transaction fee of USD 500.00. The appellant discounted the bill on 6th November, 2013 and paid USD 469,894.50 to the respondent in its account maintained with the appellant.

Going forward, on 20th February, 2014, the SCBU informed the appellant that the bill had been dishonoured for nonpayment which

information was transmitted to the respondent on the same day. It was the appellant's case that following the dishonour of the bill, the respondent was liable to pay the amount thereon. The respondent did not head to the appellant's several demands to pay the amount of the bill.

On the other hand, the respondent did not deny that she drew the bill addressed to the third-party. However, it denied that the bill was dishonoured for nonpayment and contented that it was not settled upon maturity due to the appellant's negligence to request the SCBU to avalise the bill despite repeated requests and reminders to do so.

It was the respondent's further testimony that the appellant admitted to have not made a request to SCBU to avalise the bill. It maintained that the appellant being a commercial bank, ought to have taken all necessary steps to have the bill avalised by the SCBU and that failure to do so amounted to breach of a fundamental fiduciary duty owed to its customer.

The respondent denied the appellant's claim on the bill and maintained that it was also not entitled to the amount of USD 230,026.90 which it unlawfully withheld after being erroneously credited in the respondent's dormant account which was maintained by the

appellant. As such, the respondent prayed for the reliefs indicated above.

At the end of the trial, the trial court found that the appellant was a holder of the bill which was dishonoured for nonpayment. It was found further that the appellant had the duty to request the SCBU to avalise the bill and since it failed to do so, it deprived itself the benefit to exercise its statutory right to recourse against the drawer of the bill. It was the further finding of the trial court that the appellant was not even entitled to set-off the amount of USD 230,026.90 deposited in the respondent's account. The appellant was, therefore, ordered to pay the respondent USD 230,026.90 plus interest of 12% per annum from the date when the amount was unlawfully withheld to the date of judgment. The trial court also awarded interest of 7% per annum on the decretal sum from the date of judgment until full satisfaction and costs of the suit and the counterclaim. The trial court thus dismissed the appellant's suit and partly allowed the respondent's counterclaim as indicated herein.

Aggrieved by that decision, the appellant has approached the court upon the following five grounds of appeal:

1. *The trial Judge erred both in fact and law in making a finding that the appellant had duty to communicate the respondent's instructions to Standard Chartered Bank Uganda to avalise the bill;*

2. *The trial Judge erred both in fact and law in making a finding that the failure to communicate the request to avalise the bill extinguished the appellant's right as a holder in due course to recover from the bill of exchange;*

3. *The trial Judge erred both in fact and law in making a finding that the appellant was not entitled to set-off of the amount of USD 230,026.90 from the Respondent's account maintained with the appellant; and*

4. *The trial Judge erred both in fact and law by making a finding that the appellant was liable to pay to the respondent interest at the rate of 12% per annum on the amount of USD 230,026.90 from the date of withholding of the said amount to the date of judgment.*

At the hearing of the appeal, Mr. Joseph Nuwamanya, learned advocate, represented the appellant whilst the respondent had the service of Mr. Heriel Munishi, also learned advocate. On its part, though duly served through its counsel by the name of FK Law Chambers on 2nd

September, 2022, the third-party did not enter appearance. As such, the hearing proceeded in its absence in terms of rule 112 (2) of the Tanzania Court of Appeal Rules (the Rules).

The learned counsel for the appellant and the respondent had earlier on filed written submissions for and against the grounds of appeal respectively in terms of rule 106 (1) and (7) of the Rules, which were adopted without any oral clarifications.

In his written submissions, Mr. Nuwamanya formulated and discussed the following two issues arising from the grounds of appeal, that; **one,** whether the appellant had a duty to communicate the respondent's instructions to SCBU to avalise the bill (to guarantee the bill); and **two,** whether the appellant's remedies as a holder of the bill in due course can be extinguished by virtue of the claimed failure by the appellant to communicate the respondent's instructions to SCBU.

As regards the first issue, it was Mr. Nuwamanya's argument that it was not the duty of the appellant to communicate to the SCBU the instructions to have the bill avalised since the said instructions were not made in a proper and accepted manner. The learned counsel contended that this position was well elaborated by PW1 who testified that instructions received from a client has to be verified and to meet certain

criteria in order to be acted upon by the bank and that the respondent was well aware of that fact. He submitted that the alleged instructions to the appellant did not meet the required criteria hence the appellant was not obliged to communicate it to the SCBU. Mr. Nuwamanya argued further that the respondent was well aware that its request to have the bill avalised had not been communicated to the SCBU and, in that case, the appellant cannot be held negligent for the non-payment of the bill. He submitted further that in order to hold the appellant negligent, the respondent ought to have proved that there was a legal duty of care by the appellant towards the respondent and that it had in breach of it.

In relation to the second issue, the appellant's counsel submitted that, as rightly found by the trial court, upon discounting the bill and crediting the respondent's account with USD 469,894.50 being the face value of the bill, the appellant assumed the title of holder for value of the bill whereas the respondent remained the drawer and the third-party the drawee. To support his arguments, he cited sections 31 (4) and 27 (2) of the Bills of Exchange Act [CAP 215 R.E. 2002] (henceforth the Act). It was the contention of Mr. Nuwamanya that, despite the said holding by the trial court, it overlooked the fact that the appellant and the respondent were not only sharing a banker customer relationship but also, they were holding a holder-drawer relationship which is

consistent with sections 47, 48 and 55 (1) of the Act. He contended that, it is trite law that, when a bill is dishonoured by the drawee, the drawer is liable to compensate the holder provided that notice of the dishonour is served to the drawer. That, the appellant having duly notified the respondent of the dishonour as evidenced in exhibit P8B, it is entitled to recover the value of the bill from the drawer, referring further to section 57 of the Act. The learned counsel continued to argue that, having been compelled to pay the bill, the drawer is entitled to proceed against the third-party as the drawee. He contended that, in the circumstance, the alleged negligence cannot stand to waive the appellant's statutory right against the drawer of the bill who in this case is the respondent. Finally, relying on his submissions, Mr. Nuwamanya urged us to quash the decision of the trial court and allow the appeal and proceed to hold the respondent liable to pay the appellant USD 469,894.50 with the applicable interest at commercial rate of 8% per annum from the date of maturity of the bill.

On his part, the respondent's counsel opposed the appeal and submitted in respect of the first issue as formulated by Mr. Nuwamanya that the appellant was duty bound to communicate the respondent's instructions since at that juncture the bank was the agent of the respondent, its customer. He argued that, on several occasions, as

shown in exhibits D2A and D2B, the respondent had instructed the appellant to request the SCBU to avalise the bill but it neither adhered to those clear instructions nor advised the respondent on its unwillingness to do so. The learned counsel contended further that, the appellant's action showed a high degree of unprofessionalism and negligence in dealing with that issue. That, the avalisation of the bill would have guaranteed its payment by the third-party upon its maturity.

Additionally, the respondent's counsel submitted that the SCBU was ready to avalise the bill upon instructions to do so from the appellant. Reference was made to exhibit D2B being the e-mail from Mr. Okuku of the SCBU to DW1 to that effect which was part of the thread communication in which Mr. Melvin Seprapasen, the officer of the appellant must have seen it. Furthermore, it was contended that upon realization that the bill had not been avalised, Mr. Seprapasen through exhibit D3 promised to investigate the matter and share the results with the respondent but nothing had been forthcoming. The respondent disputed the appellant's contention that the respondent ought to have known that the instructions to request avalisation of the bill had not been communicated to SCBU. That, although, PW1 testified that in order to act on the instructions to request for avalisation, certain criteria must be met, he, however, did not state the alleged criteria. And in any case,

the appellant being a commercial bank with specific department that handles international trade financial transactions was expected to be conscious of the established practices such as following clear instructions from the respondent so as to guarantee compensation in case of the dishonour of the bill as it happened.

Regarding the second issue, the respondent's counsel argued that the non-payment of the bill was caused by the appellant's negligence for failing to follow clear instructions issued by the respondent. That, had the appellant requested for the avalisation, the bill would have been paid by the SCBU upon its dishonour. In that case, argued the learned counsel, permitting the appellant to exercise the statutory right of recourse against the respondent will amount to unfair prejudice on her and it will open floodgates and excite laxity and negligent on commercial banks, which as regulated entities, are held to a higher standard, when acting on duly issued instructions from their customers. On that note, the respondent's counsel urged us to dismiss the appeal with costs.

We have considered the parties' submissions and we also find it proper to decide the grounds of appeal on the basis of the two issues canvassed by the learned counsel for the parties. The first issue is

whether the appellant had obligations to communicate to the SCBU the respondent's instructions to avalise the bill.

Before we proceed further, we find it necessary to make a brief exposition of the term avalisation as it applies in bills of exchange. As we understand the law, payment of a bill of exchange may be either at sight or at a future date. In the former situation, the buyer is obliged to settle the payment before the documents are released whereas in the latter situation, documents are released soon upon the buyer accepts the draft drawn on him under which, payment would ordinarily be effected 90 or 120 days after receipt of the documents. Obviously, therefore, as between the two, the latter has inherent risk in that, the buyer can default in terms of payment having received the documents and goods. To mitigate the risk, therefore, an aval may be required to guarantee payment of the purchase price. An aval, according to **Investopedia.com** which is a financial media website:

> *"Is the act of having a third party (usually a bank or landing institution) guarantee the obligations of a buyer to a seller per the terms of a contract, such as a promissory note of purchase agreement."*

Since the default risk is very rare in the sight bill, avalisation is not required in such kind of arrangement. It is only relevant in a time bill. Commenting on this, **Robert Lombardi,** in his *Avals and Quasi-Indorsements of Negotiable Instruments: A Comparison of Civil Law and Common Law Approach,* in **Monash University Law Review [Vol. 14, December 1988],** stated at page 265 as follows:

> *"First, only a time bill, can be avalised. As aval cannot be given by a drawer or acceptor as they are already liable on the bill and an aval is, by its nature, the added liability of a stranger to the bill."*

In the case at hand, initially, the bill took the form of a sight draft (exhibit P1). For the reason best known to the respondent, the same was amended on 24th October, 2013 so that it became a time bill in which payment would be due 120 days from the date of receipt of the documents (exhibit P3). In accordance with the facts in paragraph 16 of the amended counterclaim, much as it is in exhibit DA2, the instruction to the appellant to request for avalisation was on 9th October, 2013. At that time, the bill at hand was payable at sight. In view of the comments of the learned jurist **Lombardi** in the article just referred which we entirely associate ourselves with, avalisation was not required. In the

circumstance, it cannot be said that in not requesting the SCBU to avalise the bill, the appellant breached any legal duty.

The respondent has submitted that, such duty arises from a banker customer relationship between the appellant and the respondent. As the requirement for avalisation did not arise in a sight bill, the appellant could not be in a position to breach the said duty. In any event, we do not agree with the respondent that the agreement between the appellant and respondent to submit documents for the purpose of the transaction at issue formed an integral part of the duty of care arising from a banker customer relationship. The service, in our view, is a separate product constituting its own terms and conditions. Assuming, which is not, that avalisation was a requirement, in the absence of special agreement to that effect, mere instruction by an email does not *ipso facto* create a legal duty to the bank.

For what we have shown herein above, we find that the appellant had no legal duty to communicate the respondent's instructions to the SCBU to avalise the bill and thus it cannot be said that there was negligence on its part for non-payment of the bill. This discussion answers the first issue in the negative.

The second issue is whether the appellant's remedies as a holder for value of the bill can be extinguished by virtue of the claimed failure of the appellant to communicate the respondent's instructions to SCBU. Having answered the first issue in the negative, the second issue is simple to determine. Since we have found that the appellant was not legally duty bound to communicate the said instructions, he was not negligent. Thus, being a holder in due course following the discount, it is entitled to recover the amount of the bill from the respondent since the notice of the dishonour was duly served on the respondent. Sections 47 and 48 of the Act which are relevant in this respect provide thus:

> *"47. -(1) A bill is dishonoured by non-payment–*
>
> *(a) when it is duly presented for payment and payment is refused or cannot be obtained; or*
>
> *(b) when presentment is excused and the bill is overdue and unpaid.*
>
> *(2)* ***Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.***
>
> ***48. - Subject to the provisions of this Act, when a bill has been dishonoured by***

non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:

Provided that–

(a) when a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission;

(b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted." [Emphasis added].

We take inspiration from the decision of the High Court of Bombay in the case of **Virgo Steels v. Bank of Rajasthan Ltd. & Others** 1998 (3) BomCR 773 when interpreting section 30 of the Negotiable Instruments Act, 1881 which is similar to section 47 of the Act, stated as follows:

"If a Bank buys or negotiates the drawer's draft it would normally have a right of recourse to the drawer in the event of dishonour, such right deriving from the law relating to negotiable instruments. Under the Negotiable Instruments Act, as discussed above, section 30 specifically provides that a drawer of a Bill of Exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder. Hence the drawer and drawee in the present case are jointly and severally liable to make payment to the Bank of Rajasthan Ltd."

The procedure regarding a dishonoured bill is that the holder has right to recover from any party liable on the bill which in this case is the drawer who is the respondent. Similarly, the drawer has a right to proceed against the acceptor of the bill which in this case is the third-party herein (the drawee). Section 57 of the Act which is relevant here provides:

"Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as foilows–

(a) the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from

the acceptor or from the drawer, or from a prior indorser–

(i) the amount of the bill;

(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

(iii) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest;

(b) in the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment;

(c) where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

Therefore, in view of the above provisions, the appellant's right to recourse against the respondent has not been extinguished. The above aside, the agreement between the appellant and the respondent for purchase of the bill at a discount was a separate agreement from the contract for sale of goods between the respondent and the third-party. The appellant's suit for recovery of the value of the dishonoured bill was a cause of action arising from the contract between the appellant and respondent to purchase the bill. It was neither based on the sale of goods between the respondent and the third-party nor the agreement to submit documents between the appellant and respondent. Therefore, if the respondent desired to take an action in relation to the default by the third-party in terms of payment of the purchase price, the third-party was a necessary party. It was, therefore, not expected for the buyer to be brought by way of a third-party procedure as opted by the respondent in the instant matter.

It follows thus, the respondent is liable to pay the appellant the amount of the discounted bill, which is USD 469,894.50. However, since the appellant had applied the amount of USD 230,026.90 deposited in the respondent's account maintained with the appellant to set-off the amount payable to the appellant on account of the dishonoured bill, the respondent will now be liable to pay only the difference thereof which is

USD 239,867.60. The appellant is also entitled to the interest on the decretal sum at the rate of 8% per annum from the date of maturity of the bill to the date of judgment and interest at court's rate of 7% per annum from the date of judgment till full satisfaction.

Finally, we quash the decision of the trial court and proceed to allow the appellant's appeal as shown herein above. In the circumstance of the case, we make no order as to costs.

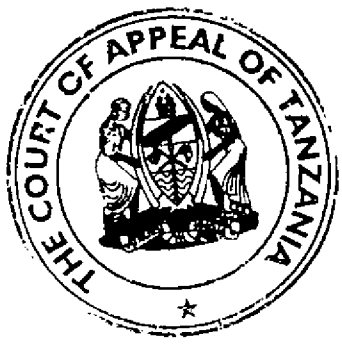
DATED at **DAR ES SALAAM** this 13th day of December, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2022 in the presence of Ms. Ashura Mansoor Salum, learned counsel for the 2nd respondent, who holds brief for Mr. Heriel Obedi Munisi, learned counsel for the 1st respondent and Mr. Joseph Nuwamanya, learned counsel for the appellant is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL