

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 261 OF 2001

EXIM BANK (TANZANIA) LTD.....PLAINTIFF
VERSUS
CITIBANK TANZANIA LTD.....DEFENDANT

J U D G M E N T

NSEKELA, J.

ZAK Import and Export Company Limited (the Company) maintained an account No.0300017002 with Exim Bank Tanzania Limited (the plaintiff). On the 24.11.1999 the company presented to the plaintiff cheque no.002864 dated the 18.11.1999 in the sum of US\$26,327.96 purportedly drawn by the Urban Sector Rehabilitation Project C-100230-038 (the drawer). The said cheque was crossed "Account Payee Only" which I take to mean that the proceeds of the cheque were to be credited to the account of the company only. The plaintiff in turn presented the cheque to the defendant (Citibank Tanzania Limited) and it was cleared on the same date, that is, on the 24.11.1999. On the same date as well, the plaintiff credited the company's account with US\$ 26,327.96 as reflected in exhibit P2 as "Internal Transfer, Spl. Clg.) (which I believe means "Special Clearing"). On the 25.11.1999, the plaintiff allowed the company to

withdraw the proceeds thereof in the sum of US\$20,000.00 followed by two subsequent withdrawals of US\$ 5,800.00 and 300.00 on the 3.12.1999 and 10.12.1999 respectively.

It is alleged in paragraphs 8 and 9 of the plaint as under –

“ 8. That on or about the 15th of August 2001, the defendant notified the plaintiff that a total of US\$26,327.96 was debited by the defendant from account No.400117-039 without the authority or consent of the plaintiff on the ground that the cheque mentioned in paragraph 6 above has been forged.....

9. That at no time prior to and during clearance of the cheque referred to in paragraph 6 above did the defendant express any doubt about the guineness of the signatures appearing on the said cheque. The plaintiff avers that the defendant endorsed and cleared the said cheques as a genuine cheque.”

On the 11.3.2002, the following issues were agreed upon and recorded accordingly, namely –

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- 1. Whether or not cheque number 002864 drawn by the Urban Sector Rehabilitation Project dated 18.11.1999 and presented to the plaintiff by ZAK Import and Export Company Limited was a forgery.*

2. *Did the plaintiff present the said cheque to the defendant for collection in the normal course of business.*
3. *Whether or not the defendant was justified in debiting the plaintiff's account in the sum of US\$ 26,327.96 after clearing the cheque that was presented for collection.*
4. *To what reliefs are the parties entitled to."*

PW1 was one Geoffrey Kitundu, Operations Manager of the plaintiff. His responsibilities included verifying and authorizing banking transactions in relation to the foreign department and cash department. He testified that a crossed cheque drawn by the Urban Sector Rehabilitation Project No.002864 in favour of the company in the sum of US\$ 26,327.96 was deposited by the company, a customer of the plaintiff, on the 24.11.1999. The cheque was dated the 18.11.1999. There were instructions attached to this cheque, namely "special clearance." The cheque was then forwarded to the defendant for special clearance. The defendant honoured the cheque by crediting the plaintiff's account with them. And so the plaintiff also credited the company's account with the amount of the cheque.

On the next day, the 25.11.1999 the company withdrew from the plaintiff US\$ 20,000.00 and subsequently two other withdrawals followed as evidenced by exhibits P1 and P2. The defendant did not

dishonour the cheque, however on the 14.8.2001, the defendant debited the plaintiff's account with them allegedly because the cheque turned out to be a forged one. Despite correspondence between them, the defendant has refused to refund the money which the plaintiff claims it was wrongly debited. PW2 was one Ramaswamy R Chandramouli, General Manager of the plaintiff. He testified that the company deposited a cheque with the plaintiff with instructions that it be cleared by special clearance. This was made on a deposit slip (exhibit P1). He added that there was nothing suspicious with the cheque. The cheque was duly paid and credited to the plaintiff's account with the defendant. After clearance of the cheque, the company withdrew the money as was entitled to do so. However, about two months later after the cheque had been cleared, the defendant complained that the cheque had been forged and so the defendant debited the plaintiff's account with them (exhibit P3). The plaintiff protested to the defendant that their account had been wrongly debited but to no avail. When cross-examined by Mr. Mujulizi, learned advocate for the defendant, PW2 stated that if the defendant had alerted them before releasing the funds, the plaintiff would have blocked the account as a prudent banker. But by the time they were informed, the company had already withdrawn the money. PW2 also testified that there is no obligation to be suspicious on every account, and that there was nothing suspicious with the company operating the account.

On his part, Mr. Mujulizi, learned advocate for the defendant called one witness, PW1 Joseph Kihulla, Operations Manager. He testified that the plaintiff maintains an account with them. The plaintiff deposited a cheque to their account whose drawer was the Urban Sector Rehabilitation Project. The said cheque was drawn in favour of ZAK Import and Export Company who deposited the cheque with the plaintiff. The cheque was deposited with instructions for special clearance and the defendant duly honoured these instructions. After the transaction had been completed, their client, Urban Sector Rehabilitation Project complained that their account had been wrongly debited. They initiated discussions with the plaintiff on the matter and then reversed the entry and credited the account of their client. The matter was then reported to the police for investigations. DW1 also stated that the payee of the cheque had no business relationship with the defendant. This marked the close of the defendant's case.

The cheque that was deposited with the collecting bank was for a sum of US\$ 26,327.96 purported to have been drawn by the Urban Sector Rehabilitation Project, a customer of the defendant, Citibank, the paying bank. It was a crossed cheque marked "Account Payee" only, and the payee was ZAK Import and Export Company, a customer of Exim Bank, the plaintiff. The company on the 24.11.1999 presented the cheque for special clearance at the plaintiff bank, who acting as a collecting bank presented the said cheque for special

clearance at the defendant's bank. The defendant bank duly honoured the cheque by paying to the plaintiff bank who credited the company's account with its proceeds. On the following day, that is the 25.11.1999 the company proceeded to withdraw from its account US\$ 20,000.00 followed by two subsequent withdrawals.

It is a fact that the payee of the alleged forged cheque, ZAK Import & Export Co.Ltd had an account with the plaintiff bank. The company was thus a customer of the plaintiff. It is not in dispute that a cheque in the name of the company as payee was deposited with the plaintiff for collection. This cheque was understandably forwarded to the defendant bank for payment. In this transaction, there are at least three contracts namely –

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- (i) *a contract between the company (payee of the cheque) and the plaintiff as collecting bank;*
- (ii) *a contract between the purported drawer of the cheque (Urban Sector Rehabilitation Project) and the defendant as paying bank;*
- (iii) *a contract between the collecting bank and the paying bank..”*

Our main concern in this suit is the contract between the collecting bank and the paying bank. The company, a customer of the plaintiff, deposited the cheque in dispute with the plaintiff for

collection. This is self evident from the evidence of PW1 and PW2. In acting as the company's agent in the collection of the said cheque, the plaintiff was expected to bring reasonable care and diligence to bear in presenting the effects for payment, in obtaining payment and in crediting the customers (company's) account. As a collecting bank, the plaintiff had to appreciate the significance of instructions upon the cheque and they had to be observed. There was evidence to the effect that the payee of the cheque instructed the plaintiff that the cheque should be cleared by "special clearance". This was done and PW1 and PW2 testified that there was nothing to raise eyebrows in this procedure. The cheque was presented to the defendant for special clearance. Now the decision whether to pay or not to pay lay with the defendant as the paying bank. The defendant bank was in a much better position to know and ascertain that the cheque in question was properly signed and belonged to the Urban Sector Rehabilitation Project, who was their customer. The defendant cleared the cheque on the 24.11.1999 and the plaintiff's account with them was reversed on the 14.8.2001. The purported drawer of the cheque was not a customer of the plaintiff and there is no evidence on the record which could have enabled the plaintiff to detect that the cheque had been forged. In Civil Appeal (CAT) No.38 of 1999, **Calist Silayo (t/a Seleka Investment) and CRDB (1966) Limited** (unreported) this court stated as follows –

“ We begin by stating that as a general rule a collecting bank, as the respondent was, is bound to use reasonable skill, care and diligence in presenting and securing payments of cheques entrusted to it for collecting and placing the proceeds to the customers account, or in taking such other steps as may be proper to secure the customers interests.”

Section 5(1) of the Cheques Act, 1969 provides as follows –

“ 5(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 customer’s account with the amount of an instrument to which this section applies, receives payment thereof for himself, and the customer has no title, or has a defective title to the instrument, the bank shall not incur any liability to the true owner of the instrument by reason of having received payment thereof.
(2) This section applies to the following instruments, that is to say –
(a) cheques.”

In order to claim the protection under section 5 above, the collecting banker must show that he received payment “in good faith

and without negligence.” The burden of proof is on the plaintiff as a collecting bank. It is trite law that a banker to whom a cheque is delivered by a customer for collection, is prima facie merely the customer’s agent to present the cheque on which it is drawn and to receive payment from that bank for the customer. In the case of **Marfani & Co. Ltd v Midland Bank Ltd** (1968) ICLR 956, Lord Diplock made the following observations at page 972. He stated thus-

“ Granted good faith in the banker (the other condition of the immunity) 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 no other person is the true owner of it. Where the customer is in possession of the cheque at the time of delivery for collection and appears on the face of it to be the “holder”, i.e. the payee or indorsee or the bearer, the banker is, in my view, entitled to assume that the customer is the owner of the cheque unless there are facts which are, or ought to be, known to him which would cause a reasonable banker to suspect that the customer was not the true owner.”

I have seriously considered the question of special clearance of the cheque. Was this an abnormal procedure within the banking fraternity? What I would gather from the evidence of PW1, PW2 and DW1 is that special clearance is a speedier way of collecting proceeds. The next question is, was the company the true owner of the cheque

when the proceeds of the cheque were paid to the company? On the evidence, I can hardly find that a request by the company to the plaintiff implied anything sinister or suspicious so as to render the plaintiff negligent. There was no evidence that the said cheque had been stolen. It took some time from the time the cheque was honoured by the defendant on the 24.11.1999 to the time when the plaintiff's account was debited. Even at the time of the trial, there was no positive evidence from the police that the cheque had indeed been forged. Neither the defendant nor the Urban Sector Rehabilitation Project called any witness to testify on the authenticity of the cheque.

In the result, I am of the settled view that on the very scanty evidence before me, I find as a fact that there was no negligence on the part of the plaintiff. Consequently, I answer the issues as under: -

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(1) *There is no evidence on the record that the said cheque had been forged;*

(2) *Yes, the said cheque was presented for collection in the normal course of business. There was nothing sinister or unusual for the cheque being specially cleared.*

(3) *The defendant was not justified in debiting the plaintiff's account in the sum of US\$ 26,327.96.”*

I therefore enter judgment in favour of the plaintiff with costs.
Interest on the decretal amount will be at 7% per annum. It is
accordingly ordered.

H.R.NSEKELA,
JUDGE

20/6/2005

Coram: Hon. Dr. S.J.Bwana, Judge.

For he Plaintiff - Mr. Simbakalia.

For he Defendant - Mr. Mjulizi.

CC: Edith.

Court: Judgment delivered.

DR. S.J. BWANA
JUDGE

20/6/2005

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign Mxay m
Registrar Commercial Court Dsm.
Date 28/6/05