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

COMMERCIAL CASE NO. 108 OF 2003

UNIVERSAL McCANN (T) LTD.....PLAINTIFF
VERSUS
STANBIC BANK (T) LTD.....DEFENDANT
AND
HABIL MAKOMEREH.....THIRD PARTY

JUDGEMENT

KALEGEYA, J.:

The Plaintiff, represented by FK Law Chambers, is a limited liability Company incorporated under the laws of Tanzania. It provides Media Services which involve media planning, promotions and productions. The 1st Defendant, represented by Ishengoma, Masha, Mujulizi, and Magai, (Advocates) is also a limited liability Company carrying on Banking business under the laws of Tanzania. The Third Party, represented by Michael Ngalo, Advocate, is a natural person and was the Managing Director of the Plaintiff.

The Plaintiff claims and prays for judgement against the Defendants as follows:

"(a) ...sum totaling Tanzania shillings 27,606,240.00 being the whole sum and proceeds of the cheque wrongly and fraudulently converted as money had and received to the use of the Plaintiffs by the Defendants,

b) ...shillings 50,000,000 being specific general and punitive damages for conversion due to the negligent actions and omissions of the Defendants;

c) ...shillings 20,000,000 being compensation for the loss of goodwill and reputation of the Plaintiffs business;

d) ...shillings 12,000,000 being costs for following up the recovery of the whole sum wrongfully converted due to the negligent actions and omissions of the Defendant;

e) Interest on ...(a), (b), (c) and (d) above at the rate of 21% from the date of conversion to the date of full payment or at such other rate and for such other period as may seem to the ... court just and proper;

f) Costs of this suit

g) Any other orders as this... court may deem fit and just to grant".

Briefly, the Plaintiff claims that the Defendant, negligently and without taking reasonable care to the plight of its customer (Plaintiff), allowed the Third Party to fraudulently open an account with it, thus facilitating the latter to steal from the former (Plaintiff) shs 27,606,240/=

being proceeds from a cheque drawn in its favour by Tanzania Breweries Ltd.

In support of its case, the Plaintiff called five witnesses: PW1 (Zadock Koola), the Chairman and Chief Executive Officer of the Plaintiff; PW2, (Onesphory Mande), the Plaintiff's Administrative Manager; PW3 (Walter Shoo) the Plaintiff's Credit Controller; PW4 (Emmanuel Kakwezi), Assistant Registrar of Companies and PW5 (Detective Corporal Rugera) the Police investigator.

For the Defence, while the Third Party opted not to testify nor call witness(es), the Defendant called one witness, Jennifer Hilal, a Defendant's Sales Manager although at the Defendant's City Branch where she is attached, her proper title is Business Development Manager.

For the Plaintiff, 16 documentary Exhibits were tendered – Plaintiff's Certificate of Incorporation (Exh. P1); Plaintiff's Memorandum and Articles of Association (Exh. P2); A document said to be a Board of Directors' Resolution for opening an account with the Defendant (Exh.P3); a letter from the Defendant to Plaintiff asking for better and further particulars about itself (Exh. P4); two demand letters from Plaintiff to Defendants

dated 27/5/2003 and 17/7/2003 (Exh. P5 and 7 respectively); two letters from Defendants dated 6/6/2003 and 4/4/2003 in reply (Exh. P 6 and P8, respectively) all in respect of the dispute; a memorandum of understanding between the Plaintiff and the Third Party (Exh. P 9); a copy of a Memorandum and Articles of Association different from Exh. P2 and which the Third Party presented when opening the account (Exh. P 10); a copy of cheque dated 31/3/2003 for shs 27,606,240/= drawn by Tanzania Breweries Limited in favour of the Plaintiff (Exh. P11); a Defendant's standard form in which customer's shareholders, shares held and their value have to be shown (Ex. P12); Defendant's withdraw form dated 8/4/2003 used to withdrawa shs 7 million from Account No. 0140017512201 (Exh. P13 ;) two cheques dated 15/4/2003 and 16/4/2003 for shs 1,800,000/= and shs 15 million drawn by Plaintiff in favour of the Third Party and Golden Red Media Company respectively (Exh. P14 and 15) and letter from one Obudo to Zadok (Exh. P16).

The Defendant tendered three Exhibits – Exh. D1 (Exh. P1), Certificate of Plaintiff's incorporation; Exh. D2 (Exh. P10) a Memorandum and Articles of Association and Plaintiff's business licence (Exh. D3)

The following facts stand established by the Exhibits together with the testimonies of PW1 – 4 and partly by the testimony of DW1.

The Plaintiff is a subsidiary Company of ZEK Group of Companies. Pw1-3's positions in the Plaintiff are the same as those held by them under the Group and already explained above.

The Plaintiff had four shareholders-the ZEK GROUP with 83 shares, Zadock E. Koola (Pw1), one share, Judith Koola, one share and the Third Party, 15 shares. The latter's shares however in terms of Exh. 9 [Memorandum of Understanding between Plaintiff and Third Party] were contingental.

For services rendered, the Tanzania Breweries Limited (referred to as TBL hereinafter) was indebted to the Plaintiff in the sum of shs 27,606,240/=. The Third Party, personally followed up the debt collection and collected cheque No. 018793 dated 31.3.2003 (Exh. P 11) in the sum above - stated drawn by TBL Ltd in favour of Plaintiff. To facilitate the withdrawal of proceeds therefrom, the Third Party opened A/C No. 0140017512201 with the Defendant. The Account was opened in the name of the Plaintiff and Exh. 11 was deposited therein. Then, under the

Third Party's authorization, withdrawals in the sum of shs1.8 million (payee: Third Party); shs 7 million (payee: Plaintiff – drawn cash) and shs 15 million (payee: The Golden Red Media Company) were made. The said withdrawals were not in any way for the Plaintiff's business.

In opening the Account, the Third Party was guided by DW1 (the Defendant's Official) who directed on what was required for the purpose and who after being satisfied that the prerequisites were completed gave a go – ahead.

The third Party presented to Defendant Exh. P3 (what was said to be a Board of Director's meeting Resolution) and Exh. D2, a copy of which is Exh. P10 (a Memorandum and Articles of Association) to facilitate the said opening of the account. The two documents though purporting to belong to the Plaintiff they were not. There was no such resolution as much as Exh. D2 (Exh. P10) was not the plaintiff's. The Plaintiff's Memorandum and Articles of Association is Exh. P2. This document (Exh. P2) shows the Plaintiff's real shareholders (as already detailed) while Exh. D1 (Exh.P10) shows the contrary. This showed only two shareholders and that the Third Party was the majority shareholder with 83 shares and another person, Francis Semwenda, who was not the Plaintiff's shareholder at all was

indicated as having 17 shares. Apart from Exh. P3 and Exh. D2 (P10), the Third Party also presented to Defendant, a Certificate of Incorporation, Exh. P1, which is also Exh. D1; Plaintiffs' business licence, Exh. D3; a Bank's standard form which has to be filled in by an intending customer showing the name, shareholders and value of their respective shares – Exh. P12. This Exh. shows the Plaintiff's shareholders as Habil Makomereh (Third Party) with 83 shares valued at shs 8,300,000/= and Francis Semwenda with 17 shares valued at shs 1,700,000/=.

Further to the above, the Defendant asked the Third Party to produce a referee as well and one Chris Obudo, a Director of TAC Marketing was so introduced (but the details of the name are from the oral testimonies because Exh. P3 simply shows ***"TAC Marketing, 0140011121201"*** and a signature).

Subsequent to the three withdrawals vide Exh. P13, 14 and 15, the Defendant blocked the account as the police intervened upon Plaintiff's complaints regarding the dubious transactions starting from the opening of the account. The Third Party then ascaped from the jurisdiction to London.

In the final submissions, each counsel vehemently stood firm by the party's position as already pointed out.

For the Defendant, it was insisted that no negligence was committed as DW1 did all that was required to check on the credibility of personalities and authenticity of the documents presented, adding that the minimum standards of care set by the Bank of Tanzania Circular of 30/6/2000 made under the Banks and Financial Institutions Act, 1991, were reached. Reference was made to ***Commercial case No. 68 of 2000, National Insurance Corporation (T) Ltd & Another*** on same stand. It was further urged that where a Director executes a document with the company's stamp or enters a transaction in that capacity, the company cannot wriggle out and reference was made to ***NBC LTD VS Vaginga & Family Co. Ltd & others,*** Commercial Case No. 125 of 2001 which quoted with approval ***Morjaria vs Kenya Batteries (1981) Limited & others*** (2002) EALT 479.

On the Plaintiff's side, it was urged that the Defendant should be found to have been negligent as the standards set by the said Bank of Tanzania circular were violated as much as what was stated in ***Greenland***

Bank case (supra). Apart from the above, the Plaintiff's counsel also made reference to many other cases including ***Bewac Limited v. African continental Bank Limited 1 [1973] ALR (Comm) 352*** which stated procedural requirements as restated in ***Greenland Bank (supra); Selangor United Rubber Estates v Craddock (a bankrupt) and others (No. 3) [1968] 2 ALL ER 1073; NBC v Said Ally Yakut (1989) TLR 199; Barclays Bank plc vs Quincecare Ltd and Another (1992) 4 All ER 363; The Trustee of the Tanganyika National Parks t/a Tanzania National Parks vs The National Bank of Commerce and International Forex Bureau Limited (HC Arusha Registry), Civil Case No. 33 of 1995; Abercrombie & Kent (T) Limited vs Stanbic Bank Limited, Commercial, Case No. 21 of 2000; Babalola vs Union Bank of Nigeria Limited (1980) (1) ALR Commercial, 201; United Nigeria Insurance Company vs Muslim Bank (West Africa) Limited [1972] 2 ALR (Commercial) at pg 8, and the Halbury's Law of England, 4th Edition, vol. 3 para. 50*** (on Bank's duty to exercise care, skill, vigilance, necessity to inquire to ascertain and remove doubts in such situations).

Reference was also made to ***Palmers' Company Law, 22 Edition, Vol. 1 at page 660, para 60-01; D'Arcy vs Tamar, Railway, LR 2. 158; Re Marseilles Extension Railway, 7 Ch. 161; Stroud's Judicial Dictionary of Words and Phrases*** (on powers of Company Directors).

It was concluded that the burden of proof of disapproving that there was no negligence lies on Defendant and not Plaintiff as urged by Defendant and made reference to ***Marfani & Co. Ltd vs Midland Bank Limited (1968) 2 ALL ER at page 583*** applied in ***Intercom services Limited and Others vs Standard Chartered Bank Ltd (2002) 2 EALR 391 at 393*** quoted in ***Greenland Case*** (supra); ***Bewac Case (supra)*** and ***Silayo vs CRDB (1996) Ltd [2002] 1 EA 288 at page 292.***

Issues framed are as follows:-

"1) Whether the Defendant was negligent in allowing opening of the account in the name of the Plaintiff Company.

2) Whether by allowing the opening and operation of the account the Plaintiff Company suffered loss and damages;

3) Whether the 3rd party is liable to indemnify the Defendant in the event the latter is found liable;

4) To what reliefs are the parties entitled."

I will tackle issue one and two together.

I am persuaded that indeed the Defendant did not exercise reasonable care in allowing the Third Party to open the account which facilitated him to draw and convert monies, the proceeds of a cheque drawn by TBL in favour of the Plaintiff.

To start with the exposition of the law, as conceded by both counsel, the ***Bank of Tanzania Circular*** No. 8 of 2000 issued by the Central Bank exercising its supervisory powers sets the minimum standards which every Financial Institution has to comply with. Section 7 thereof explicitly states:

> *"At a minimum every new account and any other new financial transaction shall be subject to the verification of the information specified in the First Schedule to this circular"*

The relevant part of the schedule is as follows:-

> *"1.....*
>
> *2. Business organization and other entities*
>
> *a) Identity of the directors/owners and of the account signatories. These are to be verified .....*
>
> *b) Nature of Business*
>
> *c) Copy of certificate of Incorporation certified by the Registrar or business names.*
>
> *d) Organization's mandate, signed application form or an account opening authority containing specimen signatures"*

The above falls under orders, directives or determinations by the Bank of Tanzania which have to be complied with by the covered Banking and Financial Institutions, of which the Defendant is one of them (s. 17 of the Banking and Financial Institutions Act read together with s. 48 (5) of the Bank of Tanzania Act).

In issuing the above, the Central Bank is not sailing in lone waters. It tapped the international experience which I had an occasion to summarize in the ***Greenland Case*** (supra) and which was referred to by both counsel, and which I take liberty to quote in extenso thus:

> *"Although it is trite fact that procedures for opening an account differ from bank to bank marshalling through the healthy list of English and Commonwealth decisions, including those referred by the Counsel, leaves no one in doubt that generally bankers are enjoined to exercise reasonable checks and inquiries on person who wish to open an account with them, whether as individual persons or on behalf of the companies or firms. Bankers should first be satisfied of such persons' identity and integrity*
> *Satisfying oneself on identity guards against defrauders from parading themselves on assumed names, and opening accounts with intentions of getting access to monies to which they are not entitled. It is appreciated however that establishing identity is not a smooth running exercise. However, again, appreciative of this, Bankers are not*

expected to stop at simply telling a prospective customer ***"just bring an introductory letter".*** *They should go further and verify the authenticity of the documentation provided.*

And the above takes us further into the second consideration: the prospective customer's integrity. This cannot be obtained or appreciated by simply looking at the physical appearance of a prospective customer because most of the defrauders are smart looking characters: outlook face-value capturing. Bankers satisfy themselves on this by requiring production of referees; people known to the banker who would introduce the prospective customer. This procedural requirement helps bankers to defend themselves by establishing absence of negligence in the event the prospective customer converts proceeds to which he is not entitled, and also ensures the trustworthiness of the customer to be, in the operation of the account itself. And, not only should referees be obtained but should also be verified by bankers' follow up.

In case of personalities who introduce themselves as having been mandated to open an account in the name of companies bankers should satisfy themselves ***on the authenticity of the documents presented which would include an original certificate of incorporation, a memorandum and Articles of Association and certified copy of a resolution of the Board of directors appointing as bankers of the company.*** *The resolution would give detailed instruction on how the account is to be operated including the authorized signatories and their*

specimen signatures. ***If the Directors are not known to the Bankers their identity and integrity should be ascertained by obtaining reliable referees who should in turn be followed up.*** *Bankers who fail to make appropriate and sufficient inquiry so as to unearth adequate information regarding the above, and who act in circumstances which would make any reasonable banker suspicious and as a result of which proceeds of a cheque collected by them are converted, stand liable in negligence to the person in whose title the said cheque is .....However, half hearted inquiries are as good as no inquiries at all. It is not enough for the Banker to simply ask a prospective customer to produce an identity letter, card or related. This is so because a dishonest person will have schemed ready for all possible obstacles. The idea behind is not that simply identities and introductions should be made but they should also be genuine. And the Banker can only satisfy himself not by simply looking at them... but by following them up for authentification."*

Were the above guidelines and due care exercised by Defendant? My considered answer is in the negative as already stated.

DW1 deposed that she made due inquiries and scrutiny. The evidence on record establishes the contrary.

DW1 is emphatic that Exh. P3 is a bank standard form which she gave to the Third Party to fill up and that he did and returned it to her.

She calls this a Board of Directors Resolution! This however is not a document deserving the title accorded to it. The 2nd paragraph thereof reflects.

> *"THAT A CURRENT ACCOUNT BE OPENED AT THE CITY BRANCH OF STANBIC BANK TANZXANIA LIMITED AND THAT THE SAID BANK BE AND IS HEREBY AUTHORISED TO HONOUR CHEQUES BILLS OF EXCHANGE PROMISORY NOTES ACCEPTED OR MADE ON BEHALF OF THE COMPANY".*

The form clearly shows that it is supposed to be a ***"certified True Extract from the minutes of the meeting"*** of the Plaintiff held on 7/3/2003. What is obvious also is that this information is supposed to be a summary and not in lieu of the Resolution. The Banker is enjoined to physically see the extracted Resolution. He is not expected to end at seeing just this, form otherwise the requirement of authenticity would be thrown into the winds. DW1 admits to have seen just this, and infact, to have flawed requirements of her own bank on this very form. She deposed:

> *"Habil produced the Resolution*
> *(witness shown Exh. P3)*
> *This is what was produced to me. The two Directors are mentioned to have attended the meeting - it is shown underneath the document. Habil signed but the other*

Director did not sign. For such a resolution what is important is the chairman's signature... The chairman's signature is sufficient. We allowed the opening of the account on that resolution with Habil's signature only.

As a Director I took it that the photograph was that of Francis and they matched with what Habil showed us as a driving licence. ***Habil said that Francis would come later"*** (emphasis mine).

I have stated the obvious that this is not a Board's Resolution. Now, DW1's failure to ask for the relevant Resolution is clearly negligence. Her laxity on this aspect is further exposed by her failure to require the 2nd Director's signature under the disguise that the Chairman's signature suffices. If that is the case, why does the standard form indicate spaces for two Directors'? Again, if what she stated is correct, why then say that Francis would have gone to the Bank later? To do what if he was not necessarily required? A mere look at Exh. P3 could not have established the authenticity of what is contained therein. As we have already seen, legally, failure to establish authenticity, for whatever reason is negligence, pure and simple.

The above aside, for the key documents, which include a Directors' Board Resolution, apart from verifying authenticity, copies thereof should

be left with the bank. One wonders how DW1 could have complied with this without seeing the resolution itself. And indeed no such document came into defendant's custody let alone its notice.

DW1 was also patently negligent on reference requirement for unexplained reason. The Reference form filled in by Obudo was not tendered as Exhibit although it was referred to in the testimonies. Dw1 concedes that Obudo stated that he had known the intended customer for two years. She surprises us however by adding that this information was verified. She deposed:-

> *"Obudo said that he knew the Company and the Director. The duration as to how long he had known them was indicated on the form ... Obudo filled it up. He said that he knows the company for 2 years.* ***The information was verified"*** (emphasis mine).

The above quoted contains a lie because by the time the controversial account was opened the Company was just 8 months old. And clearly, DW1 made no verification as claimed, for, shortly after stating what is quoted above and upon being shown, Exh. P11, she was honest enough to tell the truth thus:

> *"This shows that on 28/6/2002 it was when Universal Mccann was incorporated. 28/6/2002 to 8/4/2003 is not a period of 2 years as it is 8 months. I believed that he (Obudo) had known the Director for 2 years. The Reference was for the customer, the Company. That we took reference to be directed to the Director and not customer was an oversight".*

Oversight is negativity: it is a mistake on one's part either forgetting to do something or doing it the wrong way. Either way, in a banker/customer relationship, oversight cannot offer protection to the former where his acts occasion loss to the latter. Failure to make verification is nakedly proved by no other than the Defendant's officer (DW1).

This takes us to the memorandum and Articles of Association. It needs no emphasis that had the Defendant conducted due inquiry on authenticity, it would have been discovered that Exh. D2 presented to it was a forgery. Apart from Dw1's admissions that no inquiry was made to verify authenticity of the documents presented, indeed a scrutiny of pages 9,12, and 14 of Exh. D2, which parts are the most relevant in terms of value of the document, would have raised suspicions on the font and text of the wording thereof in relation to the rest of the document, for, they unreservedly differ. Obviously, this would have led to the necessity of

making inquiry with the Registrar of Companies. This was not done. All in all, the Defendant's witness (DW1) confesses that all these omissions were made because they trusted Obudo, the referee, and the undisclosed Defendant's Public Relations Officer who introduced the Third Party. Explaining how they were dazzled by this, Dw1 testifies:

> *"Since they were introduced by our Public Relations Officer and our Customer, we trusted him that he could not tell lies. We opened the account on reference and documentation".*

That, without more, is a patent admission of negligence. Allowing oneself to be carried away by something or a person under so called "trust" without acceptable foundation or basis is but negligence. This answers issues (a) and (b) positively. The Defendant negligently allowed the Third Party to open and operate the controversial account which led to the loss to the Plaintiff. And, as rightly pointed out by Plaintiff's counsel, the Defendants had the duty of proving that they were not negligent. Apart from Dw1's flat denial which she however contradicts here and there, the Plaintiff's erected case that there was negligence is not even scratched in the least.

Issue (3) should not waste much of our time. The Third Party did not testify nor give evidence though represented by an Advocate. The opportunity which was aptly at his disposal was not utilized. The evidence however shows, as already demonstrated, that he fraudulently acted in the whole transaction-authoring a forged memorandum and Articles of Association (Exh. D2); purporting to be a majority shareholder in Plaintiff; importing a false shareholder (Semwenda); inventing a Board of Director's resolution, painting himself to be the chairman; facilitating the withdrawal of proceeds from a cheque drawn in Plaintiff's favour and utilizing it in interests unrelated to the latter. He cannot be left to enjoy fruits of his illegal acts. The Defendant is entitled to indemnification to whatever it shall pay to the plaintiff.

I should pose here and observe that although the plaintiff also tendered Exh. P16 which is said to be a letter from Obudo (the Referee) to PW1 (Plaintiff's CEO) admitting. The Third Party's fraudulency and promising to make good the loss, adding to PW1 testimony that the Third Party admitted this on telephone, legally, its probative value is very insignificant because the author did not testify. The said letter states as follows:

"OBUDO CRIS
MD TAC
25 Regent Street
Box 105908
Dar es salaam
22-5-2003

To
Zadok Kola
Managing Director
Universal Mccaan

RE: HABIL MAKOMEREH

As per our discussion, I hereby state that the above is known to me for over two years. I am also aware from information received from him and from Mr. Zadok Kola that he misused his capacity as MD of Universal MCcaan and misappropriated funds belonging to the company for payments received from TBL payable to third parties.

In the light of the above I confirm having spoken to Habil Makomereh in the UK and he has agreed to pay back the funds in question to universal Mccaan. He has also agreed to set up a payment structure and communicate this to Mr. Kola and myself detailing how and when he is going to pay.

On the strength of the above I am ready to offer guarantee for him and request Mr. Zadok Kola to allow me through my company TAC in this arrangement offered in utmost good faith and without duress.

Yours truly,

OBUDO CRIS
TAC

Cc Micheal S. Ngalo

Ngalo and Co. Advocate"

This however does not affect conclusions already reached above.

We turn to reliefs.

The Plaintiff is obviously entitled to shs 27,606,240/= as per prayer (a).

For prayer (b) to (c), I should first observe that the part dealing with general damages was not properly pleaded. General damages are generally not specified as they are within the discretion of the Court. That apart, paragraph (b) confusedly mixes special and general damages such that it is not known under which category is the shs 50 million claimed. I should observe however, that if they had fallen under special damages the same would have deplorably failed because under the law, special damages must be specifically proved [CAT –***Masalele General Agencies vs AICT*** (1994) TLR 192; HC- ***Yusuf Mzee Ngororo vs Mohamed Salum Rashid,*** Civil Appeal No. 31 of 2002; CAT – ***Zuberi Augustino vs Anicet Mugobe*** (1992) TLR 137]. There is no scintilla of evidence even suggesting the same.

For general damages, indeed the Plaintiff's plea cannot be disregarded. Plaintiff lost utility of the principal sum which was not small money by all standards then. This must have substantially impacted on its over-all performance. Considering these pertaining circumstances, I am satistified that general damages to a tune of shs 25 million will meet the ends of justice. The same is awarded accordingly.

In conclusion, judgment is hereby entered in favour of the Plaintiff in the sum of shs 27,606,240/= being the principal sum and shs 25 million as general damages. The said amount to attract interest at a rate of 21% per annum from the date of conversion till judgment, and, the decretal sum to attract interest of 7% per annum from the date of judgment till payment in full. The Defendants are also condemned in costs.

L.B. KALEGEYA
JUDGE

Words: 4,296

I Certify that this is a true and correct copy of the original Certificate/Document
Sign: .....
Registrar, Commercial Court. DSM.
Date: 16/11/09

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PROCEEDINGS

22/10/2009

Coram : Hon. R.V. Makaramba, J.

For the Plaintiff: Mr. Duncan

For the Defendant: Mr. Gaspar Nyika

For the Third Party: Mr. Ngalo, Advocate

C.C: J. Grison

COURT:- Judgment delivered in Chambers in the presence of Mr. Duncan, learned Counsel for the Plaintiff, and in the presence of Mr. Gaspar Nyika, learned Counsel for the Defendant and in the presence of Mr. Ngalo, learned Counsel for the Third Party.

.....

R.V. Makaramba
JUDGE
22/10/2009.

Word count: 110