IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 115 OF 2014

SHARAF SHIPPING AGENCY (T) LTD ..... PLAINTIFF

VERSUS

BARCLAYS BANK TANZANIA LIMITED ..... 1ST DEFENDANT

HABIB AFRICAN BANK LIMITED ..... 2ND DEFENDANT

JUDGMENT

MWAMBEGELE, J.:

The relevant facts of the case as can be gleaned from the pleadings and testimony of witnesses are not difficult to comprehend. They go thus: on diverse dates in the year 2014 the plaintiff drew seven cheques Nos. 106427, 106342, 106153, 105836, 105930, 105928 and 105474 on Barclays Bank Tanzania Limited (the first defendant). Five of them; Nos. 106342, 105836, 105930, 105928 and 105474, were drawn in favour of Bollore Africa Logistics. The other two; No. 106427 and No. 105936, were drawn in favour of, respectively, Kuenhe+Nagel Ltd and Palm Commercial Ltd. The cheques were received by the first defendant and processed for payment. The plaintiff claims that the cheques' amounts were debited in her account but not paid to the intended drawees. Instead, through Habib African Bank (the second defendant), the proceeds were paid to a certain Bugwema Investment; a

stranger to the plaintiff, thereby causing loss and damages to her. As a result, the plaintiff claims from the defendants, jointly and severally, payment of USD 55,000.00 being refund of the total amount debited in her account in the alleged fraudulent transaction, commercial interest at the rate of 30% on the amount from the date of filing the suit to the date of judgment, interest at the court's rate of 12% on the decretal sum form the date of judgment to the date of satisfaction in full, general damages and costs of the suit.

After failure of mediation, the following issues were framed:

1. Whether the plaintiff's account was debited fraudulently and without instructions;
2. If the first issue is answered in the affirmative, whether the defendants acted fraudulently as alleged;
3. Whether the plaintiff acted contributorily negligent in handling the cheques in dispute; and
4. What reliefs are the parties entitled to.

At the hearing, while the plaintiff was represented by Mr. Abdon Rwegasira, learned advocate, the first and second defendants had the services of, respectively, Mr. Sinare Zaharani and Mr. Tarzan Mwaiteleke, both learned advocates.

The plaintiff, essentially, fielded two witnesses in support of its case; Rathinam Jebakumar PW1 and Capt. Shashi Burkan Kumar PW2. The defendants' case was comprised in the testimony of two witnesses; Halamela Gabriel DW1 for the first defendant and Syed Mukhtar Sibtain DW2 for the second defendant. The evidence-in-chief of the witnesses was taken through their statements as dictated by the High Court (Commercial Division) Procedure

Rules, 2012 – GN No. 250 of 2012 (hereinafter referred to as the Rules). It is also worth noting that the evidence for the plaintiff is also comprised in the witness statement of Lawrence Laideson whose statement was admitted in evidence under rule 56 (2) of the Rules and marked PWS1. The witness did not appear in court as he, allegedly, had left employment after filing the statement and his whereabouts were unknown at the time he was required to be made available for cross-examination.

The testimony of Mr. Lawrence Laideson is essentially that he was a principal officer of the plaintiff working as Accounts Executive. He was the one who prepared the relevant cheques and, having made sure that they had been signed by the plaintiff's signatories – PW2, Nirjmar Shankar Bhaduri and EMD Pradee Seram – handed the same to the drawees. All the cheques in the name of Bollore Africa Logistics were handed to a certain Jackson M. Isack on 15.11.2013, except one which was handed to one Justin Laban Mapunda on 26.02.2013 both from the said Bollore Africa Logistics. The other two in favour of Palm Commercial Ltd and Kuenhe+Nagel were handed to Assad Kais on 30.10.2013 and Killian H. Mhagama on 08.03.2013, respectively. Mr. Laideson goes on to state that few months later, he was informed by PW1 that the proceeds of the seven cheques were debited from the plaintiff's account but were not paid to the clients in whose favour they were drawn.

The testimonies of PW1 and PW2 are akin in material particulars to that of Mr. Laideson. They testified that the cheques were prepared by Mr. Laideson in favour of the drawees referred to above but realized later that the proceeds thereof did not eventually reach the beneficiaries. Instead, the proceeds were fraudulently paid to a certain Bugwema Investment; a stranger to them. Having communicated with the defendants, the plaintiff realized that her

account was debited and proceeds thereof paid to a stranger hence the present suit.

In defence, the first defendant, through DW1, testified that the cheques in question were indeed received in favour of the drawees and that they were received and paid to the drawees through the second defendant. After they received a complaint from the plaintiff to the effect that the intended drawees did not receive the proceeds of the cheques, they investigated and realized that the second defendant processed the cheques which had the same numbers and amounts but different beneficiary; all were in favour of Bugwema Investment. According to DW1, the transaction was fraudulently organized by someone from the plaintiff's company. He also ascribes negligence on the way the cheques were handled at the plaintiff company thereby allowing fraudsters to get hold of them and substitute them and at the end of the day the proceeds paid to a stranger.

For the second defendant, DW2 who identified himself as Chief Manager of the second defendant ranking second in the administrative hierarchy after the Managing Director, testified that Bugwema Investment had an account with them since 25.06.2009. That Bugwema Investment deposited seven cheques on diverse dates for collection of payment, through clearing process. The seven cheques were No. 105474 for USD 8,000.00 dated 02.09.2013, No. 105930 for USD 10,000.00 dated 24.10.2013, No. 105928 for USD 8,000.00 dated 24.10.2013, No. 105930 for USD 3,000.00 dated 25.10.2013, No. 106342 for USD 8,000.00 dated 08.02.2014, No. 106427 for USD 10,000.00 dated 08.03.2014 and No. 106153 for USD 8,000.00 dated 08.02.2014. All the seven cheques, he testified, were drawn in favour of Bugwema Investment.

DW2 went on to testify that the seven cheques were presented for clearance in the normal course for collection in favour of Bugwema Investment and that the paying bank; the first defendant did not return as "unpaid" and having passed all the security checks the proceeds thereof were paid to the beneficiary; Bugwema Investment.

Having stated the above, I should now be in the position to confront the issues reproduced above in determination of the case. But before I embark on this noble assignment I wish to remark two things. First, that the plaintiff and second defendant filed final submissions in support and defence of the case, respectively. The first defendant did not file any. I therefore did not have the advantage of the first defendant's final submissions in composing this judgment. As I appreciate the assistance by the learned counsel for the plaintiff and second defendant, I will not reproduce their arguments comprised in their respective written submissions but will be referring to them in the course and where necessary. As for the first defendant's advocate, I only wish to remind him that he, as an officer of the court, has a duty to assist the court in reaching a fair and just decision. What happened in this case is, to say the list, disturbing given the reputation of the law firm in which Mr. Sinare Zaharani works. Should the learned counsel wish to maintain the integrity of his firm, this is a taint which should not recur.

The second remark is that by virtue of the provisions of sub-rule (1) of rule 49 of the Rules, in any proceedings commenced by plaint like the present, evidence-in-chief of witnesses is given by a statement on oath or affirmation. That statement, as per sub-rule (2) of the rule, is filed within seven (7) days of failure of mediation. On the date of hearing, a witness is offered in court for cross-examination as per sub-rule (1) of rule 56 of the Rules. The practice has

it that, before cross-examination, the witness is also accorded opportunity to tender exhibits, if any, and after cross-examination the party who calls the witness is given the right of re-examination. The practice of tendering exhibits by the witness is founded on the principle obtaining under Order XIII Rule 7 (1) and (2) of the CPC in ordinary civil cases; that is, cases which are not commercial to which the Rules are not applicable. As the Rules are silent regarding the status of annextures to witnesses statements, the practice in the Commercial Division of the High Court, by virtue of rule 2 (2) of the Rules, has borrowed a leaf from the principle in ordinary civil cases which states that annextures to a plaint are not part of evidence – see: ***Abdallah Abass Najim v. Amin Ahmad Ali*** [2006] TLR 55, ***Japan International Cooperation Agency (JICA) v. Khaki Complex Limited*** [2006] TLR 343), ***Shemsa Khalifa & Two Others v. Suleman Hamed Abdalla,*** Civil Appeal No. 82 of 2012 (unreported) and ***Mohamed A. Issa v. John Machela***, Civil Appeal No. 55 of 2013 (unreported).

If, like what happened in this case, a witness files a statement but is not made available for cross-examination, his statement may be admitted in evidence if the court is satisfied that exceptional reasons exist for the witness's nonappearance. However, such a statement shall be accorded lesser weight. This is the tenor and import of rule 56 (1), (2) and (3) of the Rules. To make the point clear, I take the liberty to reproduce the rule. It provides:

> "(1) A party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross-examination.
>
> (2) Where the witness fails to appear for cross examination, the Court shall strike out his

statement from the record, unless the Court is satisfied that there are exceptional reasons for the witness's failure to appear.

(3) Where the Court admits a witness statement of a witness who has failed to appear for cross examination, lesser weight shall be attached to such statement."

In the case at hand the plaintiff was not able to procure Mr. Lawrence Laideson for cross-examination for the reason that he had since left employment in the plaintiff bank and his whereabouts were unknown. In the premises, the plaintiff prayed to have his statement admitted in evidence under rule 56 (2) of the Rules. The court was satisfied that the reason brought to the fore by the plaintiff for the witness's failure to appear amounted to exceptional reasons envisaged by the sub-rule and granted the prayer. Mr. Laideson's statement was therefore admitted in evidence and marked PWS 1. However, I wish to remind the parties here that I will attach little weight to it as required by the law.

So much for the preliminary remarks.

Adverting to the issues, the first one, as framed, is whether the plaintiffs account was debited fraudulently and without instructions. Mr. Rwegasira for the plaintiff has proposed that the issue be amended to read: whether the plaintiff's account was debited and money paid to the payee(s) fraudulently and without authority. It is his contention that the proposed amendment will determine the real issue in controversy between the parties. I have subjected the proposition to serious consideration and think Mr. Rwegasira is right. The

issue as framed presupposes fraudulent act of debiting the plaintiff's account and finally paying the payee (in this case Bugwema Investment) without authority while the proposed amendment presupposes the debiting transaction which may be fraudulent or otherwise followed by fraudulently paying the payee (Bugwema Investment) without authority. As rightly submitted by Mr. Rwegasira, the power to, *inter alia*, amend issues is bestowed upon the court by the provisions of Order XIV rule 5 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 – see also: ***Alan Ernestine & 3 Others v. Johnson Lukaza & Another***, Commercial Case No. 51 of 2004 (unreported). On the authority of the above provisions of the CPC and case law, I amend the first issue to read: whether the plaintiff's account was debited and money paid to the payee fraudulently and without authority.

There are three aspects, in my view, which call for determination in the first issue: the debiting of the amount in dispute, the question of fraud and the lack of plaintiff's authority. This begs to answer the sub-issues as whether the plaintiff's account was debited with the amount in question, whether there was fraud in the transaction and whether the transaction was without the authority of the plaintiff.

In determining the first issue, I find it appropriate to tackle the sub-issues first.

Regarding the sub-issue whether the plaintiff's account was debited with the amount in question, the evidence from both sides show that the parties are at one that the plaintiff's account was debited. The plaintiff avers that she drew seven cheques Nos. 106427, 106342, 106153, 105836, 105930, 105928 and 105474 on the first defendant totaling USD 55,000.00 which amounts were debited in her account. This fact is not disputed by the defendants. The central

dispute is in the beneficiaries. I would therefore, right away, find that the plaintiff has proved that USD 55,000.00 were debited in her account.

On the question of fraud, I should start by saying that the standard of proof in aspects of fraud in civil cases is not on the balance of probabilities which, generally, is the standard of proof in civil cases but beyond the ordinary – see: ***Omari Yusuph v. Rahma Ahmed Abdulkadr*** [1987] TLR 169; a case referred to by the second defendant in her final submissions and ***Ratilal Gordhanbhai Patel v. Lalji Makanji*** [1957] E.A 314. In ***Ratilal Gordhanbhai Patel***, it was observed at 316:

> "Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required".

The logic behind this somewhat stringent stance of the law was explained in ***Omari Yusuph*** (supra) as follows:

> "... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof, though as Rupert Cross cautions and illustrates in his text-book on Evidence at page 124 the application of that rule is not always commodious ..."

I will be guided by this principle in determining the question of fraud in the first issue.

The plaintiff is firm in her evidence that the seven cheques were not drawn in favour of Bugwema Investment who ultimately benefited from the proceeds thereof but in favour of Kuenhe+Nagel Ltd (one cheques), Palm Commercial Ltd (one cheques) and Bollore Africa Logistics (five cheques). The first defendant does not deny that. The second defendant states that they were drawn in favour of Bugwema Investment. The question that the cheques were drawn in favour of the payees claimed by the plaintiff is therefore not disputed as between the plaintiff and first defendant. How in a bizarre twist of things the cheques changed to be in favour of Bugwema Investment is a question which, in my view, exhibits fraud. The cheques drawn by the plaintiff (Exhibit P2) bear the same numbers as those in favour of Bugwema Investment. They also bear the same amounts. This is found in the testimony of DW2. Unless there was fraud, cheques drawn in favour of Kuenhe+Nagel Ltd, Palm Commercial Ltd and Bollore Africa Logistics could not turn to be in favour of Bugwema Investment. This could not be legally possible. I therefore find and hold that there was fraud in the transaction.

As regards the question of the plaintiff's authority, DW1 for the first defendant testified that the plaintiff authorized payments in favour of Kuenhe+Nagel Ltd (one cheque), Palm Commercial Ltd (one cheque) and Bollore Africa Logistics (five cheques). This is supported by the first defendant. There was therefore no authority by the plaintiff's to debit the amounts in favour of Bugwema Investment.

I would therefore answer the first issue in the affirmative. That is, the plaintiff's account was debited and money paid to the payee (Bugwema Investment) fraudulently and without authority.

Next for consideration is; if the first issue is answered in the affirmative, whether the defendants acted fraudulently as alleged. An answer to this issue is found in the determination of the first issue above. As I have already found and held that the cheques were not drawn in favour of Bugwema Investment, the defendants surely acted fraudulently. I say so because the clearing process by the first defendant in the name of Bugwema Investment as the beneficiary could not have been possible without her participation in the scam.

The facts of the present case and the points of controversy are similar to those in ***National Oil (T) Limited & Exim Bank (T) Limited v. Standard Chartered Bank (T) Limited***, Commercial Case No. 97 of 2005 (unreported). In that case, National Oil (T) Limited drew a cheque on Exim Bank (T) Limited in the sum of shs. 175,809,754/= in favour of the Commissioner for Customs and Excise, in discharge of its tax obligations. The cheque was presented to Standard Chartered Bank (T) Limited cleared and debited in the account of National Oil (T) Limited by Exim Bank (T) Limited. However, it transpired that the Commissioner of Customs and Excise did not receive the funds. The same were wrongly converted by Standard Chartered Bank (T) Limited and the proceeds thereof paid to a stranger who was not entitled to it. The court held Standard Chartered Bank (T) Limited liable. The decision of the High Court was upheld on appeal in ***Standard Chartered Bank (T) Limited v. National Oil (T) Limited & Exim Bank (T) Limited***, Civil Appeal No. 98 of 2008 (unreported).

The above said, I am satisfied that the plaintiff has proved the question of fraud to the standard set out in ***Ratilal Gordhanbhai Patel*** and ***Omari Yusuph*** (supra). I therefore answer the second issue in the affirmative; that is, the defendants acted fraudulently as alleged.

The third issue is whether the plaintiff acted contributorily negligent in handling the cheques in dispute. **Black's Law Dictionary**, Abridged Seventh Edition by Bryan A. Garner defines the term "negligence" at page 846 as follows:

> "1. The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm ..."

And the same legal work defines the term "contributory negligence" at the same page as:

> "1. A plaintiff's own negligence that played a part in causing the plaintiff's injury and that is significant enough ..."

The second defendant has pleaded at para 2.7 (d) of DWS2; DW2's evidence-in-chief, that the plaintiff had acted negligently in issuing and handling the cheques and thereby allowing third parties to defraud it. Likewise, DW1, basing on the report on forensic investigation conducted, testified at para 12 (iii) that:

> "The original cheques were issued to three different payees, Palm Commercial Limited, Bollore Africa Logistics (T) Limited and Kuenhe & Nagel Limited. However, images from the 2nd Defendant indicate that all the cheques were diverted to a single account titled Bugwema Investment. Investigation

is made to believe it is less likely that fraudsters in three different companies colluded to deposit proceeds in the same account at the 2nd Defendant's bank. **This signifies fraud was organized by someone in the plaintiff company**"

[Emphasis supplied].

And goes on at para 12 (vi):

> "Review of the internal cheque books ordering process and the cheque book production did not find any possibility of duplicate cheques with the same details. The cheques presented at the 2nd Defendant Bank must have been forged and must have been different with the genuine cheques. This is the reason the fraudsters opted for cheques substitution."

The foregoing averments by the defendants impute contributory negligence of the plaintiff. Do the averments have anything to go by? I am doubtful. I say so because the evidence of plaintiff through Mr. Laideson is that after the cheques were drawn and signed accordingly by authorized signatories, were handed to the respective payees through their respective employees whose names are mentioned by Mr. Laideson in PWS1 as Jackson M. Isack and Justin Laban Mapunda for Bollore Africa Logistics, Assad Kais for Palm Commercial Ltd and Kilian H. Mhagama for Kuenhe+Nagel Ltd. Those cheques were received by the first defendant and processed for payment. Thus

the question that the plaintiff was reckless in handling the cheques does not arise. That would only be true if the first defendant would have testified that the cheques were in favour of Bugwema Investment.

Thus, on the evidence, I fail to see contributory negligence on the part of the plaintiff. After all, taking reasonable precautions in handling the cheques was primarily the duty of the first defendant. Putting it differently, it was not the duty of the plaintiff to take precautions in the management of the first defendant's business, as was the second defendant's. I find fortification in this stance in ***Tai Cotton Mill Ltd. v. Liu Chong Hing Bank ltd and Others*** [1985] 2 All E.R. 947, at p. 954 in which it was held that the customer of a bank was not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment.

And to sink the nail a little bit deeper, the present is a tort of conversion and therefore an intentional tort – see: ***Standard Chartered Bank (T) Limited v. National Oil (T) Limited & Exim Bank (T) Limited*** (supra) citing V. H. Harpwood's **Modern Tort law,** 7th Edition para 17.1.2 and Ratanlal and Dhirajlal's **The law of Torts**, 26th Edition, p. 454 - to which contributory negligence of a plaintiff is no defence – see: ***Quinn v. Leatherm*** [1901] AC 497; [1900 – 3] All ER. 1 at p. 17 cited in ***National Oil (T) Limited & Exim Bank (T) Limited v. Standard Chartered Bank (T) Limited*** (supra).

At this juncture, I find it irresistible to quote an excerpt from a persuasive decision from Canada of **Boma Manufacturing Ltd v. Canadian Imperial of Commerce** (1996)3 S.C.R. 727:

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

[Quoted in ***Standard Chartered Bank (T) Limited v. National Oil (T) Limited & Exim Bank (T) Limited*** (supra)].

Applying the above principle to the present case, even if the plaintiff was to be held contributorily negligent in handling the cheques in question, the same could not be applicable in that the subject matter of the tort is strict liability.

I therefore answer the third issue in the negative. That is; the plaintiff did not act contributorily negligent in handling the cheques in dispute.

The last issue is about reliefs to which the parties are entitled. Flowing from the discussion above, I find and hold that the plaintiff has proved the case against the defendants to the required standard. She is therefore entitled to the refund of USD 55,000.00 (United States Dollars Fifty Five Thousand only) which was debited in her account but did not reach the drawees, interest on that amount from the date of filing the suit to the date of judgment, interest at court's rate on the decretal sum from the date of judgment to the date of satisfaction of the decree in full, general damages and costs of the suit.

In the upshot the case is decided for the plaintiff and in terms of rule 67 (3) of the Rules, I proceed to order as follows:

1) The defendants, jointly and severally, shall pay the plaintiff the sum of USD 55,000.00 (United States Dollars Fifty Five Thousand only);
2) The defendants, jointly and severally, shall pay the plaintiff interest of 21% per annum from the date of filing the suit to the date the judgment is pronounced to the parties;
3) The defendants, jointly and severally, shall pay the plaintiff Tshs.10,000,000/= (Shillings Ten Million Only) as general Damages;
4) The defendants, jointly and severally, shall pay the plaintiff interest at court's rate of 7% per annum from the date the judgment is pronounced to the parties to the date of satisfaction of the decree in full; and
5) The defendants, jointly and severally, shall pay the plaintiff costs of this suit.

Order accordingly.

DATED at DAR ES SALAAM this 9th day of February, 2018

J. C. M. MWAMBEGELE

JUDGE

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION