



REPUBLIC OF MALAWI
IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO 77 OF 2015

(Being Commercial Case Number 42 of 2013, Commercial Court, Lilongwe)

BETWEEN:

BRYMSONS LIMITED APPELLANT

AND

NATIONAL BANK OF MALAWI LIMITED..... RESPONDENT

CORUM: Honourable Justice Dr. Jane Ansah SC, JA

Honourable Justice R.R. Mzikamanda SC, JA

Honourable Justice A.C. Chipeta SC, JA

Chilenga, Counsel for the Appellant

Yotamu Longwe, Counsel for the Respondent

Minikwa, Recording Officer

Muntiti, Reporter

JUDGEMENT

Mzikamanda SC, JA

This is a long outstanding matter. The judgment is unanimous. The appeal in this matter was made by Brymsons Ltd against The National Bank of Malawi Limited in respect of the decision of the High Court, Commercial Division, Lilongwe, dismissing the appellant's claim for the sum of K6,603,390 in damages for breach of contract. That decision was rendered on 27th May, 2014. There are six grounds of appeal namely that:

1. The learned Judge erred in law in finding that the plaintiff was bound by the fraudulent acts of Mr. Chikumbutso Chinyengo.
2. The learned Judge erred in law in finding that the method that Mr. Chikumbutso Chinyengo used for drawing the relevant cheques was neither unusual or out of the norm.
3. The learned Judge erred in law in finding that simulated signatures would not put a reasonable banker on inquiry.
4. The learned Judge erred in fact in finding that the plaintiff's account was not audited for the past two years.
5. The learned Judge erred in law in finding that the plaintiff's loss was their own making.
6. The findings of the learned Judge are contrary to law and evidence.

The prayer is for reversal of the decision of the Court below.

The appeal is opposed.

The background to the matter shows that the appellant is company. At all material times it carried out business within the City of Lilongwe and operated a current bank account with the respondent's Lilongwe branch under account number 18341. The appellant had three

signatories to its cheques and any one of the three would sign. The signatories were; Mr. Bheda, Mrs. Naaz Bheda and their son who were all directors in the company. The company had an employee named Mr. Chikumbutso Chinyengo who would from time to time be sent with cash cheques duly signed, mostly by Mr. Naaz Bheda, to the respondent's Lilongwe branch and cash the cheques. Mr. Chikumbutso Chinyengo was also tasked with doing bank reconciliation. Mr. Chinyengo would not normally have access to the appellant's accounts books or cheque books which were all kept under lock and key by the directors. They would occasionally be given to him to do reconciliation. During such instances, Mr. Chinyengo would take opportunity to take cheque leaves from the cheque books which he would forge and cash at the same Lilongwe branch, in the same way he would cash legitimate cheques duly signed by Mrs. Naaz Bheda. Between 7th November 2009 and 27th April, 2012 the respondent bank allowed withdrawals by Mr. Chinyengo of about 70 forged cheques to the sum of K6,603,390. Thereafter, Mr. Chinyengo went on leave and never returned to work. That was when Mrs. Bheda took over the amount reconciliation and discovered that a cancelled cheque had been paid out. An audit that followed revealed that K6,603,390 was stolen through forged cheques where Mrs. Bheda's signature was forged. The matter was reported to Police and to the National Bank of Malawi Limited as well as Standard Bank Limited. National Bank of Malawi Limited refused to reimburse although Standard Bank Limited did reimburse. The appellant commenced an action in the High Court, Commercial Division, Lilongwe, to recover the lost money in a claim of damages for breach of contract on the part of National Bank of Malawi Limited. That action was not successful, after full trial, as the claim was dismissed. Hence this appeal.

This appeal relates to banker and customer relationship and the duty of care, among other obligations attendant to that relationship. The

law governing such a relationship has developed over time and continues to develop with the growth and complexity of business as well as advancement in technology. Yet, some basic tenets remain unchanged in some respect. We will return to a discussion of the applicable law later in this judgment. For now we will briefly outline the arguments that have been advanced by the parties. These are both in writing and oral.

In referring to what he considered as the applicable law and principles counsel for the appellant cited provisions of the Bills of Exchange Act contained in section 23,29,30,75,78,79 and 92 of the Act. He also cited some foreign and local case authorities in support of the grounds of appeal. In arguing the first ground of appeal that the learned judge erred in law in finding that the appellant was bound by the fraudulent acts of its employee Mr Chinyengo, counsel submitted that the fraudulent acts of its employee did not bind the appellant. Counsel submitted that forgery is a criminal offence under section 51 of the Penal Code and fraudulent acts are invalid as highlighted in section 21 of the Bills of Exchange Act. According to him, once there is forgery established there can be no contributory negligence. He relied on the case of **Barclays Bank vs. Simmons (WJ Son and Cooke (Southern) Limited** [1980] 1 QB 677 in support of the argument. In answering the question whether the Judge was right in finding that the appellant's loss was of their own making, counsel submitted that the Judge erred in that finding. According to him the respondents had no authority to pay the forged cheques under section 24 of the Bills of Exchange Act and the case of **Seventh Day Adventist Health Centre Vs. National Bank of Malawi (2000 -2007) MLR (Comm) 109**. He submits that in terms of **Barclays Bank vs. Simmons** (supra) the respondent is liable for all the losses. Counsel also cited the case of **National Bank of New Zealand Limited vs. Walpole and Partners Limited** {1997} 2 NZLR 7 and **Barclays Bank Plc vs. Qurice Care Limited and another** {1992}4 ALLER 363 at 376 in support of

his argument. Counsel recognized that the duty of the bank could never be absolute as was held in **National Bank of Malawi Limited vs. Right Price Wholesale Limited** MSCA Civil Appeal Case No. 242 of 2009 (case No. 10 of 2011).

In arguing the second ground of appeal, counsel submitted that the Judge in the Court below erred in law in finding that the method Mr Chikumbutso Chinyengo used for drawing the relevant cheques was neither unusual or out of the norm. According to him forgery being a crime there was nothing usual with a crime even if the employee imitated the signature of a signatory. He submitted that the Bank had no authority to cash a forged cheque under section 24 of the Bills of Exchange Act, even though the employee was sent to deposit or cash cheques of the appellant on regular basis.

In arguing the third ground of appeal that the learned Judge erred in law in finding that simulated signatures would not put a reasonable bank on inquiry, counsel observed that forgery is the making of a false document with intent to deceive or defraud and where a person succeeds in deceiving with the forged document here cannot be any protection to the Bank for want of authority. According to counsel for the appellant, the bank should have been on notice by the fact that the employee drew and cashed sixty-nine cheques of his employer. According to counsel, the size of the cheque is a factor for putting the bank on notice. He argued that it is incumbent on the banker to ensure that only genuine cheques are paid. According to counsel, section 51 of the Penal Code would not have effect if genuine signatures cannot be distinguished from forgery as banks would on daily basis pay forged cheques. Counsel relied on the case of **Orbit Mining and Trading Co. Limited vs. Westminster Bank Limited** [1963] 1QB 794 (CA) when he adopted a position that the number of forged cheques was so excessive that it ought to have put a reasonable banker on inquiry. Counsel also

relied on the Indian case of **Citizen Co-operative Bank Limited vs. Ritesh Mittal Air** (2003) J & K 67 (BCAJ) where four forged cheques were issued on different dates to the total amount of R152,100 Rupees (Rs) and cashed by the bank. Although the bank denied liability pleading that it was negligent act on the part of the claimant himself as he had not taken due precautions and kept the cheque both safely and where differences in hand counting on the cheque could not be easily detected through visual comparison the bank was non the less held liable to make good the loss saying.

“In case of forged signatures not with the connivance of the depositor, the bank is not free of liability”.

Counsel submitted that while the account holder must certainly take all precautions to ensure that the cheque book issued by the bank is kept in proper custody, this does not exonerate the bank from its liability. He submitted further that the account holders' failure to inform the bank about stolen cheques or forgery committed is not a valid defence to ward off the bank's liability. He submitted also that in case of slightest doubt, the bank must apply high-tech methods to detect misuse of cheques. According to Counsel the only defence which the banker can successfully make in this behalf is that the fraud on bank was committed with the knowledge of the customer concerned.

Counsel referred to the fourth ground of appeal that the learned Judge erred in fact in finding that the appellant's accounts were not audited for two years and argued that it does not matter when the forgery is discovered. Counsel further argued that the question of audit or lack of it did not affect the right of the appellant to claim on cheques which were clearly forged. He cited the case of **Morrison vs London County and Westminster Bank Limited** [1914] 3 KB 356 where it was held in respect of that fraud by an employee that started in May 1907

until November 1911 remitting in bank payments, the bank had been negligent in collecting the cheques drawn to payable to selves or order and endorsed by the employee. Counsel pointed out that in relation to cheques collected after the two-year period however, being 43 of the 50 forged cheques, the collecting bank was held not negligent on failing to make inquiries. Another case cited on this point is that of **Carpenter's Company vs. British Mutual Banking Company** {1938}1KB 511 where an employee defrauded his employer through bank cheque withdrawal from 1920 to 1935 without there being any query on the cheque from the employer, the defence put forward by the bank that it had not been negligent in not making inquiries as the claimant had not queried the cheques for 15 years was rejected, the court having stated that he principle of culling steeps put forward in Morrison's cases had to be received with great reserve.

Regarding the fifth ground of appeal that the learned Judge erred in law in finding that the appellant's loss was of their own making Counsel argued that in cases of forgery there is no contributory negligence unless the cheque itself was negligently drawn. He argued that a thief gets no rights in the case of a stolen cheque. Counsel further argued that in Malawi, we do not have the doctrine of contributory negligence in respect of forged cheques as it does exist in England under their Banking Act of 1979, which Act is not part of our law. According to Counsel, the cases of **Barclays Bank Plc vs. Quice Care Limited and another** [1992]4 ALL ER 363 at 376 and **National Bank of Malawi vs. Right Price Wholesale Limited** MSCA civil Appeal NO 242 of 2009 which held that the duty on the bank could never be absolute are premised on the English Banking Act of 1979 which is not part of our law. Counsel then submitted that the respondent banker in the present case had no authority to pay the 69 forged cheques which were presented by the

employee of the appellant, being Mr. Chikumbutso Chinyengo, in contravention of section 24 of the Bills of Exchange Act.

In response to some questions from the bench Counsel said that high-tech method is any method that should not allow a forged cheque to be paid. He submitted that the bank should have the technology to stop forged cheques although he did not expect banks to become forensic experts. Counsel also indicated that the Bill of Exchange Act has given Bankers a defence of negligence and that forged cheques can be treated differently depending on circumstances.

On the general ground of appeal being the sixth ground of appeal that the findings of the learned Judge are contrary to law and evidence, counsel argued that the respondent had no authority to pay the forged and invalid cheques as a matter of law. He submitted that the relationship between a banker and a customer in matter of drawing and payment of the customer's cheques is that of the customer being principal and the bank being agent. He submitted that the bank owed fiduciary duties to the customer and is prima facie bound to exercise reasonable care and skill in carrying out instructions of the principal. He further submitted that if the bank executed an order knowing it to be dishonestly given or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make, the bank would plainly be liable.

Counsel for the respondent opened his argument by saying that the appeal rests on one issue, being the duty of a banker to its customer. According to counsel for the respondent, the banker owes a duty based on contract signed and can only be liable if in breach of duty and such liability is not absolute. Counsel submitted that the appeal is before this Court by way of re-hearing, in which case the Court can re-examine the evidence. According to counsel for the respondent, the bank went

through the normal process of verifying genuine signature on cheques through UV scanner which showed that there was nothing wrong with the signature. The bank teller could not differentiate the signature on the cheques and the specimen signature in the bank. In conducting the signature checks, the bank does not use forensic tools and it would be expecting too much that bank tellers undergo training to become forensic experts. Counsel also submitted that the amounts on the cheques were below the threshold where reference would be made to drawer to indicate whether the cheque be cashed or not. According to counsel, the bank was entitled to treat the cheques as genuine from the drawer who mandated them to pay. Counsel submitted that the case of **National Bank of Malawi Limited vs. Right Price Wholesale** discussed the duty of care in Malawi and correctly decided that it is not absolute. According to counsel, that case was not decided on the premise of the English Banking Act of 1979. He submitted that the finding by the Court below that the appellant facilitated the fraud could have been made without reference to the **Barclays Bank Plc V Quice Care** case. He also submitted that the appellant could not abrogate on their duty to manage their accounts properly so as to discover the fraud. On this point counsel cited the case of **Lipkin Gorman (a firm) V Karpnale Limited and another** [1992] 4 ALL R 331 in support of the proposition that while a bank shoulders the greater responsibility, a customer is not entirely without responsibility. In the cited case, the Court accepted the following five propositions made by counsel on behalf of the bank, that to say:

1. The bank is entitled to treat a customer's mandate at its face value, save in extreme cases.
2. The bank is not obliged to question any transactions which is in accordance with the mandate unless a reasonable banker would

have grounds for believing that the purpose of defrauding their principal or otherwise defeating his true intention.

3. It follows that if a bank does not have reasonable grounds for believing that there is fraud, it may pay.
4. Mere suspicious or unease does not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate.
5. A bank is not required to act as an amateur detective.

The cases of **Barclays Bank Plc vs. Quice Care Limited and another** [1992] 4 ALL ER 363 and **London Joint Stock Bank vs. MacMillan and another** [1918] AC 777 were cited in support of the proposition of the customer of the bank bearing some responsibility in the management of the bank account. According to counsel, the MacMillan principle exonerates the banker in instances where a customer has fallen short of the light obligation placed on him or her. Counsel submitted that where a customer's conduct is such that he virtually allowed the misappropriation to be orchestrated, such conduct would give rise to estoppel as illustrated by the case of **Brown Vs. Westminster Bank Limited** [1964] 2 Lloyds Rep. 187 where a servant of an aged woman forged her signature on cheques drawn on her account who kept answering the branch manager that all was well. The woman was estopped, on account of her explicit representation that all was well.

Counsel brought to the attention of the Court the following statement from the **National Bank of Malawi Limited vs. Right Price Wholesale** case that:

“..... The signatures in question were striking similar. By merely looking at the signatures one would be inclined to conclude that they were made by the same person”.

Counsel submitted that the above stated is the position in the present case as well, in that the signatures on the forged cheques are strikingly similar as if made by one person. Counsel invited this Court to apply the principles in the **National Bank of Malawi Limited vs. Right Price Wholesaler's** case to the present case. He also invited this Court to apply the MacMillan principle that where a customer's conduct facilitates the fraud, he will be responsible for the loss resulting from such action. The customer's conduct can be such that he virtually allowed the misappropriation to be orchestrated'.

We have examined in detail, the judgment of the Court below, the arguments presented before us, together with the authorities cited in support. It is clear to us that both sides invested a lot in the preparations for the appeal. We thank them for their industry.

We must state that this appeal comes to us by way of rehearing. We have, thus, subjected the evidence on record to fresh scrutiny. We are not bound by the findings that the Court below made and we may make our own findings if our analysis of the material leads us to doing so. Where we agree with the Court below, we will be able to say so.

This appeal concerns the relationship between a banker and its customer and the attendant rights and duties they have in that relationship. Factually, there is no dispute that at the material time sixty – nine forged cheques belonging to the appellant were presented and cashed by Mr Chikumbutso Chinyengo, an employee of the appellant who presented them and cashed them at the respondent's Lilongwe Branch. It is not in dispute that Mr Chikumbutso Chinyengo is the employee who on a regular basis cashed the appellant's cheques duly signed by Mrs. Naaz Bheda on the instructions of the said Mrs. Naaz Bheda. It is not in dispute that the signature on the forged cheques and the ones duly signed by Mrs. Naaz Bheda are strikingly similar, such that

even the joint forensic expert required specific tools to examine the signature to see if there were differences.

As to the applicable law, the starting point is section 24 of the Bills of Exchange Act. It provides as follows:

“ Subject to this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party there to can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery”.

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it requiring determinable future time a sum certain in money to or to the order of a specified person or to bearer (see section 3(1) of Bills of Exchange Act)

A cheque is the document which contains an order to the bank to pay a certain amount of money from the account of the customer.

As a general rule, the provisions applicable to a bill of exchange payable on demand apply to a cheque. Thus section 24 of the Bills of Exchange Act applies to cheques as well. Indeed, there are those who view a cheque as a bill of exchange drawn on a specified banker and expressed to be payable on demand, notwithstanding some differences between them.

The first point to note about section 24 of the Bills of Exchange Act, is that all that is said in that section is subject to the Act. The section therefore should not be read in isolation from the other provisions of the Act.

The second notable aspect of the provisions is that a forged or unauthorized signature is wholly inoperative and no right accrues under the forged or unauthorized signature.

The third notable part of the provision is that there would be situations when a party may be precluded from setting up the forgery or want of authority. Those situations are not closed.

The last notable part is the provision which makes room for ratification of an unauthorized signature not amounting to forgery.

There are numerous case authorities that discuss the relationship between a banker and its customer, particularly regarding the handling of forged cheques. While the relationship between a banker and a customer has been defined in various ways, it was correctly observed in **Seventh –Day Adventist Health Centre Vs. National Bank of Malawi** [2001-2007] MLR (com) 109 that dominant features remain including it being that a banker being debtor and customer being creditor as well as that relationship which imposes duties on both sides, express or implied (see also **First Merchant Bank Limited vs. Alzohaib Trading** MSCA civil Appeal No 45 of 2000 (unreported). A cheque drawn by a customer is a mandate to the bank to pay that cheque. In doing so, the bank must exercise reasonable care and skill to ensure that the payment is proper and that the customer is protected (see **London Joint Stock Bank vs. MacMillan** [1918] AC 777 at 789). The duty on the part of the customer is to ensure that the bank is not misled by the cheque that the customer draws. The position taken in **National Bank of Malawi Limited vs. Right Price Wholesale** that the duty on the banker with regard to forged

cheques is not absolute is consistent with the third aspect of section 24 of the Bills of Exchange act as we outlined above. In other words, while the customer must be protected against the cashing of forged cheques, there will be situations when the customer may be precluded from setting up the forgery or want of authority. These situations in which a customer may be precluded from setting up the forgery of his cheque or want of authority are not closed and will necessarily depend on the facts of each case. This must be understood to mean that even if there is some evidence of forgery or want of authority, a party may be precluded from setting up the forgery or want of authority in certain situations. The law in this regard was well summarized in **National Bank of Malawi Limited vs. Right Price Wholesale Limited** regarding a claim of negligence against a bank that pays out a forged cheque in the following terms at page 9 of the unreported judgment:

“Generally, negligence on the part of a banker means falling below the standard of reasonable care expected of a bank. The bank's mandate is to honour its customer's cheques as long as the account has sufficient money. A bank cannot however debit its customer's account with a forged cheque. The mandate is considered so as to protect the customer. That being the case it must follow that a bank must exercise due care and diligence in the management of its customer's account. The relevant question is, what degree of care and diligence is expected of a bank”.

The Court in addressing the question quoted with approval Ross Cranston on Principles of Banking law at page 200 where the question was discussed and where it was stated that the duty is to exercise care and skill of a reasonable bank in carrying out the particular activity concerned and that the law does not impose liability for what turns out to be an error in judgment unless the error was such that no reasonably

well informed and competent bank would have made it. That paragraph also observed that certain transactions are so out of the ordinary course that they ought to arouse doubts and put the bank on inquiry. It had earlier been observed that a strict approach to mandate protects customers. Having so observed however the Court went on to say at page 11 of its judgment that:

“While a banker shoulders the greater responsibility, a customer is not entirely without responsibility”.

It further stated at page 13 that:

“The correct analysis of the principles from the cases above clearly establishes that a banker will only be liable where consequential loss results to a customer where the bank knew of the dishonest transaction or that the bank acted recklessly in failing to make inquiry when the circumstances of the transaction called for such an action. It follows from this analysis that the duty of the bank could never be absolute. It is not that a bank is liable in every case where money is misappropriated from a customer’s account.”

The court went on to state at page 14 that:

“The MacMillan principles exonerate the banker in instances where a customer has fallen short of the light obligation placed on him. Obviously where a customer virtually facilitates a fraud, he will be held responsible for the loss resulting from such an action. This a customer’s conduct might be such that he virtually allowed the misappropriation to be orchestrated. Such conduct would give rise to estoppel as illustrated by the case of **Brown vs. Westminster Bank Limited** [1964]2 Lloyds R 187”.

We observe that the principles of law applicable to the present case were well laid down in the above extracts from **National Bank of Malawi Limited v Right Price Wholesale Ltd (Supra)**.

We now turn to the grounds of appeal. As to the first ground of appeal that the Court below erred in law in finding that the appellant was bound by the fraudulent acts of its employee, Mr. Chikumbutso Chinyengo, we observe that the appellant had developed a practice of drawing cash cheques which were regularly handed over to Mr. Chikumbutso Chinyengo, with instructions to go and cash such cheques at the Lilongwe branch of the respondent. We also observe that as part of such practice the cash cheques were drawn on such amounts as were just below the threshold that the appellant was aware would not require verification by the bank. Further still, we observe that although the appellant kept its cheque books and books of accounts securely under lock and key, it developed a practice of periodically releasing these secure documents to Mr. Chikumbutso Chinyengo for purposes of reconciliation, before getting them back to be placed under lock and key again. We find it most unsatisfactory on the part of the appellant that it could not have checked the secure documents it gave to Mr. Chikumbutso Chinyengo, both at the time of giving them and at the time of getting them back. We also find it most unsatisfactory that it received bank statements and cheque images from the bank and placed these under lock and key without checking them. If the appellant had checked these regular bank statements and the cheque images from the bank that had been drawn on the account, it is probable that it would have discovered any anomalies on the account even before the sixty-nine cheques were all cashed. These cheques are serially numbered.

Conversely, if the appellant did check these documents, it follows that it did not observe any anomalies on the account such as to raise an alarm, on its part. It is quite curious that it was only after the employee

had left without notice, and without reporting back, that the appellant begun to notice the alleged forgeries. The Court below observed in its judgment at page 12 of the unreported judgment that:

“Indeed, the casing of the plaintiff’s cheques by Chikumbutso Chinyango was an operation which was reasonably consonant with his duties”

At page 16 of the judgment of the Court below, the Court observed that the amounts of the cheques that were cash and misappropriated by Mr. Chikumbutso Chinyengo were within the same ranges as the amounts on the cheques drawn by Mrs. Bheda, which cheques were all cash cheques. In all the circumstances of this case the words **of National Bank of Malawi Limited v Right Price Wholesale Ltd** that the customer virtually facilitated the fraud are applicable in the present case. The first ground of appeal is without merit and is dismissed.

As to the second ground of appeal that the learned Judge erred in law in finding that the method that Mr. Chikumbutso Chinyengo used for drawing the relevant cheques was neither unusual nor out of the norm, we wish to observe that discussion in respect of the first ground of appeal applies here with full force. The arguments by counsel for the appellant suggest a strict interpretation of forgery being a crime. Our earlier discussion of section 24 of the Bills of Exchange Act highlighted that there are circumstances in which a party may be precluded from putting up forgery or want of authority. The court below put it at page 13 of its judgment that

“Further still, as already noted in the practice of the defendant bank with regard to the plaintiff’s account, was that they would not make enquiries from the plaintiff whenever the plaintiff’s cheque was presented to the bank by Chikumbutso Chinyengo. In other words, the method that Chikumbutso Chinyengo used for drawing the relevant

cheques was neither unusual or out of the norm. In this regard, I would thus agree with the views expressed by May L.J. in the court of Appeal's decision in **Lipkin Gorman V Karpanale of Co** [1989] 1WLR 1340 (CA) (the decision was revised on another point in 1992) that courts should not be too ready to hold that a bank had acted in breach of its duty of care when it honoured without question a cheque drawn with the authority of the customer's agent.

The second ground of appeal is without merit and is accordingly dismissed.

As to the third ground of appeal that the learned Judge erred in law in finding that simulated signatures would not put a reasonable banker on inquiry, we observe that the Court below dealt with the question in the following terms at page 5 of its judgment

"According to the evidence of the single joint handwriting expert, Mr. Mavuto Chiumbuzo who came to testify in this instance, the signatures on the forged cheques were simulated signatures of Mrs. Naaz Bheda. Indeed, it has long been accepted by forensic experts that the construction of simulated signatures is such that they are intended to appear to a lay person as genuine. Indeed, as was noted by the forensic expert in **Diya V Halifax PLC** [2009] EWCA Civil 183 that simulated signatures can either be genuine or very good simulations. With simulated signatures that are of high quality it will often require an examination using a very powerful microscope to reveal through magnification, the numerous pen-stops and lifts or signs of correction, along with indications of a slow, tremulous line quality. This is what happened in this instance when the signatures in question were examined by Mr. Chiumbuzo. However, the question would be what should be expected from an ordinary bank teller who has been presented with a cheque at the counter.

The Court below addresses the last question at page 11 of its judgment in the following terms:

“As earlier noted, it is generally accepted that simulated signatures are difficult to detect with the naked (eye) for someone who is a layman in the field of forensic science. Indeed, as also noted earlier the fact that the signatures in this instance were simulated could only be confirmed after the same were examined under the magnification of a microscope designed for such a task by an expert. In view of this, I do not think that it can be argued that a mere cashier at the bank would have exercised the same care and skill as that of a qualified handwriting expert”.

The analysis on the question of simulated signatures as done by the Court below is accurate and we would not have any basis for departing from it. A banker is not required to act as an amateur forensic expert. The third ground of appeal is without merit and is dismissed.

As to the fourth ground of appeal that the learned Judge erred in fact in finding that the plaintiff’s account was not audited for the past two years, we find no evidence on record that contradicts this finding. The line of argument that counsel for the appellant took was that it did not matter whether there was an audit or not in the past two years in so far as the claim herein is concerned, as long as there is proof of forgery of the cheques. He cited a number of case authorities, in support of his position. We observe that this ground of appeal might have been risen out of a passing observation that the Court below made at page 17 of its judgment that:

“From the foregoing, I must state that I did not find any evidence to suggest that the defendant bank acted in breach of its duty of care in honouring the cheques that were presented. In any case I must also fault the way in which the plaintiff operated its account in that for a period which was close to two years the plaintiff never audited their accounts.

Indeed, I believe that this is not the way that accounts of a limited liability company are supposed to be handled. I believe that the plaintiffs ought to have made it their duty to periodically check their accounts and not just put all their trust in Mr. Chinyengo. If they had done so I do believe that they should have been in a position to notice that their account was being operated fraudulently and alerted the defendant bank accordingly. I must thus find that the plaintiffs' loss was of their own making and thus proceed to find that the plaintiff's action fails with costs to the defendant".

Clearly, the faulting of the appellant on lack of audit was after the Court below had earlier recorded that it found no evidence that the bank acted in breach of duty of care in honouring the cheques that were presented to it. In any event, there is nothing on record to suggest that the faulting on lack of audit for two years was without basis. The fourth ground of appeal is not made out and is dismissed.

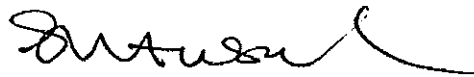
What we have said above applies with equal force to the fifth ground of appeal which is that the learned Judge erred in law in finding that the plaintiffs' loss was of their own making. We are satisfied that had the appellant taken appropriate steps to manage their cheque books and books of accounts by properly securing them and checking them together with the checking of the bank statements and cheque images they received from the bank they would have avoided the forgery. The appellant is thus precluded from setting up the forgery or want of authority in this case.

As to the last ground of appeal which is that the findings of the learned Judge are contrary to law and evidence, we observe that what we have discussed in relation to the previous five grounds of appeal demonstrate that the sixth ground of appeal is unsustainable. We have discussed the applicable law and the relevant evidence on record and we

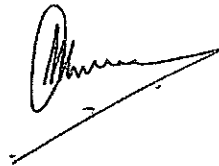
have come to conclusions that are no different from those of the Court below. We have no basis for departing from the finding of the Court below in this matter. We equally dismiss the sixth ground of appeal on the basis that it is not made out.

All in all, this appeal must fail and it is dismissed with costs.

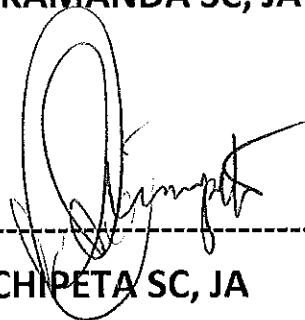
Pronounced at Lilongwe this 31st day of March, 2022



HONOURABLE JUSTICE DR. JANE ANSAH SC, JA



HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA



HONOURABLE JUSTICE A.C. CHIPETA SC, JA