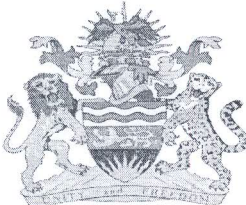


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REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRAR
CIVIL DIVISION
CIVIL CAUSE NO. 86 OF 2017

JAMES ALIDI KAOMBE..... PLAINTIFF

-Versus-

NED BANK MALAWI LIMITED.....DEFENDANT

Coram: Honourable Mr. Justice D. Madise
Mr. Kamkwasi of the Counsel for the Plaintiff
Mr. Chayekha of the Counsel for the Defendant
Mr. M. Mbekeani, Official Court Interpreter

Madise, J

JUDGEMENT

1.0 Introduction

1.0 The plaintiff in this matter commenced this action by a writ of summons on 31st March 2017 against the defendant claiming repayment of the sum of K25 925,000 plus interest, and damages for negligence. The defendant disputed the claim.

2.0 The Pleadings

2.0 The plaintiff claims that between 17th August 2016 and 4 September 2016, the defendant paid a total of six cheques amounting to K25,925,000 purportedly drawn by the Plaintiff on his account which was paid to unknown persons. The plaintiff stated in his claim that he never gave any authority to the defendant to honour the cheques. The defendant has denied that the plaintiff never gave them authority to pay out the stated cheques and they have called the plaintiff to strict proof.

3.0 The Facts

3.0 The plaintiff told this Court that he left the country for South Africa on 4th August 2016 and only returned on 17th September 2016. He tendered in evidence a copy of the passport page (JAK 1) which has stamps indicating that he exited Malawi in August and re-entered allegedly in the month of September 2016. The plaintiff has also tendered in evidence four cheques, two of which were cashed from his account while he was away in South Africa (JAK 2).

3.1 He stated that he gave the defendant's bank his cellular phone numbers for communication but the bank never called him. The numbers are 0888892669 and 0999917178. The plaintiff stated that some fraudster forged his signature and cashed those cheques and the bank never called him for confirmation.

3.2 In conclusion he stated that the signatures on the forged cheques were different from his signature which he had submitted to the bank. Coincidentally all the four cheques were

paid out by the same teller No 3. The plaintiff claims the defendant was negligent in paying out these forged cheques.

- 3.3** In defence the defendant summoned five (5) witnesses. Lydia Dambula from Nedbank explained to the Court how an account is opened and the procedure to be followed when a cheque is presented for encashment.
- 3.4** She stated that once a cheque is presented, the cashier first checks and record the identity of the person presenting the cheque and subjects the cheque to a UV light. Later the cashier checks the date on the cheque and the amount in words, figures and the credit balance in the account. The cashier then checks the signature on the cheque and compares it with the one in the system.
- 3.5** If the amount on the cheque is within the cashiers' limit, he/she can proceed to pay it out. However, if the cashier notices an anomaly, he/she will return the cheque to the person presenting it or refer it to his/her supervisor. Where the amount exceeds the cashier's amount, he/she will refer it to a supervisor. The supervisor will also check the cheque and satisfy him/herself that everything is in order including the signature on the cheque.
- 3.6** Finally, the supervisor will call the drawer of the cheque using the numbers provided by the customer when opening an account. Once the signatory answers the phone the supervisor will indicate the name of the signatory and his name on the cheque. Once authorisation has been granted the cheque will be honoured.
- 3.7** In the present case Lydia Dambula told the Court that cheques dated 16th August 2016, 21st September 2016 and 27th September were presented to her for encashment. After verifying the details on the cheques and checking the correctness of the details on the cheques, she called the plaintiff using his phone number

0888892669 which he had given the bank when he was opening his bank account. The witness stated that on all these occasions the plaintiff answered the phone and admitted that he was a Mr. Kaomba. When the witness informed the plaintiff that there was a Mr. Mphatso Moya with cheques with different amounts the plaintiff apparently authorised the payments of the cheques.

- 3.8** However, since all the cheques had huge amounts the witness referred them to the Operations Manager. The witness tendered in evidence the cheques she handled. (LD2, LD3 and LD4). In conclusion the witness stated that the Bank did all it could to ensure the process was within the stipulated regulations.
- 3.9** The plaintiff applied for a writ of subpoena to Godfrey Meke an employee of Telecom Malawi Limited. Meke stated that he was detailed to produce a call log for TNM number 0888892669. The call log indicated the traffic of calls from and to the within number.
- 3.10** The specific dates are 22nd August 2016, 24th August 2016, 26th August 2016 and 27th August 2016. The other numbers communicating with the plaintiff's TNM number are 1848942, 1848946, 17577772 and 1753592 which are all ground lines for Nedbank offices. According to Meke this indicated that someone from Nedbank did call the plaintiff on the stipulated days and the duration of the calls are mostly in seconds.
- 3.11** Linley Ng'ambi, the third defence witness told the Court that she was an employee of Nedbank as a Customer Service Consultant at Capital City Branch in Lilongwe. She recalled the events surrounding a cheque dated 26th August 2016. When the said cheque was presented to a cashier it was referred to her for further scrutiny.
- 3.12** She then called the signatory on 0888892669 the number the customer gave the Bank when he was opening the account. She

stated that the phone was answered and the receiver stated that he was Mr. Kaomba. The receiver of the call then confirmed the payment after the witness had mentioned the amount and the name of the person cashing it. However, since the cheque was beyond the witness's limit, she referred it to the Branch Manager. She then authorised the cashier to effect payment.

3.13 However, when another cheque dated 3rd October 2016 was presented to the Bank, the same procedure was followed and the signatory refused to confirm the cheque. Later on, the signatory called the Bank and gave his authority to pay the cheque. The witness then sent an email to the customer's branch in Blantyre. Mr. Nyangulu the Branch Manager then replied the email advising not to pay the cheque as the transaction was a fraud. This how the other issues on the alleged fraud came to light.

3.14 Simeon Hara a Customer Service Consultant for Nedbank told the Court that he transacted two cheques dated 22nd and 25th August 2016. When he received the cheques he checked the identities of the payee, the dates, the amount in words and figures and the signatures on the cheque. He similarly called the signatory and mentioned the amount on the cheque and the payee. The witness alleged the plaintiff confirmed the cheque. But since the amount was over his limit to authorise, he referred it to his Branch Manager. He then authorised the cashier to pay it out.

3.15 Benson Mzumara the Forensic Investigator for Nedbank Malawi LTD told the Court that upon joining the bank in 2017 he was handed over the present file to investigate. According to the witness, the cheques that were presented to the Bank were all genuine, and the various steps undertaken by the bank when a cheque is presented were all followed.

- 3.16** He further stated that almost all cheques indicated the name of the person who called the customer and the name of the customer. When he checked the call log from TNM it reveals that in all cheques the Bank had called the plaintiff for confirmation before the cheques were paid out. He made reference to LD1, LD2, LD3, LD4, LN1, LN2, SH1, SH2, and TP1.
- 3.17** When the witness checked the plaintiff cheques which he had issued but were not in dispute, he came to the conclusion that the signatures were similar (mother features). Reference was made to BNM1, BNM2 and BNM3. His final assessment after the investigation was that the Bank did all it could to verify the correctness of the cheques and the transactions.
- 3.18** The story as narrated by the five witnesses was confirmed by Thokozani Phokoso a Chartered Accountant for the defendant. He told the Court that he had a chat with the plaintiff who admitted that he had pre-signed the cheques but failed to secure them properly whenever he was out of the country.
- 3.19** The witness further revealed that when the plaintiff left the country, he never told the bank of his absence. This could have alerted the bank every time his telephone was answered. He denied that the Bank was suspecting its employee Emmanuel Ngoma to have been involved in the fraud. That marked the end of the defence's case.

4.0 The Issues

- 4.0** There are two main issues for determination before me;
- (a) Whether the defendant is liable in damages for negligence to wit failure to prevent or detect fraud in respect of the plaintiff's account.
- (b) Whether the defendant is liable to repay the sum of money allegedly lost.

5.0 The Law

5.0 The burden and standard of proof in civil matters.

5.1 The celebrated case of Miller vs. Minister of pension (1947). All ER 372 at 373-374 in which Lord Denning gave perhaps the best definition of how a court should balance and weigh the evidence before it in a civil matter as opposed to a criminal case. He proceeded as follows.

"If the evidence is such that the tribunal can say we think it is probable than not. The burden has been discharged but if the probabilities are equal, it is not.

5.2 Several local authorities have validated the Miller case and it now settled law that the burden and standard of proof is set at the beginning of the trial by the state of pleadings and remaining unchanged throughout the duration of the trial. In simple terms, he/she who alleges the existence of certain facts must be the first to prove his/her case as in the ordinary state of things a positive is easier to prove than a negative.

6.0 What is Negligence

The best definition of negligence was expounded in the case of Blythe vs. Birmingham water works Co (1856) 1 EXCH 781.

6.0 The law demands that we owe a duty of care to our neighbour. This principle was well explained in the celebrated case of Donogue vs. Stevenson (1932) AC 562. To succeed the plaintiff must be able to convince the court on a balance of probabilities that;

- (a) The defendant had a duty of care to the plaintiff.
- (b) That the said duty was breached by the defendant.
- (c) That the breach caused the plaintiff to suffer damage.
- (d) That the damage was not remote.

7.0 The Finding

- 7.0** This case has been heavily contested. There is no dispute that cheques were presented to the defendant and that moneys were paid out amounting in total to K25 925 000.00. The plaintiff denies issuing those cheques and claims he was outside the country when those cheques were presented to the defendant's Bank. He claims the Bank was negligent as he never received any telephone call to confirm those cheques. The plaintiff wants his money back plus interest and damages for negligence.
- 7.1** The Bank has disputed the claims. The Bank summoned six witnesses who explained in detail the procedure that it follows when a customer is opening an account and the procedure that is followed when a cheque is presented at the counter for encashment. The defendant has told the Court that from a cashier the cheque goes to the supervisor or the branch manager depending on the amount on the cheque.
- 7.2** There is undisputed evidence that the Bank did call the number the plaintiff gave when he was opening an account. That number 0888892669 appears in the call log TNM the service provider gave the investigators. I have had a careful look at the call log and I find that indeed the Bank did call this number to confirm the cheques.
- 7.3** However, the plaintiff claims he was outside the country and never received those calls. The plaintiff has presented before me stamps at various border posts as evidence that he exited and later re-entered the country. The question before me is who was answering those calls? Who was in possession of the plaintiff's phone?
- 7.4** The plaintiff claims the alleged cheques were stolen from his cheque book. That the signatures were forged. What the plaintiff is telling the Court is that the person who stole the cheque leaves

and forged his signature also stole his mobile phone. However, he had his mobile phone all the time he was allegedly outside the country.

7.5 Now this is the true version of events. It is not true that the cheques were stolen. It is not true that those signatures were forged. I have had a careful look at the signatures and they all look similar. I did not expect a 100% replica. The mother features of the signatures are similar and present on all cheques.

7.6 It is not true that the plaintiff did not receive the calls as per the call log. He came to this Court with an intention to defraud the defendant's Bank through the due process of law. However due process of the law is not for sale.

7.7 Finally, it's not true that the plaintiff was outside the country when the Bank was making contact with him using his mobile phone number. It is common knowledge that those border post stamps can easily be sourced through dubious means.

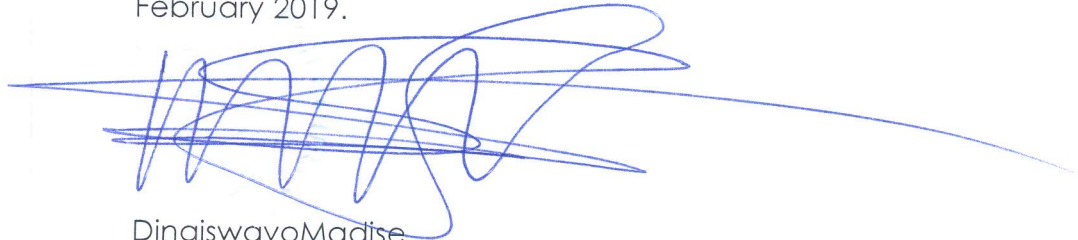
7.8 In these premises, I have carefully looked at the entire evidence and the relevant law in the within matter and I come to the considered conclusion, on a balance of probabilities that the plaintiff has failed terribly to prove his case. I therefore dismiss his summons.

8.0 Costs

8.1 Costs are awarded at the discretion of the court and they remain the exclusive preserve of the court. I condemn the plaintiff in costs.

I so order.

Pronounced in open Court at Blantyre in the Republic on 20th
February 2019.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

DingiswayoMadise

Judge.