IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 210 OF 2006**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

STANBIC BANK ZAMBIA LIMITED **APPELLANT**

AND

GODFREY MWILA **RESPONDENT**

Coram: Chirwa, Silomba and Mushabati, JJS

On 8th May, 2008 and 27th February 2009.

For the Appellant: Mr. M. Sakala of Corpus Legal Practitioners

For the Respondent: Mr. J.G. Kalokoni of Kalokoni and Company

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JUDGMENT

Mushabati, JS., delivered the judgment of the court.

Cases referred to;

1. ***BARCLAYS Bank of Zambia vs. SKY FM Limited and another –SCZ Judgement No. 10 of 2006***
2. ***Mohamed vs. Attorney General (1982) Z.R. 49***
3. ***Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172***
4. ***Kankomba and Others vs. Chilanga Cement PLC (2002) Z.R. 129***

This is an appeal against the High Court judgment of 17th October, 2006. The respondent sued the appellant jointly with Standard Charted Bank Zambia Limited for recovery of;

(a) Damages for negligence

(b) Special damages for loss of money amounting to US$3,650-00

(c) Interest on the said sum and costs.

The claim for damages for negligence was not fully considered by the trial court but up-held the claim for the recovery of US$3,650-00 with 10% interest from the date of the writ until final payment.

An application for a misjonder of party namely Standard Chartered Bank Zambia Limited, was filed but there is no record of what happened to it. The High Court judgment still cited Standard Charted Bank Zambia Limited as a party but the appeal is by Stanbic Bank Zambia Limited alone.

The evidence in support of the claim was from P.W.1, Kelvin Chola Mwila, a brother of the late Godfrey Mwila, who was the holder of

the dollar account from which the sum of US$3,650 was allegedly wrongly paid out by the appellant bank.

P.W.1's evidence was to the effect that he was the Administrator of the Estate of his late elder brother, Godfrey Mwila, who held a dollar account with the appellant Bank. This account had all late Godfrey Mwila's personal details including his residential address, telephone number and specimen signatures. A balance of US$2000 had to be maintained in this account at all times. The late Godfrey Mwila was issued with a cheque book in February, 2003. On or about 31st May, 2003 the deceased went to the Bank to withdraw US$2000. It was at that stage that he discovered his balance as being US$1.350-00. A sum of US$3,650-00 was reflected as having been paid on cheque number 00000011 which was missing from his cheque book. The deceased was told by the Bank Manager, a Mr. Msiska, that he (the deceased) had issued out a cheque of $3,650-00 to a Mr. Charles Simango, who, P.W.1 claimed, was unknown to the deceased. The said cheque was deposited into Mr. Charles Simango's account held at Standard Chartered Bank. Standard Chartered Bank was instructed by the appellant Bank's

Chief Security Officer to block Mr. Simango's account. The Security Officer was further instructed to report the matter to the police. Neither did he sign the said cheque. Police carried out their investigations. Standard Chartered Bank failed to produce Charles Simango whom it had very little information about. The deceased contended that had the appellant Bank properly investigated the signature on the cheque it would have discovered that the signature on it was not his. The appellant bank refused to reimburse him his lost money hence this claim against it.

The appellant bank called one witness also, namely D.W.1, Jacqueline Chipasha Mutale, who was the Bank Manager for Lusaka Main Branch. In her statement, D.W.1 said on 31st May, 2003 the Appellant Bank paid out US$3,650-00 on cheque No. 00000011 after it was examined, processed and cleared diligently in the ordinary course of its business. The exercised diligence was of reasonable standard expected of a bank clerk or cashier. No apparent irregularity could be detected on the face of the said cheque and so the appellant bank had no reason to believe that it had been forged. The signature on it was compared to the

Respondent's specimen signature. The cheque in question could not be referred to the Respondent, like the other cheque that was referred back to him, because the respondent had enough funds in the account. The cheque appeared to be aunthetic. No need arose to have it referred back to the Respondent. The appellant Bank, though it had the original cheque in its possession, did not release it to the Police for fear that it might go missing whilst in Police custody. The Police had refused to indemnity the appellant bank if the said cheque went missing whilst in their custody. The appellant bank had no obligation to confirm with its customers on all drawn cheques but in practice it could do so if the amount of the cheque was above US$5,000-00. It was the appellant bank's contention that the respondent was negligent in that he failed to safely secure his cheque book. Had he not been negligent he could have discovered the missing cheque leaf and would have notified the appellant bank in time before the cheque was cleared.

The learned trial judge reviewed the above evidence and up-held the claim, hence this appeal.

The appellant bank filed four grounds of appeal. These are:

1. ***The trial Judge misdirected himself in law when he held that the plaintiff's letter demanding refund from the Appellant was proof of forgery.***
2. ***The court below misdirected itself in disregarding the established canons of the liability of a Bank in relation to forged cheques.***
3. ***The court below misdirected itself in law when it rejected the entire evidence of the Appellant' first witness Ms. Jaqueline Chipasha Mutale as hearsay, when in fact not, while it accepted the hearsay evidence of PW1.***
4. ***The lower court misdirected itself in both law and fact when it held that the Appellant was liable to bear the loss and reimburse the Respondent the sum of USD 3,650 plus interest at 10% from the date of issue of the writ of summons until payment.***

The appellant supplemented the above grounds with both written heads of argument and oral submissions. The respondent equally

supported the lower court's judgment with both written heads of argument and oral submissions.

In his written heads of argument the appellant argued that Kelvin Mwila's evidence was rejected as being hearsay. Reliance was placed on the letter of demand written by the deceased as a proof of forgery in this case. The deceased did not give evidence in court and so the content of the said letter remained hearsay.

On non co-operation of the appellant bank with the Police as contained in Kelvin Mwiya's evidence, the appellant bank still argued that this was also hearsay evidence in that he merely repeated what he was told by the Police. It was further argued that what Mr. Mwila said under re-examination should not be allowed to stand on its own as it was dependent on what he said, both under examination- in -chief and cross-examination. The whole evidence remained hearsay. The judgment in the court below must be set aside on this ground.

On the second ground it was argued that negligence was pleaded in this case and the court below acknowledged this fact when it said in its judgment at page 15 of the record as follows:-

"Negligence was pleaded in this matter by both the plaintiff and the defendant."

The court however, failed to consider this question and said

"I will not deal with the issue of negligence in detail because it has already been decided that the basis of a Bank's liability where it has paid a forged instrument is not negligence but because money has been paid out without authority of the customer."

Both the Respondent and appellant's cases rested on the plea of negligence and despite this fact the court below failed to consider it in detail. The court, instead, chose to deal with a different legal question on which the appellant was not heard.

The other two grounds of appeal in the memorandum of appeal were not argued. The last ground of appeal was made the second in the written heads.

In his oral submissions the learned Counsel for the appellant basically repeated his written heads of argument which we do not intend to repeat here except the argument that the court below

over-looked the question of forgery. The court should have determined all the issues that were before it.

In reply to the written heads of argument Mr. Kalokoni stated on behalf of the respondent that grounds one and two were related and were going to be argued together.

It was argued that the court below did not misdirect itself when it held that the letter of demand by the plaintiff (Respondent) was sufficient proof of forgery. This being the case the payment made on a forged instrument, negligence was not an issue. Further, even gross negligence of a customer, regarding the care of his cheques was for remote to be used as defence under a plea of estoppel. The court below made a specific finding that the appellant bank had failed to challenge the Respondent's letter of 4th June, 2003 in which he disputed signing the cheque in question. Mr. Kalokoni argued that the appellant bank destroyed the original copy of the encashed cheque. Secondly it destroyed the respondent's specimen signature card and finally it refused to co-operate with the Police. These facts proved that the appellant bank had paid Charles

Simango the sum of US$3,650-00 without authority. The Bank did not dispute the payment of the said amount.

On the third ground of appeal Mr. Kalokoni argued that the evidence of D.W.1, Jacqueline Chipasha Mutale, was hearsay. She did not testify on matters which were within her personal knowledge or on documents she may have come across in course of this case. In this case D.W.1 did not handle the transaction in question. She neither personally investigated the matter nor personally verified the cheque in question. Apart from the fact that she did not testify on matters from her personal knowledge, she did not refer to any company documents because the employees who dealt with the transaction and investigated the case did not present any written reports.

Finally on the last ground of appeal the respondent merely said when a bank pays out a cheque without authority from its customer's account it shall bear the loss. This is what the appellant bank did in this case and so it must bear the loss and interest of 10%. The appeal must, therefore, be dismissed.

In his oral submission Mr. Kalokoni submitted that the appellant bank did not dispute paying the sum of $3,650-00 from the respondent's account. The facts that the appellant bank destroyed both the cheque on which this amount was paid that the respondent's specimen signature were enough evidence that the appellant bank honoured the cheque without authority.

Finally it was submitted that P.W.1's evidence was not hearsay. The Bank's negligence was, on the authority of **Barclays Bank of Zambia vs. Sky FM Limited and another**[1] **,** proved and so the lower court was on firm ground when it held that it was liable for the loss. These are the submissions by both parties.

First and foremost we wish to point out that the plaintiff, now the Respondent in this case, died before he gave his evidence. The matter was prosecuted by his younger brother who claimed to be the Administrator of the estate. The process was not amended by Substitution of the party. We find this strange. The deceased's name should have been substituted with that of P.W.1.

The chief argument in this case is that the case was determined on hearsay evidence. P.W.1, who testified on behalf of the Claimant,

was not the owner of the account from which the sum of US$3,650 was allegedly withdrawn without authority.

The appellant's argument was that cheque book from which the cheque that was used to draw the said amount was in control of the account holder, the late Godfrey Mwila. He never drew the attention of the bank that the cheque in question was missing from his cheque book so that the payment could be stopped.

In arriving at the decision that a forgery had been committed the learned trial judge relied on the fact that the late Godfrey Mwila had written a letter of demand to the bank relating to the payment of the said sum of US$3,650-00.

The appellant argued that the said letter or its contents were still hearsay in that P.W.1 was not the author of that letter.

We have considered these arguments. We have looked at P.W.1's statement which formed part of this evidence. It was clear to us that the matters he talked about were not from his personal knowledge. He was talking of what his late brother did after the discovery of the purported irregular payment was made.

No explanation of how the cheque which was in the account holder's custody went missing. The late Godfrey Mwila claimed that he did not know the payee on that cheque, namely Charles Simango. The cheque leaf that was used came from his book. So how did it find its way in the hands of Charles Simango, who was unknown to him? We find it hard to accept the explanation that Charles Simango was unknown to him, more so he was the sole custodian of his cheque book.

The bottom line, however, in this case, is that P.W.1's testimony was based on hearsay. He was the only witness called on behalf of the plaintiff (Respondent). The officer who prepared a police report, relating to the police investigations, was not called as a witness. Rules of evidence on production of documents is clear. These must be produced by the authors who can even testify to their contents.

In this case we find that the evidence by both parties was nothing more than hearsay because both witnesses gave evidence on matters which were not from their personal knowledge, for example D.W.1 was not the one who investigated the matter. Neither did she personally handle the transaction in question.

If the evidence by both P.W.1 and D.W.1 is discarded there will be no other dependable evidence left on record. We find it hard to appreciate the reasons for the reception of hearsay evidence in this matter, especially by the plaintiff. It was up to the plaintiff to prove his case on the balance of probabilities. A failed defence by the defendant did not lighten his burden. We said in the case of **Mohamed vs. Attorney General**[2] as follows:

> ***A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.***

This was re-stated in the cases of ***Zulu vs. Avondale Housing Project Limited***[3] and ***Kankomba and others vs. Chilanga Cement Plc***[4].

We must re-state here that "it is trite law that he who asserts must prove."

We find no cogent evidence on which the lower court based it findings of forgery and the ultimate liability of the appellant bank. The appeal is bound to succeed on this ground alone.

We find it otiose to consider the other remaining grounds because there is no evidence on which they can be considered against. The whole evidence on record was hearsay.

All in all we up-hold the appeal. The lower court's finding of liability against the appellant bank is set aside.

On account of the view we take, we make no order as to costs.

D.K. CHIRWA
SUPREME COURT JUDGE

S.S. SILOMBA
SUPREME COURT JUDGE

C.S. MUSHABATI
SUPREME COURT JUDGE