

AMOS MAROWA
versus
STEWARD BANK LIMITED

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 17 November & 13 December 2017

Opposed Matter- Exception

J Mafume, for the plaintiff
Mr Mbuyisa, for defendant

CHAREWA J: Plaintiff issued summons against the defendant claiming \$13 700 “arising from a deposit of sum made to plaintiff’s account, which was unlawfully taken by defendant without a proper court order or notice. The amount having been earned by plaintiff through a lawful transaction for the sale of a motor vehicle.”

In the alternative, plaintiff claimed for “payment of the sum of \$13 700 as damages to the plaintiff for the loss of said figure through negligence of defendant, which failed to act reasonably in its duty of care to plaintiff who is a client of defendant. In that the bank ought to have known that it was transferring stolen money.”

Finally, the plaintiff claimed for interest at the prevailing bank rate and costs on an attorney client scale.

Unsurprisingly, defendant gave notice that, unless the summons were withdrawn, it would except thereto firstly, as disclosing no cause of action as regards the main relief sought; secondly, in respect of the alternative relief, that it had no duty of care to ascertain the source of funds credited into plaintiff’s bank account; and thirdly, that the summons was defective for non-compliance with r 11(a).

The summons not having been withdrawn, the defendant duly filed its exception on the grounds that it disclosed no cause of action, and in any event the bank owed no duty of care to its customers to ascertain the source of deposits into their accounts.

The facts

The undisputed facts are that plaintiff entered into an agreement whereby he sold his motor vehicle to one Esther Hodza. Both plaintiff and Esther Hodza operate bank accounts with the defendant. Esther Hodza duly paid the plaintiff \$13 700 for his vehicle, by bank transfer, between their accounts held with defendant, on 14 November 2016, which transfer defendant duly processed.

Unbeknown to both plaintiff and defendant, Esther Hodza fraudulently utilised defendant's funds to make the transfer to plaintiff in payment of the motor vehicle she bought from him. Upon realisation, on 5 December 2016, that the transfer into plaintiff's account was from its funds, the defendant reversed the transfer and reported Esther Hodza to the police for fraud. Plaintiff's vehicle was thus confiscated by the police for purposes of the intended prosecution of Esther Hodza.

Parties' submissions

Plaintiff submits that defendant ought not to have reversed the transfer from Esther Hodza to himself without due process as he was an innocent third party. Or if it was necessary or lawful to do so, the defendant is liable to him in delict for having failed in its duty of care to him by negligently allowing the transfer from Esther Hodza to himself to go through in the first place.

Defendant submits that in terms of banking law, any funds deposited with a bank are subject to use by the bank as it deems fit and further, a bank is entitled to reverse any erroneous, fraudulent and unlawful transactions without notice or a court order. Further, a bank owes no duty of care to its customers to ascertain the origins of any money deposited into a bank account. Thus the plaintiff's claim discloses no cause of action.

The law

It is clear from their heads of argument that both parties appreciate the position in our law that any money held in the bank is the property of the bank to do with as it pleases, including to make reversals where credits have been obtained through error, theft or fraud. The only obligation the bank has is to ensure that it must pay the customer upon demand and honour any cheques validly drawn by the customer from his lawful funds according to the tenor of the cheque, and the sufficiency of the credit balance.¹

¹ See *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2) ZLR 385 (S). See also *Standard Bank of South Africa v Echo Petroleum* CC 2012 (5) SA 283 (SCA)

The point of diversion between the parties is that the plaintiff seeks to insulate himself from any consequences of fraud, theft or erroneous transfers by limiting the bank's power and discretion to make reversals of such transactions to only those occasions where he is himself the author of the fraud, theft or error.

The issue to resolve is therefore whether defendant was at law entitled to reverse credits innocently received by the plaintiff. If so, then plaintiff has no cause of action.

In so far as the claim for damages is concerned, plaintiff makes no averments that it is based on contract or statute. *Ergo*, it must be based on common law, whence it is trite that wrongfulness or unlawfulness must be present, leading to the breach of the duty of care, in those circumstances where the law imposes a legal duty to prevent harm.²

The question to address therefore is whether defendant owed plaintiff a legal duty of care to scrutinise the source and veracity of deposits into plaintiff's account. If so, then plaintiff has a cause of action against defendant, otherwise the converse is true.

Analysis

Was defendant entitled to reverse the transfer fraudulently done by Esther Hodza to plaintiff's credit?

It seems to me that case law supports the notion that as long as money is to the credit of a customer's account, once the bank discovers that that credit was as a result of error or illegality, the bank is entitled to reverse the credit regardless of the identity of the author of the illegality or error. Whether or not the customer is an innocent recipient of illegal or erroneous deposits is immaterial, for, as long as the money is within the control of the bank, it is entitled to deal with it as appropriate.

I notice that the plaintiff, after acknowledging in his heads of argument and oral submissions that the bank is allowed, at law, to reverse transactions arising from fraud, theft or error, without notice or a court order, did not refer me to any authority that the illegal or erroneous acts must have been perpetrated by the customer affected by the reversal. Nor have I, in my own reading of the authorities found anything to the contrary. In fact, it makes perfect sense to me that as long as the bank has control and power over deposits, it should have the fiduciary duty to correct illegal or erroneous transactions.

² See *Zimbabwe Banking Corporation v Pyramid Motor Corporation* 1985 (1) ZLR 353 (S). See also *Music Room (Pvt) Ltd v ANZ Grindlays Bank (Zim) Ltd* 1995 (2) ZLR 167

To allow an “innocent” recipient to keep deposits which have been illegally or erroneously moved from another’s account will destroy trust in the banking sector: that banks will take the utmost care of their customers’ deposits and will not confirm fraudulent or illegal transfers. Failure to uphold this principle would severely erode the very bedrock of banking institutions and practice. In my view, it must be for this very reason that the law has placed no limits as to when a bank must make reversals save for specific instances where this is precluded, for example, under the principles of estoppel, which have not been pleaded in this case.

In casu, money was in fact fraudulently debited from defendant’s account and credited to Esther Hodza’s account, before it was then transferred to plaintiff’s account. I see nowhere in his papers that plaintiff has disputed this. Plaintiff was thus paid for his motor vehicle with funds which did not belong to his purchaser, Esther Hodza, but to defendant. Plaintiff’s counsel, Mr Mafume, conceded that banks can and should not ignore fraudulent transactions. He also conceded that Esther Hodza had no authority to move defendant’s money to her account and then transfer it to plaintiff. Therefore, defendant properly reversed the illegal transactions as it was wont.

Consequently, I cannot, therefore, agree with plaintiff that he should be allowed to keep monies which have been illegally or erroneously taken from another and paid to him however innocent he may be. Thus, I can only conclude that the sum total of this is that the plaintiff has no cause of action against defendant. Certainly, the “innocence” of the recipient of illegal or erroneous transfers does not ground a *causa* to retain the funds so transferred.

In passing, I note that even the cursory reference to unjust enrichment (that defendant confiscated plaintiff’s motor vehicle and also reversed the monetary transfer) is misplaced. Mr Mafume conceded that plaintiff’s vehicle was not confiscated by defendant as pleaded in the summons but was taken by the police as an exhibit. He further conceded that the rights to the vehicle remain with the plaintiff since its purchase price was not paid because of the reversal of the illegal transfer by Esther Hodza.

Did defendant owe a duty of care to plaintiff to ensure that no illegal transfers were done to his account?

Now, in so far as the argument that defendant owed plaintiff a duty of care to ensure that funds deposited into plaintiff’s account were not done so illegally or erroneously, I can only say that I find that plaintiff tied himself in knots. It seems to me that he completely departed from the tenor of his pleadings by failing to support the averments therein in his heads

of argument. I have not seen anywhere in his heads of argument where plaintiff disabused the court from being persuaded by defendant's arguments that banks do not owe a general duty of care to their customers. Nor has plaintiff made any submissions to counter defendant's argument that banks are not obliged to scrutinise the source of every deposit to ensure its veracity, but that the only obligation banks have to their customers is when they are paying out on a cheque to make sure that the drawing is valid and legitimate.

Rather, the heads introduce an entirely new aspect which is not covered in the pleadings: that of vicarious liability. Plaintiff reinforces this new aspect in his oral submissions when he argues that because of the nature of defendant's model of business, which has diverged from traditional banking practices, the defendant has a duty to ensure that its agents, like the said Esther Hodza, should not abuse its systems and cause harm to others.

My belief that plaintiff ventured into the realm of vicarious liability is supported by the authorities he cited in his heads of argument, specifically supporting the idea that an employer must be held liable for the actions of its employees.³ As a result, plaintiff advances no legal arguments at all to support his averment in the pleadings that the defendant owed him a duty of care to scrutinise the source and veracity of deposits into his account.

Consequently, I find that banks do not owe a duty of care to their customers to ascertain the source of funds credited to the customers' accounts. Therefore, no delict can arise from failure to do so by any bank. As a result, and *in casu*, plaintiff's claim discloses no cause of action in this respect.

In the premises, I find that the exception is well taken. And once there is no cause of action, then the summons is a nullity such that the plaintiff's claim must necessarily be dismissed.

Disposition

CONSEQUENTLY, IT IS ORDERED THAT

1. The exception is upheld.
2. The plaintiff's claim is dismissed with costs.

Mafume Law Chambers, plaintiff's legal practitioners
Mtewa & Nyambirai, defendant's legal practitioners

³ For example *Local Authorities Pension Fund v Munyaradzi Nyakwawa & 5 Ors* HH60-15