



JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO 441 OF 2015



**BETWEEN:**

**SHAWN HANKE** ..... **PLAINTIFF**

**-AND-**

**NBS BANK LIMITED** ..... **DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Wame, of Counsel, for the Plaintiff

Mr. Machika, of Counsel, for the Defendant

Ms. A. Mpasu, Court Clerk

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**JUDGMENT**

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*Kenyatta Nyirenda, J.*

The Plaintiff instituted the present case by originating summons, dated 22<sup>nd</sup> October 2015, by which summons he seeks the following declarations and orders:

- “(i) *A declaration that on the true construction of the Bills of Exchange Act Cap 43:02 of the Laws of Malawi, the Defendant failed to strictly comply with Sections 45, 46, 48, 50, 51, 70 and 74 of presenting the bill of exchange to wit a foreign cheque for honouring to the drawee of the Cheque within reasonable time and giving a notice of dishonor within a reasonable.*
- “(ii) *A declaration that by reason of clause (1) above, the Defendant is guilty of negligence and caused the drawer of the Bill of Exchange to be discharged of any liability.*
- “(iii) *A declaration that pursuant to the declaration in clauses (i) and (ii), the Defendant had a duty to the Plaintiff as a customer of the Defendant to negotiate and present for acceptance all bills of exchange deposited into the Plaintiff’s Bank Account as holder drawn on other banks as drawees within a reasonable time and to give Notice of Dishonour where there is such a dishonor within a reasonable time.*



- (iv) *A declaration that the by reason hereof the Plaintiff is entitled to special damages and general damages, and interest on the special damages at 1% above the National Bank Limited ruling lending rate.*
- (v) *An order for costs of this action.”*

The originating summons is supported by an affidavit sworn by the Plaintiff [hereinafter referred to as the “Plaintiff’s affidavit”]. The Plaintiff’s affidavit is brief. I might as well set out the substantive part thereof in full. This is what it says:

- “2. *THAT the subject matter of the proceedings herein is an action for negligence and breach of contract by the Defendant arising from a Banker-Customer relationship.*
3. *THAT I am a customer of the Defendant and I hold a bank account vide 00025348111011, Ginnery Corner in the city of Blantyre, in the Republic of Malawi.*
4. *THAT on 24<sup>th</sup> April 2015, I deposited a cheque with the Defendant amounting to United States Dollars Seven Hundred drawn by Samaritan’s Purse in my favour as a holder and North Valley Bank as a drawee. I exhibit hereto marked as “SH1” a Photostat copy of the deposit slip attesting my deposition.*
5. *THAT I refer to paragraph 4 above and further depose that the Defendant has failed to negotiate and/or present the said bill of exchange for payment to date and the Defendant has failed to give any notice to me on what happened to the said bill of exchange.*
6. *THAT by reason hereof the Defendant is guilty for negligence and breach of contract.*

**PARTICULARS OF NEGLIGENCE AND BREACH OF CONTRACT**

- 6.1 *failure to present the bill of exchange for payment within a reasonable time*
- 6.2 *failure to give a notice of dishonor within a reasonable time*
- 6.3 *failure to credit the bank account and communicate to me*
7. *THAT I refer to paragraph 6 above and further depose that by reason hereof I have suffered special and general damages.*

**PARTICULARS OF DAMAGES**

- 7.1 *USD 700 being the value of the bill of exchange*
- 7.2 *Damages for loss of use and great inconvenience caused*
- 7.3 *Damages for grave mental anguish caused*
- 7.4 *Damages for breach of contract*

7.5 *Damages for humiliation caused*

*WHEREFORE, I pray for declaration and orders sought in the Originating Summons with costs of the action.”*

The Defendant contests the action by the Plaintiff and it has filed two affidavits, namely, affidavit in opposition to the originating summons sworn by Mr. Vitsitsi, the Defendant’s International Trade Manager, on 9<sup>th</sup> November 2015 [hereinafter referred to as the “Defendant’s affidavit”] and a supplementary affidavit sworn by Ms. Bodole, the Defendant’s International Trade Manager on 18<sup>th</sup> April 2016 [hereinafter referred to as the “Defendant’s supplementary affidavit”].

The Defendant admits that the Plaintiff is its customer and that he deposited a cheque with it as alleged in the Plaintiff’s affidavit but denies any act of negligence or breach of contract. The basis of the denial has been put thus:

- “5. *That I further state that by depositing the foreign bill of exchange/cheque in his Malawi Kwacha denominated account number 0025348111011, the Plaintiff merely conveyed instruction to NBS Bank Limited to collect funds for him.*
6. *That since the cheque originator’s (Samaritan purse) account and the Plaintiff’s account were held at different banks and different jurisdictions NBS Bank Limited had to pass instructions to North Valley Bank to effect payment.*
7. *That however since NBS Bank Limited and North Valley Bank not correspondent banks the Defendant had to pass the information to the originator’s bank via an intermediary bank.*
8. *That therefore the Defendant had to engage into multilateral settlement at Citi Bank London which was a common correspondent bank between the two banks.*
9. *That in the circumstances NBS Bank Limited was not collecting the cheque on its paying bank in order that it may be paid or dishonoured.*
10. *THAT the Defendant’s only duty was to facilitate presentation of the cheque to the paying bank in order that it may be paid or dishonoured.*
11. *That in discharge of its duty the Defendant on 8<sup>th</sup> May 2015 delivered the cheque by post to North Valley Bank through the Citi Bank London for decision whether it should be paid or not.*
12. *That I therefore refer to the contents of paragraph 5 of the Plaintiff’s affidavit and deny that the Defendant had a duty to negotiate the said bill of exchange.*
13. *That I again refer to the contents of paragraph 5 of the Plaintiff’s affidavit and deny that the Defendant failed to present the said bill of exchange for payment.*
14. *That I repeat the contents of paragraph 11 above and state that the Defendant duly discharged its obligation by presenting for payment the cheque through the inter-*

*bank clearing system, as such the Defendant's responsibility to the Plaintiff was discharged when it forwarded the cheque by post to North Valley Bank through the Citi Bank London.*

15. *That I refer to the contents of paragraph 6 and deny the particulars therein that the Defendant was negligent and breached the banker-customer contract ...*
16. *That it is normal in banking practice that where a customer of a bank (collecting bank) delivers to the presenting bank for collection and credits to his account a cheque drawn on another bank by a person having an account at a branch of the paying bank and the cheque being liable for handling through the clearing system regardless of the fact that the cheque has been stamped on receipt by the branch which receives it and the amount credited to the customer's account forthwith the customer will not receive value for the cheque on that date until the cheque is cleared.*
17. *That furthermore, in the absence of confirmation of the validity of the cheque in terms of the signature or absence of forgery, the cheque could not fall within the definition of a bill of exchange since a forged or unauthorized signature is wholly inoperative and no right to retain the bill, discharge it or enforce it can be acquired through or under that signature."*

The Defendant's supplementary affidavit complements the Defendant's affidavit in many respects and alludes to the following "new" matters. The Defendant physically delivered the cheque to Citibank London (an intermediary bank) on 5<sup>th</sup> May 2015 for clearing through Fedex Express. Citi Bank London accepted delivery of the cheque on behalf of Citi Bank London on 8<sup>th</sup> May 2015. What happened thereafter is contained in paragraphs 11 to 15 of the Defendant's supplementary affidavit:

11. *Thereafter, the Defendant did not receive any communication about acceptance or dishonor of the cheque as such on 27<sup>th</sup> July, 2015 as per normal practice Mrs Bodole sent a swift message enquiring on the cheque.*
12. *THAT on 20<sup>th</sup> August, 2015 Citi Bank London sent a swift message informing us that they were unable to locate the cheque in the system and further requested us to provide them with a copy of the cheque, copy of the collection letter, address and tracking details through which the cheque was sent and GCC reference. Exhibited hereto marked "CBa" is a copy of the said swift message.*
13. *THAT on 24<sup>th</sup> September, 2015 I sent Citi Bank London a swift message advising them the particulars of the cheque, tracking details and particulars of the collection. However, the Defendant did not send a copy of the said cheque as I was not in possession of the same. Exhibited hereto marked "CB4" is a copy of the said swift message.*
14. *THAT further on 5<sup>th</sup> November, 2015 I wrote Citi Bank London an email on the same issue to which they advised us that they were investigating on the matter.*

*Exhibited hereto marked "CB5" is a copy of the said email together with a response from Citi Bank Limited dated 12<sup>th</sup> November, 2015.*

15. *THAT besides following up on the swift messages, on 3<sup>rd</sup> and 5<sup>th</sup> November, 2015 I also sent an email to Samaritan Pursue enquiring on the cheque and they advised us that they will investigate on the issue and give us feedback. However, the Defendant has not received the said feedback to date. Exhibited hereto marked "CB6" is a copy of the said email and response dated 5<sup>th</sup> November, 2015."*

### Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities. That means that he or she must prove by showing that something is more likely so than not: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**.

It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that he suffered damage as a result of negligence and breach of contract on the part of the Defendant.

### The Law

The originating summons refers to sections 45, 46, 48, 50, 51, 70 and 74 of the Bills of Exchange Act (Act). To my mind, the relevant provisions are the ones reproduced below.

Section 45 of the Act sets out rules as to presentment of a bill for payment. A bill is duly presented for payment which is presented in accordance with the following rules:

- "(a) where the bill is not for payable on demand, presentment must be made on the day it falls due;*
- (b) where the bill is payable on demand, then, subject to this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the indorser liable. In determining what a reasonable time is, regard shall be had to*  
  
*the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case;*
- (c) presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place*

*as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found;*

- (d) *a bill is presented at the proper place-*
  - (i) *where a place of payment is specified in the bill and the bill is there presented;*
  - (ii) *where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;*
  - (iii) *where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known; or*
  - (iv) *in any other case if presented to the drawee or acceptor wherever he can be found, or presented at his last known place of business or residence;*
- (e) *where a bill is presented at the proper place and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required;*
- (f) *where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all;*
- (g) *where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found;”*

Section 46 of the Act deals with excuses for delay or non-presentment for payment and it provides as follows:

*“46. — (1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.*

- (2) *Presentment for payment is dispensed with—*
  - (a) *where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be affected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment;*
  - (b) *where the drawee is a fictitious person;*

- (c) *as regards the drawer where the drawee or acceptor is not bound as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;*
- (d) *as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented;*
- (e) *by waiver of presentment, express or implied.*

Section 48 of the Act governs the giving of a notice of dishonor and effect of non-notice. The section reads:

*“48. Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:*

*Provided that—*

- (a) *where a bill is dishonoured by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course, subsequent to the omission, shall not be prejudiced by the omission;*
- (b) *where a bill is dishonoured by non-acceptance, and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment unless the bill shall in the meantime have been accepted.”*

According to section 50 of the Act, delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence. Notice of dishonor is dispensed with in any of the following circumstances:

- “(a) when, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser to be charged;*
- (b) by waiver express or implied. Notice of dishonor may be waived before the time of giving notice has arrived or after the omission to give due notice;*
- (c) as regards the drawer in the following cases, namely—*
  - (i) where drawer and drawee are the same person;*
  - (ii) where the drawee is a fictitious person or a person not having capacity to contract;*
  - (iii) where the drawer is the person to whom the bill is presented for payment;*

- (iv) *where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill;*
- (v) *where the drawer has countermanded payment;”*

Section 74 of the Act deals with presentment of cheque for payment. It states that:

*“Subject to this Act—*

- (a) *where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid;*
- (b) *in determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case”*

### Submissions by the Plaintiff

It is the case of the Plaintiff that the Defendant failed to present the cheque within reasonable time and, consequently, the Defendant is guilty of negligence. Counsel Wame submitted that four matters are not in dispute, namely, that (a) the Plaintiff deposited with the Defendant a cheque drawn on North Vale Bank, USA, (b) the Defendant accepted the cheque and undertook the mandate of collecting the value of the sum of money indicated on the cheque on behalf of the Plaintiff, (c) instead of the Defendant presenting the cheque to North Vale Bank, the Defendant presented it to City Bank London, and (d) at the date of issuance of the originating summons and at the hearing of the summons, the Defendant had not credited the Plaintiff’s account with the sum equal to the value of the cheque.

Counsel Wame also contended that the City Bank London was acting as an agent of the Defendant and failure of the agent has to be imputed on the Defendant (and not the Plaintiff) because, to quote Counsel Wame, “the Plaintiff never took part nor was he a party in appointing the intermediary bank”.

Counsel Wame concluded by submitting that the Defendant has failed to carry out its statutory duties of presenting the cheque within a reasonable period and, accordingly, the Plaintiff is entitled to the reliefs being sought.



### Submissions by the Defendant

Unlike Counsel Wame who only made oral submissions, Counsel Machika filed with the Court comprehensive written submissions and it is only fair that the legal arguments contained therein be set out in full:

- (g) *To begin with, L.S. Sealy and R. J. A. Hooley in their book Commercial Law (Text, Cases, and Materials) Fourth Edition, on page 515 stated that **“the tangible nature of the instrument (a piece of paper) dominates the intangible right to payment embodied in the instrument. Transfer of the right to payment requires physical delivery of the instrument itself.”***
- (h) *It is therefore undisputed that one of the most important condition precedent to payment under a foreign bill of exchange is delivery of the same to the person ordered to pay under the said bill of exchange. In fact, section 39 (2) of the Bills of Exchange Act makes delivery mandatory in such situations.*
- (i) *Furthermore, section 3 (1) of the Bills of Exchange Act defines a bill of exchange as an **unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.***
- (j) *The above provision mentions two main parties namely a person who draws the bill and gives the order to pay, the “drawer”, and the person upon whom the bill is drawn, and who is thereby ordered to pay, the “drawee”.*
- (k) *In the matter at hand, the cheque was drawn on a bank in a different jurisdiction, the North Valley Bank. The Defendant was only a collecting Bank. As such the cheque was liable for handling through the clearing system regardless of the fact that the cheque was stamped on receipt by the Defendant.*
- (l) *In the case of **Emarlad Meats (London) Limited vs. AIB Group (UK) Limited [2002] EWCA Civ 460** the court held that where a cheque is delivered to a bank for collection the Bank receives the cheque as agent for the customer for the purpose of collecting it on the customer’s behalf.*
- (m) *Further, a collecting bank owes its customer a duty to collect or present for payment a cheque promptly and, once collected, to credit the customer’s account with the amount. Further, a bill must be presented as per section 45 of the Bills of Exchange Act and at a proper place.*
- (n) *In the case of **Barclays Bank plc vs. Bank of England [1985] 1 ALL ER 385** the court interpreted presentment at a proper place to mean that the cheque must be physically presented for payment at the branch of the bank on which it is drawn and that presentment by electronic means would not comply with the requirements of section 45.*

- (o) *In the matter at hand, the Defendant duly discharged this duty by presenting for payment the cheque by post on 8<sup>th</sup> May, 2015 through the inter-bank clearing system in particular to the intermediary bank the Citibank London.*
- (p) *Further, it is trite law that a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customer. The standard of reasonable care and skill is an objective standard applicable to banks.*
- (q) *In the case of Selangor **United Rubber Estates Limited vs. Cradock (a bankrupt) (No 3) [1968] 1 WLR 1555 at 1608 Ungoed – Thomas J** stated that whether or not the standard of reasonable care and skill has been attained in a particular case has to be decided in the light of all the facts, which can vary almost infinitely.*
- (r) *In the matter at hand, the normal banking practice is that where a customer of a bank (collecting bank) delivers to the presenting bank for collection and credits to his account a cheque drawn on another bank by a person having an account at a branch of the paying bank and the cheque being liable for handling through the clearing system regardless of the fact that the cheque has been stamped on receipt by the branch which receives it and the amount credited to the customer's account forthwith the customer will not receive value for the cheque on that date until the cheque is cleared.*
- (s) *Furthermore, as stated above the payment system in the matter at hand was paper based and the cheque was physically transferred from NBS Bank Limited to Citibank London (an intermediary bank) by courier.*
- (t) *Again in the **Barclays Bank plc vs. Bank of England** case the court stated;*
- “I start with the case where a customer of a bank (the presenting or collecting bank) delivers to the presenting bank for collection and credit to his account a cheque drawn on another bank (the paying bank) by person having an account at the branch of the paying bank, the cheque being liable for handling through the.....clearing..... The steps which will normally follow are these. (1) The cheque will be stamped (crossed) on receipt by the branch which receives it. The amount will normally be credited to the customer's account forthwith. The customer will not, however, receive value for the cheque on that date: thus the customer cannot without agreement withdraw the sum prior to clearance, he will not earn interest or if (overdrawn) be relieved of his obligation to pay interest and it will not rank as a credit for the purpose of calculating bank charges. The credit is provisional in the sense that it will be reversed if the cheque is dishonoured or not satisfactorily cleared and there is in any event delay before it will become fully effective.....(4) the cheques so sorted will then be taken in closed boxes to the clearing house, where they are either handed over to employees of the various paying banks or placed in racks reserved for those banks.”*
- (u) *The above passage recognises that subject to the rules of the clearing system a cheque may be honoured, dishonoured or not satisfactorily cleared. Further, the law recognises the rules applicable in payment systems.*

- (v) *Further, in the case of **Tayeb vs. HSBC Bank plc [2004] 4 ALL ER 1024** the court stated that by virtue of a bank – customer relationship, a customer is taken to have also contracted with reference to the clearing rules, customs and practice. Likewise, in the matter at hand, the Plaintiff is also bound by those rules.*
- (w) *In the matter at hand, we argue that the cheque was presented within a reasonable time. The defendant did not act negligent. Section 45 (2) and 74 (2) of the bills of Exchange Act state that when considering what is a reasonable time regard must be had to the usage of the trade and of bankers. Further, **RM Goode in Commercial Law 3<sup>rd</sup> Edition, 2004 on page 546** said that the fact that the vast majority of cheques drawn on one bank and collected by another are presented for payment through the cheque clearing system means that a court would undoubtedly have regard to all reasonable rules of practice of the clearing system when deciding what was a reasonable time.*
- (x) *As stated by the Plaintiff the cheque was deposited with the Defendant on 24<sup>th</sup> April, 2015. The Defendant thereafter discharged its duty by presenting for payment the cheque through the inter-bank clearing system to the intermediary bank, the Citibank London on 8 May 2015.*
- (y) *However, the Defendant has to date not received any feedback on the said presentment. Nevertheless, the Defendant has tried as a way of an alternative method of presentment notified Citibank London by way of an email of the cheques essential features namely the amount entered by the drawer, the name of the drawer, the cheque number and the name of the paying bank.*
- (z) *Therefore, in the absence of any advice or communication from the correspondent bank the defendant could not give notice of dishonour and consequently credit the Plaintiff's bank account. As such the Defendant cannot be held to have failed to strictly comply with sections 45, 46, 48, 50, 51, 70 and 74 of the Bills of Exchange Act.*

### Analysis and Determination

I have carefully considered the affidavit evidence and the submissions by both Counsel. The Plaintiff deposited a cheque in his account no. 0025348111011 with the Defendant on 24<sup>th</sup> April 2015. This is a Malawi Kwacha denominated account.

As such, he merely conveyed instruction to the Defendant to collect funds for him. Citibank London is a common correspondent bank between the Defendant and the Drawer's bank. The Defendant physically delivered the cheque to Citibank London on 5<sup>th</sup> May 2015.

The case of **Barclays Bank plc v. Bank of England [1985] 1 ALL ER 385** is authority for the proposition that where Bank A (the presenting bank) receives from a customer for collection a cheque drawn on bank B (the paying bank) by a person

having an account at a branch of the paying bank and the cheque is dealt with through the inter-bank system for clearing cheques, the presenting bank's responsibility to its customer in respect of the collection of the cheque is discharged only when the cheque is physically delivered to the said branch for decision whether it should be paid or not. In the apt observation by Bingham, J. at page 390:

- “14. ...*The respondent contended that ‘the duty of a banker entrusted with a cheque for collection is to take reasonable steps to obtain payment of the cheque and credit the proceeds to the customer’s account or notify the customer that payment has been refused.’ This formulation is in my judgment correct but must be read subject to the overriding statutory rule that the appropriate way to obtain payment under the cheque is (subject to any relevant statutory exception) to present it for payment as prescribed by s 45 of the 1882 Act.*”
15. ....
16. *If one pauses at that point, the answer to issue (I) would appear plain. The presenting banker’s admitted duty is to take reasonable steps to obtain payment. To obtain payment the cheque must be duly presented for payment, otherwise the drawer will be discharged. Presentation must be to the drawer or, as is usual, to ‘some person authorised to pay or refuse payment on his behalf’ at the place of payment specified in the cheque, which can only mean to the staff of the branch on which the cheque is drawn at the address shown on the face of the cheque. The cumulative effect of these provisions, standing alone, would indicate that ‘the clear duty imposed upon the collecting bank to present the cheque for payment and obtain an answer without delay’ (see *Riedell v Commercial Bank of Australia Ltd [1931] VLR 382 at 389 per Mann J*), even if only a duty to take reasonable steps to achieve this result, involves presentation for payment at the drawee branch.*
17. *But section 45 of the 1882 Act does not stand alone. Section 46(2) provides ... ‘a man who employs a banker is bound by the usage of bankers’ (per Willes J in *Hare v Henty (1861) 10 CBNS 65 AT 77, 142 er 374 AT 379*) and for a customer of a participating bank this involves acceptance of the clearing system under which for all practical purposes presentation takes place at the clearing house.*

*Whether as a result of usage, waiver or estoppel by convention between the banks, delivery at the clearing house is to be treated as equivalent to presentation, with the result that the collecting bank’s duty to its customer is discharged on delivery of the cheque to the clearing house.”*

In the present case, it is clear from the Defendant’s affidavit evidence that the Defendant followed all rules of practice of the clearing system. It physically delivered the cheque and followed up with swift messages and emails. In the

premises, it is my finding that (a) the cheque was duly presented for payment within a reasonable time, (b) the Defendant did not fail to give any notice of dishonour within a reasonable time as it did not receive any advice from the correspondent bank or the issuing bank on the status of the cheque and (c) the Defendant could not credit the Plaintiff's bank account in the absence of the correspondent bank issuing bank effecting payment and communicating the same to the Defendant.

Conclusion

In these circumstances, the Defendant acted with all reasonable care and skill expected of a banker in presentment of the cheque. It is not guilty of any negligence or breach of contract as claimed by the Plaintiff. Consequently, I dismiss the Plaintiff's action in its entirety with costs to the Defendant.

Pronounced in Court this 1<sup>st</sup> day of July 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda

**JUDGE**