



IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL DIVISION  
CIVIL CAUSE NO 232 OF 20154

Between

Anthony Khunga.....Plaintiff

-And-

National Bank of Malawi.....Defendant

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**CORAM:**

**HONOURABLE JUSTICE D.A. DEGABRIELE**

Mr. A. Chunga

of counsel for the Plaintiff

Mr. Chokhoto

of Counsel for the Respondent

Mr A. Kanyinji

Official Interpreter

Ms Msimuko

Court reporter

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*DeGabriele, J*

**JUDGEMENT**

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**Introduction**

The plaintiff commenced these proceeding by a writ of summons, claiming the amount of Mk300,000.00 as a sum of money that went missing from the plaintiff's bank account number 1783114 held at Mzuzu service Centre of the National Bank. The plaintiff is further claiming damages for negligence, damages for inconveniences and the costs of this action. The defendant denies liability.

**The Plaintiff's evidence**

The plaintiff took oath and adopted his statement of claim with the leave of the court. The statement was as follows

1. *The Plaintiff is suing on his own behalf and the defendant is being sued on its own capacity.*

2. At all material times, the plaintiff is and has been a customer of the defendant.
3. At all material times, the defendant is and has been a registered institution operating a business in banking services.
4. The plaintiff, as a customer, was provided with an ATM card which was being used in withdrawing money.
5. On 16<sup>th</sup> May, 2014, the plaintiff used card to withdraw some cash amounting to MK100,000.00 through ATM at Shoprite complex in Mzuzu.
6. In the morning of the 17<sup>th</sup> May, 2014, the plaintiff wanted to withdraw some money through ATM at Tutla's Shop but the machine withheld the card with a remark "card not active".
7. The plaintiff reported the matter to one of the defendant's employees working at Mzuzu Service Centre in the name of Mr. Chitsulo who advised the plaintiff to remain at Tutla's Shop because some staff members of the defendant who look after the ATM's were on their way to assist the plaintiff.
8. When the said staff members arrived, the plaintiff explained to one of them, a Mrs. Nyirenda as to what happened and the said Mrs. Nyirenda told the plaintiff to wait as she checked to find out if the card was inside the ATM.
9. After checking the plaintiff was told that the card was not in the machine the development which surprised the plaintiff.
10. The plaintiff then called Bruno Chitsulo to inform that the card was not in the machine at Tutla's Shop and the said Bruno Chitsulo told the plaintiff to give him the account number which the plaintiff did.
11. Later the plaintiff was informed by the said Bruno Chitsulo that the ATM card might have been withheld because the account had already been drawn three times in the morning and the amount was MK100,000.00 using the same card.
12. This development surprised the plaintiff even more, because the ATM card was with him till the time he wanted to use it at around 9:00 am when it was withheld in the machine.
13. At this point it became apparent that someone apart from the plaintiff was tampering with the plaintiff's account.
14. When the plaintiff asked how secured his account was, the defendant assured the plaintiff that his account was very much secured.
15. Surprisingly, on 19<sup>th</sup> May, 2014 after the plaintiff's card went missing, the plaintiff's account was drawn MK200,000.00 through ATM in Lilongwe.
16. The plaintiff's money missed due to the negligence of the defendant.

The plaintiff called a witness but the evidence was essentially the same. His witness **PW2** told the court that he did not use his father ATM's card in 16<sup>th</sup> and 17<sup>th</sup> May 2014 and he never shared the PIN code which his father had shared with him.



### The Defendant's evidence

1. The defendant admits the contents of paragraphs 1, 2, 3, and 4 of the plaintiff's statement of claim.
2. The defendant denies the contents of paragraph 5 of the plaintiff's statement of claim and puts the plaintiff to strict proof thereof.
3. The defendant refers to paragraph 5 of the plaintiff's statement of claim and shall at trial show that on 16th May, 2014, the plaintiff gave his son his ATM card and the PIN code thereof for the purpose of withdrawing the sum of MK100,200.00 through an ATM machine which his son did at Shoprite Complex and by disclosing his secret pin code to the plaintiff negligently compromised the security of his card and his son transacted at the ATM in full view of the fraudster further compromising the security of the card and revealing the pin code to the fraudster.
4. The defendant repeats paragraph 3 above and shall at trial show that the plaintiff's son lost the plaintiff's card with the card that he had stolen from Angellina Chitimbe at unknown to both the plaintiff and the defendant.
5. The defendant denies the contents of paragraphs 6 of the plaintiff's statement of claim and shall at trial show that the plaintiff tried to withdraw some money using the card of Angellina Chitimbe which the fraudster had swapped the previous day and which had been deactivated as it had been reported stolen and the ATM machine accordingly withheld the card of Angellina Chitimbe which at the time, the plaintiff thought was his card.
6. The defendant admits the contents of paragraphs 7, 8, 9, and 10 of the plaintiff's statement of claim.
7. The defendant denies the contents of paragraph 11 of the plaintiff's statement of claim and shall at trial show that the plaintiff only complained of missing money on Monday 19th May, 2014 and that it was discovered that there had been withdrawals of MK100,000.00 each on 17th May, 2014 at Tutla's ATM at 06:03 hours, MK100,000.00 on 18th May, 2014 at Kafoteka Filling Station in Lilongwe and MK100,000.00 on 19th May, 2014 at Kafoteka Filling Station in Lilongwe.
8. The defendant denies the contents of paragraph 12 of the plaintiff's statement of claim and shall at trial content that the plaintiff compromised the security of his ATM card by disclosing his ATM pin code to his son who lost the card to a fraudster on 16th May, 2014.
9. The defendant admits the contents of paragraph 13 of the plaintiff's statement of claim and shall at trial show that prior to the report of the missing money, there was no reason for blocking the plaintiff's ATM card as the plaintiff insisted that his card had been withheld in the ATM machine, a matter that was still under investigation and further no one could use the card without the plaintiff revealing the pin code to them.
10. The defendant admits the contents of paragraph 14 of the plaintiff's statement of claim.
11. The defendant admits the contents of paragraph 15 of the plaintiff's statement of claim and shall at trial contend that the plaintiff's money went missing due to his own negligence in compromising the security of his ATM



- card by disclosing his pin code to a third-party contrary to the advice given to him by the bank when issuing the ATM card.
12. The defendant denies being negligent as alleged in paragraph 16 of the plaintiff's statement of claim or the sub- paragraphs there under or at all and shall specifically show at trial that:-
  13. The plaintiff had insisted between 17th May, 2014 and 19th May, 2014 that his card had been withheld in the ATM machine and as such there was no reason to block his ATM card if his position were correct, the ATM card would have been safe.
  14. Failure to trace the fraudster was due to the fact that the fraudster was wearing a hat at all transactions and as such his face was obscure from all cameras.
  15. The defendant repeats paragraph 11 above shall contend at trial that the loss of funds in the plaintiff's account was due to his own negligence by compromising the security of the card by disclosing his pin code and passing on his card to a third party.
  16. The defendant therefore denies liability for the sum of MK300,000.00 special damages, damages for negligence, damages for inconveniences, costs or for any sum at all.
  17. Save as hereinbefore specifically admitted, the defendant denies each and every allegation of fact contained in the plaintiff's statement of claim as if the same were herein set out and traversed *seriatim*.

The defendant called four witnesses to give evidence. Briefly, DW1 was an administrator at the material time who received a report on 17th May 2017 that the Plaintiff's card had been retained by the ATM at Tutlas. He dispatched the ATM custodian Mrs Nyirenda who did not find the Plaintiff's card in the machine. The NCR company was called to come and find the card if it was stuck between the spaces but they did not find it. The Plaintiff then told the witness in the presence of Mrs Dorothy Nyirenda that he had given his PIN code to his son on 16th May 2017. The Plaintiff insisted that his card was in the machine. DW2 reiterated the same evidence but added that the plaintiff had another son who had gone to school who also knew the PIN code. DW3 was the investigator who carried out the investigations and established that a number of cards had been stolen and he demonstrated through the CCTV recordings the way fraudsters stole ATM cards and PIN form unsuspecting clients. He also stated that the person withdrawing the money from the Plaintiff's account was covering his head and he could not be identified. The witness showed the court recordings of the CCTV cameras. DW4 was Bruno Chitsulo who was the person the Plaintiff first approached on the 17th

May 2017, and who also established that an amount of MK100,000.00 had been withdrawn earlier that day from the Plaintiff's account.

### The Law and its application to the evidence

In civil matters, the Plaintiff has the burden of proving the elements of his or her case and to so prove the case on a balance of probabilities. The Supreme Court of Appeal observed as follows in the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, that

*"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative"*

This suit is founded on negligence. The classic statement which define what constitutes negligence is outlined in the case of **Blyth v. Birmingham Waterworks Company (1856) 11Ex Ch 781** and is as follows:

*"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*

It was held in the celebrated case of **Donoghue v Stevenson (1932) AC 562** that



that when he inserted his card in the machine on 17th May, 2014, the machine retained the card with the message "card not active". He reported the issue to Mr Chitsulo who advised him to wait by the machine as the persons who deal with the machines were on their way. When the officer, Dorothy Nyirenda who was **DW2** arrived, she did not find the Plaintiff's card in the machine, but one belonging to Annie Chitimbe which had been deactivated as it had been reported as stolen. The Plaintiff after insisting that his card was still in the machine was informed that a company called NCR which maintained the machines will dismantle the machine the following Monday. The NCR people did not find the applicant's ATM card in the machine.

It is the evidence of the applicant that he transacted between 8:30-9:00 a.m. on 17th May 2014 and the ATM response by DW2 was between 10:00 a.m. to 11:00 a.m. While it is not clear the exact time that the Plaintiff was informed that withdrawals had been made around 6:00 a.m., I am convinced that there was enough time for the Plaintiff to put in waiting a request to get his ATM card blocked. Indeed, I take judicial notice that Banks do not stop payments or cancel ATM cards or restrict access to services without clear written instructions by the client. If they were to do so then many clients would lose trust and confidence in the Banking system.

The Plaintiff claims that he reported the matter to the Defendant in a letter dated Sunday 18th May, 2014, which was delivered to the defendant on Monday 19th May 2014. The letter is exhibited as RP5. A close reading of the letter simply shows that the plaintiff was simply lodging a complaint on the missing money amounting from Mk100, 000. 00 from his account No. 1783114 and he wanted the Defendant to investigate. Basically, he did not believe the machine that retained the card for not being active because he had used the same card to cash money at an ATM at Mzuzu Shoprite the previous day, 16th May 2014. What I find strange is that in the letter of complaint the Plaintiff, who was well aware that the MK100, 000. 00 which was missing as a result of an ATM withdrawal around 6:20 a.m. on 17th May 2017 did not see it fit to request or instruct the bank to block access to his card immediately. At that stage, he had not used his card to make such a withdrawal. I find this to be negligent conduct on the part of the Plaintiff, which negligence

resulted in loss of money. In my considered opinion, a person owes himself or herself duty of care when their assets or lives are at risk. One does not have to sit and wait for a third party to take certain action to protect one's assets or life. I find that the Plaintiff simply sought to have an investigation carried out to establish what happened to the KM100, 000. 00 and he did not give instructions to block the card. The Defendant could not be expected to act without such instructions.

It is the evidence of the Plaintiff that when he went to the bank on 19th May, 2017, to deliver the letter of complaint, the customer manager then requested that a printout of his statement be mark which revealed that 2 more encashment had been made in Lilongwe on Sunday and Monday as shown by exhibit RP4. The Plaintiff stated that the Defendant then blocked the card on 19th May 2017 and the managers stated they would pay back as the bank had been negligent. Later the Defendant stated they would not pay as the Plaintiff had given his PIN code to another person contrary to the policy and agreement between himself and the bank.

The Plaintiff insists that the Defendant acted negligently by not blocking his ATM card on 17th May, 2017 and their claim that there were no expressly written instructions to do so does not make sense, since on 19th May 2014 the Defendant blocked access to the account without express instructions. This assertion is not borne by the evidence. On receiving the letter, the Defendant commenced the investigations which begun by calling for a printed statement of the account. After seeing that the client was losing money and 2 more withdrawals had been made on Sunday and Monday, the defendant acted in the most reasonable was in the presence of the Plaintiff to block access to the account. Indeed, at this stage, the Defendant owed an explicit duty of care to act in a way as to safeguard the funds of the Plaintiff. Moreover, the Plaintiff was present when the decision was being made. While there is no evidence of express instruction to block access on 19<sup>th</sup> May 2014, I am convinced that the blocking was together with the client in the face of such a huge loss of funds. No reasonable client would even challenge such blockage. The circumstances were different with the occurrences on Saturday as at that time the Plaintiff believed that his care had been retained and as far as he



was concerned he had not cashed the MK100,000.00 and the mistake was with the bank.

The Defendant denies that there was negligence because the Plaintiff had disclosed his Personal Identification Number (PIN) code to another person. The Plaintiff herein and his witness PW2 who was his son, do not dispute that the ATM PIN code was given to the son. This is indeed contrary to the policy of the bank as indicated in Exhibit RPI which was the standard letter sent to all ATM clients by the bank, which reads as follows;

*"HERE IS YOUR PERSONAL IDENTITY NUMBER (P.I.N.) PLEASE  
MEMORISE IT IMMEDIATELY*

*YOU ARE STRONGLY RECOMMENDED TO DESTROY THIS  
DOCUMENT AFTER YOU HAVE MEMORISED THE NUMBER*

*Do not disclose this number to person*

*Do not write your number on your card or keep it with your card"*

The Plaintiff as stated above did not act like a reasonable man to himself. He did not act with a duty of care towards himself. By disclosing the PIN code to his son, he breached the rules and conditions of his contractual relationship with the Defendant.

The Plaintiff contributed heavily to the loss of his own funds. The claim that the bank manager said they made a mistake and would pay is hard to believe because he had just issued clear instructions that the bank should investigate. The defendant is unlikely to bind itself before clear investigations are carried out.

Through the evidence of the CCTV, DW1 has demonstrated that the Defendant did carry out an investigation. The investigation disclosed that it is possible for unsuspecting clients to have their PIN numbers intercepted and stolen together with their cards. Furthermore, in this case the Plaintiff compounded the matter by giving his PIN code to his son. Whether or not the son or the father were the victims of PIN theft or card swap is not clear. What is clear is that the ATM card and its PIN code were stolen by persons unknown who subsequently withdrew money from the Plaintiff's account. The persons unknown, knowing that they were



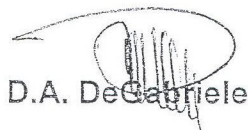
fraudulently withdrawing money and stealing from a client of the bank, disguised themselves that the CCTV cameras were not able to identify the person. I do not think that the defendant should be held liable to negligence for failing to identify the person and get that person arrested. It is enough that there is CCTV cameras and Guards posted on the premises to ensure a safe environment.

I am convinced that the events as they unfolded on 17th May, 2014 would have made any reasonable man request a blocking of access to his ATM immediately. Indeed, an inference can be drawn from the events of the 17th of May 2014, which inference would lead to the conclusion that a further loss of funds was a very real possibility that would lead to injury to the Plaintiff. The Plaintiff herein chose to disbelieve that the card that was in the ATM was not his card and there was no other card to his own detriment.

In the final analysis, having carefully reviewed the evidence in this case, it is my finding that the Plaintiff has failed to establish on a balance of probabilities, a case of negligence on the part of the Defendant for the loss of money that he had suffered. I find instead that the Plaintiff was the one who was negligent and failed to exercise a duty of care towards himself. The I therefore do not find that the defendants were negligent. To this end the Plaintiff's claim fails in its totality.

Costs are awarded to the Defendant.

**Made in Chambers at Mzuzu Registry this 19<sup>th</sup> day of June 2017**

  
D.A. DeGastrie  
JUDGE