MALAWI JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 38 OF 2014

(Being Commercial Case No. 63 of 2012)

BETWEEN

MALAWI SAVINGS BANK LIMITED .....APPELLANT

AND

MALIDADE MKANDAWIRE t/a

MALANGOWE INVESTMENTS .....RESPONDENT

CORAM: HON. JUSTICE E.B. TWEA SC, JA

HON. JUSTICE DR J.M. ANSAH SC, JA

HON. JUSTICE R.R. MZIKAMANDA SC, JA

Kauka……...Counsel for the Appellant

Ghambi…….Counsel for the Respondent

Chimtande (Mrs.)……..Recording Officer

JUDGMENT

MZIKAMANDA SC, JA (TWEA SC, JA and Dr. ANSAH SC, JA concurring)

This is an appeal against the judgment of Honourable Justice Dr. Kachale delivered on 2ih March, 2014. His Lordship dismissed the action the appellant brought against the respondent in the Commercial Division of the High Court. The appellant was dissatisfied with the judgment and it appealed to this Court on a number of grounds. It seeks reversal of the whole of the decision and that judgment be entered in its favour for the sum of K3,404,876.98 , interest, collection costs and party and party costs. The appeal is opposed.

The grounds of appeal are that:

1. The Learned Judge erred in excluding admissible evidence, namely exhibits "IM 3" "IM 4"' and "IM 5"' being letters from National Bank of Malawi and Standard Bank, confirming that the three cheques in issue were indeed honoured by the appellant bank.
2. The Learned Judge erred in law in excluding from evidence cheque images when in the first place, by the defendant's own admission, the defendant admitted that he issued the cheques.
3. The Learned Judge erred in law in holding that a person in the position of the plaintiff s witness, who was a Branch Manager at the time the dispute arose and a Credit Manager when he testified, could not properly tender in evidence cheque images of the bank for which he worked.
4. The Learned Judge erred in law in holding that letters addressed to a particular official in an organization can only be tendered in evidence by that particular official.
5. The Learned Judge erred in fact and law in holding that the plaintiff failed to call material witness.

The facts of the case show that Mr. Malidade Mkandawire traded under the name Malangowe Investments and maintained a business account with the Malawi Savings Bank Limited at its Blantyre Branch. He operated his business as a distributor of Southern Bottlers Limited (Sobo) products within Uliwa area in the Northern district of Karonga, a long way from Blantyre. The proceeds of the distributorship were usually banked through the Chilumba Branch of the Malawi Savings Bank Limited in the Uliwa area. To the knowledge of the respondent and the appellant, there were persistent technical problems with the internal electronic networks of the Bank owing to repeated disruptions in Malawi Telecommunication Limited lines to which the Bank was connected. As such, there were delays in crediting the Mangalowe account in Blantyre with the banked proceeds. In tum, this resulted in several cheques to Malangowe's suppliers and other debtors being dishonoured when presented to respective banks. In some instances it usually required telephonic confirmation between Blantyre and Chilumba Branches of the Bank to verify deposits not electronically reflected in the respondent's account for corresponding payments to be made on the cheques presented. All transactions relating to refer-to-drawer, and the accompanying RD cheques, together with corresponding reversals, were separately recorded in the account of Malangowe. Sometimes the Bank would make payments against the respondent's account from the suspense account and records would be regularized subsequently.

According to Mr. Mkandawire, he became frustrated with the trend of events as he felt that the dishonouring of cheques was damaging his business reputation and trading relations. He said that he decided to withdraw all the money from the account, leaving a small amount. He took out K5,995,658.36 and left a balance of K4,814.98. The last transaction took place on 27th April, 2010. Thereafter the account was not to be used again. The Bank then commenced an action claiming

from the respondent the sum of K5,088,515.27 which it alleges was paid to Malangowe's debtors through cheques presented and had not received any corresponding deposits from the respondent. The respondent successfully challenged that claim in the Court below as the action was dismissed with costs. The Bank was dissatisfied with the judgment of the Court below. It now appeals to this Court.

In this Court it was argued for the appellant that the respondent banked with the appellant Bank that honoured the three cheques issued by the respondent. However due to system challenges on the part of the appellant, the bank statement indicated that the cheques had been dishonoured, even in situations where the cheques were honoured through special arrangements. In the Court below the appellant adduced evidence from two banks where the cheques had been deposited to show that they had been honoured. The Court below disallowed the evidence of both the cheques and the letters from the other banks purporting to confirm that the cheques had been honoured, on the ground that they amounted to hearsay evidence.

In arguing grounds 1 and 4 together counsel for the appellant said that the Learned Judge erred in law in holding that the letters from National Bank of Malawi and Standard Bank of Malawi confirming that the cheques in issue were honoured could only have been tendered by the very persons who wrote the letters or the officer from the appellant Bank who made the initial inquiry. On the rule against hearsay, the Court below had relied on the cases of **Subraminian v Public Prosecutor** [1956] 1 WLR 965; **S Boardman v Manyawa & Prime Insurance Co** Civil Cause No. 1238 of 2000 (unreported); **Denmark Watson v NICO General Insurance Company Limited** Civil Cause No . 1570 of 2010(unreported); **Mputahelo v Republic** [1999] MLR 222. Counsel for the appellant argued that to the rule in **Subramanian V Public Prosecutor** (supra)

there are exceptions founded on good public policy as in **Mputahelo v Republic** (supra). He argued that the cheque images and the letters from the respective banks where the cheques were deposited did not amount to hearsay evidence. In any event they would constitute an exception to the rule against hearsay.

He asked the Court to accept that (i) a body corporate is an inanimate entity which cannot either act or form an intention except through its directors and employees and that (ii) if those persons who are responsible for the general management of a company delegate their duties to another, then the acts of that other will be the acts of that company. Should the Court accept these two propositions founded on common sense, good public policy and recognized by the law, then there was nothing wrong with the appellant's Credit Manager tendering in evidence the letters from the National Bank of Malawi and Standard Bank of Malawi Limited. One such letter bears a stamp of the Credit Department of the appellant bank and the Credit Manager came across both letters both in his capacity as Branch Manager and Credit Manager. Thus he was fully acquainted with the matter and was a competent witness.

It was argued that the Learned Judge misapplied or at least applied too narrowly the principle in **Sadanand v Technicold Ltd and Others** 11 MLR 90, rather than the Learned judge observing that the appellant had misconstrued the case. The relevant passage was quoted thus:

> *"A statement contained in a document is admissible as evidence of any fact stated therein of which direct evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person who had or can reasonably be*

supposed to have had personal knowledge of the matters dealt with in that information ... "

Again in relying on **Mpungulira Trading Ltd v Marketing Services Division** [1993] 16(1) MLR 346 in dismissing the appellant's case the Learned Judge erred because in that case the Judge did not disallow the letter; he allowed it but said he would attach no weight to its contents. The author had not been called and there was no indication that the plaintiff was the recipient of the letter.

In arguing ground 2 of the appeal that the Learned Judge erred in law in excluding from evidence cheque images, which cheques the respondent admitted that he issued them, counsel for the appellant stated that the respondent having admitted both in his pleadings and in his own viva voce evidence that he issued the cheques whose images were introduced in evidence, the Court below should not have gone on to disallow the cheque images.

In respect of ground 3 of the appeal it was argued that the Credit Manager who was the Branch Manager of the Branch on which the cheques were drawn and Credit Manager at the time of trial was a competent witness who could properly tender the cheque images. It was an error of law for the Learned Judge to have held that the Credit Manager through whose department the cheques were processed was not competent to tender the cheque images.

In respect of ground 5 of the appeal it was argued failure to call a Ms Vaida Chadzala whom the Court below said was better placed to explain the evidence in relation to the suspense account was not fatal to the appellant' case since there are occasions when more than one person is capable of testifying on a matter, and the present matter is one such matter. This being a civil matter, the standard of proof is

on the balance of probabilities. That standard was met when the Credit Manager testified.

In arguing for the respondent, counsel's response drew the attention of this Court to the relief sought by the appellant which was that 'the whole decision be reversed, and judgment entered in favour of the plaintiff for the sum of MK.3,404,876.00, interest, collection costs and party and party cost', when what the appellant had originally claimed was MK5,088,515.27, to which sum of money there had been no amendment. It was thus argued that the appeal is based on issues not brought before the Court below, in which case the appeal should be dismissed even on that ground alone.

Counsel argued that it was irrelevant for the appellant to criticize the style of writing judgment on the part of the Court below, because the style did not prejudice the case for the appellant. As to the appellant's witness who had been a Branch Manager of the Bank at the time of the transactions and a Credit Manager at the hearing of the matter, the same could not be regarded as sufficiently senior in the institution to be considered the mind of the Bank. Even his delegate could not form the mind of the Bank. In so arguing counsel relied on **Tesco Supermarkets Ltd v Nattrass** [1971] 2 All E.R. 121 which laid down that a person who is sufficiently senior in a company could be regarded as the mind of the company while persons who are not senior enough could be regarded only as legal persons in their own right. It was held that a stores manager could not be regarded as forming the mind of the company.

Regarding the two letters from the National Bank of Malawi and Standard Bank of Malawi Limited, it was argued that they contradict the bank statements issued by the appellant in that the statements clearly show that the three cheques were

dishonoured and no any other transaction to the contrary is appearing in the appellant's own bank statement. Further, neither the officer from the appellant bank who made inquiries from the other banks nor the authors of those letters of confirmation were called as witnesses. According to section 184(**1)** of the Criminal Procedure and Evidence Code, the person who saw, heard or perceived should be the one to testify as any other testifying would be providing hearsay and inadmissible evidence. The present letters do not fall into any of the exception to the rule against hearsay, it was argued. Reference was made to the case of **Kamwendo v Bata Shoe Company Malawi Limited** Civil Cause Number 2380 of 2003 for the proposition that according to the rules of documentary evidence, a document speaks for itself and no parol evidence is to be introduced to contradict a document, subject to recognized exceptions. Also cited on this point were cases of **Gross v Lord Nugent** [1824-34] All E.R. 305, **Ratten v R** [1972] WLR 578 and **Chidanti Malunga v Fintec Consultants (a Firm)** Commercial Case No 6 of 2008. As such the Court below was justified in holding that the letters from National Bank of Malawi and Standard Bank of Malawi purporting to confirm that the cheques in question were honoured were inadmissible evidence, counsel concluded on this point.

As to the cheque images, it was argued that while it was admitted that the cheques were issued by the respondent, it was the fact that the cheque images were presented to the Court below to establish the truth that the cheques were honoured that the respondent objected to. The case of **Subramanian v Public Prosecutor** was cited for the proposition that evidence of a statement made by a witness who is not called to testify may be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement or may not be hearsay and admissible if it is to establish, not the truth of it, but the fact that it

was made. Thus the Court below was justified in not admitting the cheque images as presented to it by the appellant's witness.

It was further argued that the fact that the witness was the Branch Manager at the material time does not change the fact that he had no direct dealing in the transactions and no valid reasons were given for the failure to call Ms. Chadzala who had such dealing. Citing **Maonga v Blantyre Print and Publishing Company Limited** [1991] 14 MLR 240 where Unyolo J, as he then was, said that if a witness who is available is not called, it may be presumed that his evidence would be contrary to the case of the party who failed to call him, counsel argued that the appellant having failed to call a material witness, the Court below was justified in holding that the Credit Manager could not tender the cheque images. Also cited on this point was **Leyland Motor Corporation Limited v Mohamed** Civil Cause Number 240 of 1983 (unreported) and **Mohamed v Leyland Motor Corporation Limited** [1990] 13 MLR 204. The respondent's prayer is that this appeal be dismissed with costs.

In its judgment, the lower Court isolated the main issues for determination as being whether there was a contractual relationship of banker and customer between the Malawi Savings Bank and Malidade Mkandawire as well as whether payment was made by the Bank to his credit on the basis of that relationship. As to the first question, the Court found that there was a contractual relationship between the parties. However, the Court was not satisfied that the Bank paid out the money shown on the bank statement as the relevant cheques are reflected as having been returned to drawer. The Court was unable to find adequate proof on the balance of probabilities for the alleged payments.

It is clear to us that this appeal revolves around the rule against hearsay. In **Subramanian v. Public Prosecutor** [1956] W.L.R 965 at 970 the Privy Council characterized the hearsay rule thus:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.* "

We remain alive to the fact that the precise scope of the rule against hearsay in some respects remains a matter of controversy, although we want to note that sometimes the courts treat the rule against hearsay with excessive reverence in civil or criminal trials. Recent developments, both statutory and common law, have demonstrated a much more relaxed approach to the rule against hearsay. As was stated in **R v Christie** (1914) Cr. App. R 141; [1914] AC 545, the principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of criminal offences as against a party to a civil action. It is a basic rule of the law of evidence that evidence which is relevant should be admitted, unless there is a rule of law which says that it should not be. Relevance is a matter of degree in each case and the court would have to consider whether the evidence is sufficiently relevant for the determination of the issue or issues in the case. It is also for the court to determine what weight it will attach to the evidence based not on arbitrary rules, but by

common sense, logic and experience. In that regard, each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited (See **DPP v Hester** [1972] 2 WLR 910; [1972] 3 All ER 440; [1973] AC 296; *Phipson on Evidence* 10th Edition, paragraph 2011). Now, in deciding whether the rule against hearsay has been breached or not, it is essential to examine the purpose for which the evidence is tendered. It is important to recognize that as the law of evidence develops, and with technological advancement in society, there emerge an increased number of exceptions to the rule against hearsay. We bear all these principles in mind as we determine this appeal.

We will proceed to examine the grounds of appeal in the manner they were argued. As to grounds 1 and 4 we are called upon to determine whether the exhibit IM3, exhibit IM4, and exhibitIM5 are admissible and if so, whether the Credit Manager would properly tender them in evidence. In point of fact, the record of appeal shows that exhibits IM3, IM4 and IMS are cheque images for K215,000, payable to Malangowe Investment, K l ,664,274.98 and K l ,525,602.48 payable to Southern Bottlers Ltd, respectively. There are two letters marked exhibit IMl , relating to exhibit IM3, from Standard Bank and exhibit IM2, relating to exhibit IM4 and exhibit IM5, from National Bank of Malawi.

In rejecting the letters from the other banks addressed to the appellant, the lower Court reasoned that these were not introduced by the authors thereof or the recipients in the appellant's bank who had initiated the inquiry in the first place. According to the Court, comments relating to the documents would amount to hearsay if made by Mr Mmadi, the Credit Manager. Further still the Court was of the view that the said letters did not constitute official records as contemplated in **Sadanand v Technicold Ltd and others** 11 MLR 90. That case concerned the

production of invoices. While the letters herein differ from invoices, we see a common feature that they are official documents issued on behalf of an institution. We do recognize that the absence of the ability to test hearsay evidence by cross- examination in court is regarded as a basis for the rule against hearsay. But we also know that there are exceptions to this rule and the categories of such exceptions are not closed. In the present case, we think that the letters in question would have been properly introduced in evidence by either the authors or the recipients thereof or both. Further we think that the letters must be viewed as having originated from the banks that accepted the cheques to the Malawi Savings Bank which held the relevant bank account. We think that is consistent with banking business. It would be incorrect to assume that the letters were written by or addressed to an individual in personal capacity when they were clearly on bank business.

We have addressed our minds on who within the Malawi Savings Bank was competent to introduce the letters in evidence. We are mindful that generally in corporate governance, the directors form the mind of the corporate entity and as such may act on behalf of the entity. They may not delegate their delegated authority further. We however note that in the nature of banking business, proof of records of transactions may be given orally or by way of affidavit by a partner or an officer of the bank as stipulated in section 4 of the Bankers' Books Evidence, Cap. 4:05 of the Laws of Malawi. The Bankers' Book Evidence Act makes special provision for proof of contents of what are described as Banker' Books, being any form of bank records including ledgers, day books, cash books, account books and all other books or records used in the ordinary business of the bank. We think that Mr. Mmadi who was the Credit Manager of Malawi Savings Bank at the time he testified in evidence and who was at the helm of the department that processed the letters and the cheques was an officer of the Bank of sufficient seniority to be able

to produce the letters by the Bank in evidence. We think that this approach is consistent with what the Act just cited is aimed at addressing and is consistent with search for truth in the trial so as to determine what really happened. We do not think that the rule against hearsay is offended by such an approach.

Further, with the admission by the respondent that he issued the cheques whose images were before the court, the Court below had no basis for doubting the authenticity of the same. The stamps on the cheques indicating the number of the bank teller who received the particular cheque in the respective banks must show that the cheques were presented for payment, a fact that is not disputed. The authenticity having been confirmed by the respondent, it was incumbent upon the Court below to examine the cheque images for the story they tell, whether there was cross-examination on it or not. We do not think the evidence in the present case should be limited to examination of the electronically produced bank statement, especially in the light of the electronic challenges the Bank encountered during the material time as highlighted in the record, a matter the respondent was fully aware of. While it is correct that Ms Vaida Chadzala, Head of the Electronic Clearing House of the Malawi Savings Bank at the time, would have been a witness regarding the payment of the cheques, she would certainly not have been the only witness on the point. She was characterized by the Court below as material witness. We do not think she stood alone in that characterization. In point of fact there is evidence that the transactions were also processed through the credit department which was under the charge of the Credit Manager. We think that Mr. Mmadi, the Credit Manager, would easily be characterized as a material witness in the circumstances of this case.

As to the scanned cheques introduced on the matter, the lower Court rejected them apparently because no reversals of their having been dishonoured were recorded in

the banks account statements electronically generated. These are cheque images of cheques the respondent admitted to have issued. They are cheque number 000088 for K215,000, issued to his business, cheque number 000059 for K l ,664,274.98 issued to Southern Bottlers Ltd and cheque number 000122 for K l,525,602.00 also issued to Southern Bottlers Limited. The authenticity of the cheque images is not denied. We have carefully examined the record from the Court below. It is clear that the cheque to Malangowe Investment was paid. Indeed he could neither say whether the letter from Standard Bank confirming that the cheque was paid was a mere fabrication or not. He also said that in case the letter was true, he would take it as such, which suggests that he was not really contesting the content of the letters. It was open for the Court below to find on balance of probabilities that the cheque was so paid despite the reflection in the electronically generated bank statement, particularly with the explanation given on network challenges and special arrangements.

Then there is the evidence of the Credit Manager that these cheques were paid despite that electronically they were indicated to be returned to drawer. They were paid on account of special consideration of the circumstances of the respondent as recognized by the bank. He went to great length to explain the special circumstances in which the respondent operated his account. He also explained at length the intricacies of banking procedures generally and what specifically obtained in the present case. We can understand the many interruptions the court below made as the Credit Manager made the explanation, a fact the court appeared to have been apologetic for. We are in agreement with the observation made by the Court below that the record keeping on the part of the appellant was not up-to-date. That notwithstanding, the record clearly shows to us that the cheques in question were paid even though the bank statements show returned to drawer without there

being corresponding reversal entries made electronically. We are satisfied that these were done elsewhere as explained by the Credit Manager.

We bear in mind that the cheques were large and also for payment to Southern Bottlers Ltd. There is no record that the suppliers, Southern Bottlers Ltd, ever complained that the cheques were not paid or that the respondent used other means to settle the indebtedness with Southern Bottlers Ltd after the cheques were dishonoured. We do not think that Southern Bottlers Ltd would have ignored dishonoured cheques. That would not have made business sense. We have also examined the bank statements produced in evidence and we note the bankers cheque presented on 21st April, 2010 for K5,802,571.36 was for settling indebtedness with Southern Bottlers Ltd in the ordinary course of the respondent's business and not merely for moving money from the bank out of frustration as the respondent would like the Court to believe. We note that on 23rd April, 2010 there was a withdrawal of K95,000.00 from the same account. There was yet another withdrawal of K98,087.00 from this account on 27th April, 2010. It was only after these withdrawals, which left a credit balance of K4,814.98, that the account fell into disuse. The level of each cash deposit is much lower than the levels of the payments made at any given time between 31st May, 2009 and 28th April, 2010. We have a distinct impression that this was a troubled business account which required special measures in dealing with. On balance of probabilities we are inclined to believe the evidence of the appellant that special arrangements were made from time to time in the handling of the respondent's bank account and that with these arrangements that respondent's enterprise was able to maintain the account for the duration of time it did.

The respondent took issue with the figure originally claimed by the appellants and the change of the figure in the appeal for a lower figure. The figure in this appeal

represents the total on the three cheques. We understand that the larger figure in the original claim included interest and other charges. In this appeal we have focused our attention on the total figure after adding the amounts on the three cheques in question. We do not think that the claim before us on this appeal raises different issues from the ones raised in the court below. We accept the explanation that the figure before us excludes the computation of interest and other charges.

In all these circumstances we think that the balance of probabilities favours the appellants and we find for them. The Judgment of the Court below cannot stand. It is reversed. This appeal must succeed. We enter judgment for the appellant for the sum of K3,404,876.98 together with interest and costs.

Pronounced in open court at Blantyre this 5th day of July 2016.

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HONOURABLE JUSTICE E.B. TWEA SC, JA

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HONOURABLE JUSTICE DR J.M. ANSAH SC, JA

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HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA