**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 145 OF 2002**

**BETWEEN:**

**G. H. MAJITHA t/a HARDELEQ SUPPLIES.....PLAINTIFF**

- and -

**COMMERCIAL BANK OF MALAWI LTD.....DEFENDANT**

**CORAM: JUSTICE W. M. HANJAHANJA**

Kalima, of Counsel for the Plaintiff

Bandawe, of Counsel for the Defendant

Katunga (Mrs), Official Interpreter.

**JUDGEMENT**

In this action the plaintiff is claiming against the defendant the sum of K3,504,807.63 as damages for conversion, interest thereon and a sum of K282,173.08 under the Legal Practitioners (Scale Minimum)(Amendment) Rules 2002.

The plaintiff, Gunvant Haridas Majitha, is a trader in hardware goods and operates his business in the City of Blantyre under the name of Hardeleq Supplies. He employed a Mr Ellisa Jackson Takomana (the Debt Collector) to collect payment cheques from the plaintiffs customers. Unknown to the plaintiff, the Debt Collector opened a current account with the Commercial Bank of Malawi at the Ginnery Corner, Chichiri in the

name of Hardeleq Merchants Supplies. As required by bank practice, the Debt Collector produced to the bank a Certificate of Business Registration **Exhibit P1**. The certificate showed that Hardeleq Merchants Supplies was registered on 29th July 1998 under Registration Certificate Number 43900, **Exhibit P2.** in the name of the Debt Collector.

Instead of handing over paid up cheques to the plaintiff, in the name of the plaintiff, the Debt Collector deposited the cheques into his own account with the Commercial Bank at Chichiri. It is the evidence of the plaintiff that he, the plaintiff, never had a current account, at all with the bank at Chichiri. It was during the auditing of the plaintiff's accounts that auditors queried why some debts were long overdue. As a result an inquiry was made on the outstanding accounts. It was discovered that for over a period of three years between 14th August 1998 and 18th October 2001 a substantial number of debtor companies had drawn cheques in the name of the plaintiff but that the payment cheques had been directed and deposited into the Debt Collector's current account at the Commercial Bank, Chichiri. These deposits came to K3, 504,807.63. The whole amount was subsequently withdrawn by the Debt Collector.

In the premises on 6th November 2001, the plaintiff addressed a letter to the bank's manager, Mrs Thupa**, Exhibit P3** complaining as follows: -

**"I have discovered after a detailed audit of our accounts that cheques payable to Hardeleq Supplies from our debtors were being paid into an account held at your branch. This was discovered after a number of my debtors produced paid cheques, which bear the stamp of your branch. This surprised me, as I do not hold an account with the Commercial Bank of Malawi at your branch or at any branch of your bank under the name of Hardeleq Supplies.**

**I would like to know how Commercial Bank of Malawi opened an account under the name of Hardeleq Supplies without my consent and how cheques payable to Hardeleq Supplies were being paid into that account.**

**I have enclosed a copy of our Business Registration Certificate, which clearly shows that I, Gunvat Haridas Majitha, have been carrying on business as Hardeleq Supplies since 15th October 1982.**

**Yours faithfully**

**G. H. Majitha".**

The bank replied on 19th November 2001 – **Exhibit P4** as follows:

**"This is to confirm that the matter is being investigated by the Bank's Security Services Department".**

**Yours sincerely,**

**Roselyn Thupa(Mrs)**

**Corporate Banking Manager".**

The outcome of the investigation came out in a Memorandum **Exhibit P5 says:**

**"Mr Ellisa Jackson Takomana opened an account on 13th August 1998 in the name of Hardleq Merchants Supplies. On short name, he indicated Hardleq Supplies of Hardleq Supplies (Suppliers). The Certificate of Registration, which he produced to the bank, number 43900 reads Hardleq Merchants Supplies and Ellisa Jackson Takomana as the sole proprietor. The account was opened in our books on 13th August 1998 and the customer was handled by Mr Vandika. The Manager by then, Mr J.V. Likubwe authorised opening of the account. The account was opened with an initial deposit of K500 cash. On opening the account, it was created as Hardleq Supplies omitting Merchants.**

**Most deposits made to the account were cheques. On CA 50 on some deposits, the account was written as Hardeleq Supplies. Most deposits written Hardeleq were left in the box by the customer. From the time the account was opened up todate, all cheque deposits amount to K3,497,145.53. It has been hard to prove which of these cheques were paid in the name of Hardeleq Supplies as all cheques deposited were cleared.**

**The account was wrongly written as Hardleq Supplies instead of Hardleq Merchants Supplies. On short name the bank should have objected to the use of two names i.e. Hardleq or Hardeleq because on the Registration Certificate, the name is Hardleq Merchants Supplies. On all cheques drawn by the customer, the customer stamped all his cheques as Haldeleq Supplies changing his business name. The bank should have obtained a proper explanation from the customer why the customer opted the short name to read by two different names.**

**G. S. Ziba**

**Branch Sport Inspector**

It was the evidence of the plaintiff that cheques drawn by his debtors intended for payment for the plaintiff were deposited by the Debt Collector into his own account. For

example, a cheque dated 7th August 2001 drawn in the name of the plaintiff Hardeleq Supplies for K52,321.00 issued by the Malital Limited was deposited into the Debt Collector's account and stamped by the Chichiri Bank on 9th August 2001 **Exhibit P7.** The plaintiff then produced a bank statement of withdrawals **Exhibit P8** showing huge amounts of withdrawals from the Debt Collector's account with the bank dating from 13th August 1998 to 11th March 1999. Similarly, the plaintiff produced a cheque **Exhibit P IO** issued by Carlsberg in favour of Hardeleq Supplies for K1,905.00 which found its way into the Debt Collector's account. Likewise a cheque issued by MASAF **Exhibit 11** for K12,375.00 dated 28th May 2001. Among the many other cheques was cheque **Exhibit 12** issued by Manica for K6,130.00 dated 15th December 1999 and Transport Equipment Manufacturers **Exhibit P 13** cheque for K17,085.00 dated 26th October 2001.

After these revelations, the Bank ordered the closure of the Debt Collector's current account.

It was the evidence of the plaintiff that the Debt Collector ran away from the country when he got wind of the case. The plaintiff puts the blame for the loss of his money squarely on the Bank. The Bank denies liability and accuses the plaintiff of negligence by giving the Debt Collector an opportunity to create this fraud.

The central issue in this case is upon whom the loss arising from the Debt Collector's fraud is to fall, the plaintiff or the defendant Bank. The plaintiff's case is that the Bank had no authority to accept and deposit the cheques and pay out to the Debt Collector account cheques, which were clearly issued for the use of the plaintiff and in his own business name. The loss, therefore, the argument is, falls on the Bank. Meanwhile the Debt Collector has fled the country to an unknown destination leaving the plaintiff and the bank to fight out who between them is the innocent victim of his crime and who is to bear the financial loss.

If the plaintiff succeeds, there is an issue as to whether the Bank is liable to pay interest on the sums wrongly paid to the fraudulent Debt Collector's account.

In cross examination, the plaintiff testified that it took three years to discover this fraud because, like the rest of his members of staff, he trusted the Debt Collector that he would collect cheques from his customers and deposit them into the plaintiff's current account. He did not detect anything wrong because he trusted him until these fraudulent transactions were exposed. This was because there were times he deposited the cheques into his account personally and at times when either the account or the Debt Collector made the deposits.

From time to time, he would instruct the Debt Collector to push and chase out for

outstanding accounts from his debtors, particularly during the six months period before the discovery of the fraud when he started to notice that he was in financial problems with his creditors due to lack of funds. He then instructed his Accountant to check with the debtors. It turned out that most of the debtors had settled their accounts. They produced paid up cheques as proof. He testified that because he did not have an account with Bank, he was therefore, in no position to detect the fraud.

The plaintiff summoned one witness, an expert in banking business. He is Galomako Munthali, the Investor Services Manager with the National Bank. He condemned and criticised the procedure followed by the defendant's Bank in processing the Debt Collector's account with them. He felt the Bank took no precaution to check that the names endorsed on the various cheques as Hardeleq Supplies were the same as that of the Debt Collector's account name which was Hardeleq Merchants Supplies. A prudent banker would not have accepted these deposits given the difference in names on the cheques and the account. His evidence was that when a customer comes to open a business account the Bank asks for two things, a Certificate of Incorporation, a Certificate of Business Registration and References. They key document is the Certificate of Registration. As the account is opened the name of the account should be exactly the same as that reflected on the Certificate of Registration tendered. The Bank should not accept a different name from the customer and one appearing on the Certificate of Registration.

As a collecting bank, he said, the name appearing in the cheque "payee" should be the same as the one on the cheque both personal and business. He said it was an error to accept a deposit of a cheque indorsed HARDELEQ into an account named HARDLEQ. He noticed that there was a difference in spelling. The former has an E between D and L whereas the later has no E between D and L. Further in HARDELEQ, there is an E between L and Q, making it to have two Es whereas the later has only one E in the name. He testified that there was a problem or oversight in the opening of the account. He would have expected that the one opening the account would have recorded in what was in the Certificate of Registration in this case HARDLEQ MERCHANTS SUPPLIES as opposed to the name of HARDELEQ SUPPLIES. It was his opinion as a banker that this account was opened without backing by the Certificate of Registration which was against the normal banking practice. He concluded by saying that there was some negligence on the part of the officer who opened the account and further by accepting to deposit cheques for the credit of that account with different names. This was very unprofessional.

The defendant also called one witness. He is Gaver Chawanangwa Ziba, the Bank's Internal Auditor. He was informed by the Manager of the bank at Chichiri that cheques in the name of HARDELEQ were deposited in the account of HARDLEQ. He then commenced his investigations. His main worry was in the short name. There were two names on short names HARDLEQ SUPPLIES and HARDELEQ with a difference on the placing of E on both names. His main findings were that the account opening was

properly done but the creation of the name in the computer was not properly done. He confirmed that the account maintained by the bank was in the name of Elissa Jackson Takomana.

In cross-examination, he conceded that the account was wrongly created as HARDLEQ SUPPLIES instead of HARDLEQ MERCHANTS SUPPLIES. On short name, he should have objected to the use of two names, that of HARDLEQ and HARDELEQ because on the Registration Certificate, the name is HARDLEQ MERCHANTS SUPPLIES. His major concern was why the bank accepted two names.

Counsel for the defendant, Mr Bandawe, submits that the case for the plaintiff must fail because the plaintiff has given evidence of acting in bad faith and with negligence. This, he submits, is procedurally wrong. His argument is that negligence has not been pleaded. The plaintiff, therefore, cannot allege negligence on the part of the bank. He argues that it was out of context for the plaintiff through the evidence of PW2 to raise the issue of negligence by the bank in opening or creating the account. He referred the court to Lord Edmund Davies in **FARRELL v SECRETARY OF STATE FOR DEFENCE (1980) 1 WRL 172**.

"**failure to plead negligence against a specified person precludes that court from finding that person guilty of negligence.**"

Mr Bandawe further relies on the defence of estoppel. He argues that the plaintiff is estopped from claiming a refund because his inaction or action encouraged or played a significant role in preventing the defendant from detecting that the Debt Collector was stealing these cheques and depositing them into his own account. Mr Bandawe cited the case of **Morison v London country (1914) 3 K.B. 356.**

**In the Morison case, the plaintiff authorised one Harry Abott, his employee, to sign cheques on behalf of the plaintiff's company. Abusing the trust that the plaintiff had in him, Abbot opened an account with the plaintiff's bank where he diverted some cheques for a period of five years. The plaintiff brought an action against the bank for conversion. The court at first, instance, ruled in favour of the plaintiff. On appeal, the Court of Appeal reversed the decision and ruled in favour of the bank.**

Mr Bandawe maintains that the plaintiff's conduct was similar to that of Morison.

Mr Bandawe further submits that the plaintiff had condoned whatever negligence the defendant had committed and therefore is protected by Section 25 of the Bills of Exchange Act 1882 similar to Section 79 of the Malawi Bills of Exchange Act. It

provides:-

**"where a banker in good faith and without negligence**

**(a) receives payment for a customer of an instrument to which this section applies; or**

**(b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself, and that the customer has no title, or a defective title to the instrument, the banker does not incur any liability to the true owner of the instrument by only having received payment thereof".**

In addition, Mr Bandawe submits that interest is not payable. He says damages for conversion are the face value of the instrument and no more. He referred the court for this proposition to the Morison's case, **Capital and Countries Bank v Gordon (1903) A.C. 240, and MacBeth v North and South Wales Bank (1908) A.C. 137.**

Counsel for the Plaintiff, Mr Kalima, submits that the case for conversion has been made out. He disagrees that the defence of estoppel, and the protection under Section 79 of the Malawi Bills of Exchange Act is available to the defendant. His argument is that the plaintiff did not open any account with the Bank for the defence and protection to apply. As the plaintiff had no account with the bank, he could, therefore, be in no position to know that cheques drawn in his name by his customers were being deposited into this bank by the Debt Collector. The plaintiff never received statements from this bank showing the movement of his customers' cheques deposited and withdrawn at this Bank. The plaintiff should, therefore, not be blamed for taking no action to stop the fraud for the period of the three years in question. He referred the court to the case of **Lloyds Bank v Savory and Company (1933) A.C.201; (1932) ALL E.R Rep100** in which the misappropriation of cheques took place between 1924 and 1930, a period of six years and yet the respondent recovered from the bank damages for conversion. It is the argument of Mr Kalima that in that case, inability or failure to discover fraud did not preclude the courts from awarding the plaintiff damages for conversion. Simply put, he says, the defence of estoppel must fail.

As for Section 79 of the Bills of Exchange Act, Mr Kalima submits that the defendant enjoys no protection provided by this section. This is because the evidence has established that the defendant acted in bad faith and with negligence. Even though, the evidence shows that the defendant properly opened the account for the Debt Collector but the evidence also establishes that the defendant wrongfully created this account. The bank allowed the Debt Collector to use two short names reading differently without making proper inquiries. The bank created the account with a name different from the

name on the Certificate of Registration. The bank permitted cheques payable to the plaintiff's "Hardeleq Supplies" to be deposited in an account for the Debt Collector, "Hardleq Merchants Supplies". Mr Kalima argues that by receiving from the Debt Collector cheques payable to the plaintiff's "Hardeleq Supplies" and paying these into the account of the fraudulent Debt Collector, the defendant converted the plaintiff's cheques in the sum of at K3,504,807.63 and the plaintiff is entitled to the award of that sum as damages for conversion.

Mr Kalima feels it was not necessary to plea negligence as alluded to by Mr Bandawe. It is enough to establish that the bank did not act in good faith and acted with negligence. The bank acted carelessly in that they ought to have noticed that the payee on the cheque "Hardeleq Supplies" was different from the holder of the account "Hardleq Supplies" into which the cheques were deposited. It was wrong for the bank to allow cheques payable to "Hardeleq Supplies" to be paid into the account of "Hardleq Supplies". This, he said, was a clear case of conversion.

Mr Kalima referred to the cases of **Baker v Barclays Bank Ltd (1955) 2ALL E.R. 571, Motor Traders Guarantee Corpn v Midland Bank (1937) 4 ALL E.R.90 Paget's Law of Banking page 419** which deal with collection of cheques to which a customer has no title. Mr Kalima draws the court's attention to the proposition that conversion is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be an act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it. Intention is no element of conversion. The plaintiff must have been entitled to immediate possession of the chattel at the date of conversion **Hollins v Fourler (1875) LR.7.HL 757 at 795; White v Teal (1840) 12 AD and EL100 106 at 115; Paget's Law of Banking pages 418 and 419.**

Mr Kalima submits that in the present case the sum of K3,504,807.62 was payable to the plaintiff's "Hardeleq Supplies" and not to "Hardleq Supplies" and that the plaintiff was entitled to the immediate possession of the cheques.

He argues that by crediting the money into the Debt Collector's account number 1404117, the bank dealt with the cheques in a manner inconsistent with the plaintiff's ownership of them. The bank, he submits is, therefore, liable in conversion.

From the foregoing, I have no doubt in my mind that beginning from the time the fraudulent Debt Collector's account was opened throughout 1998 to 2001 the practice and procedure followed by the defendant bank was grossly unprofessional. This is born out from the testimony of both bankers, the National Bank Investment Service Manager and the defendant's Bank Internal Auditor. There was gross negligence in the opening of the account. There was massive negligence in the execution and operation of the Debt

Collector's account. This negligence or omission facilitated the occurrence of the fraud. The Bank exercised no precaution. They, without this precaution, let the fraudulent Debt Collector deposit into his account and withdraw therefrom K3,504,807.87 moneys from cheques drawn for the use of the plaintiff. This was an act of bad faith and act of negligence. I must, therefore, find them responsible for the loss suffered by the plaintiff. I hold the view therefore, in my judgement, that the protection given to a Bank under Section 79 of the Bills Exchange Act is not available to the defendant in the face of these glaring acts of bad faith and acts of negligence. The names "Hardeleq Supplies" and "Hardleq Supplies are totally different. This difference ought to have come out very clearly if the bank exercised some caution and precaution in the opening of the account and maintenance of the account.

The defendant has pleaded estoppel. There is no question of estoppel in this case. There was no relationship of a banker and a customer between the parties in this case in order for estoppel to apply. The conduct of the plaintiff, that being the position, is blameless. The defence is without merit. No bank statement passed between the defendant and plaintiff to enable the plaintiff detect the fraud. He discovered the fraud when he inquired with his customers why their accounts were long overdue after the auditors had discovered that there were many 90 days overdue accounts.

Since the plaintiff had no current account with the defendant, it was impossible for the plaintiff to know fraud was in existence. He received no bank statements from the bank, as a result the plaintiff owed the Bank no duty to take reasonable and ordinary precaution to prevent the fraud from happening. The defence of estoppel must, therefore, fail.

As for the claim for interest, I have this to say:- The plaintiff has lost his money which if he had deposited in an interest earning account he would have the opportunity to earn more than what he lost by this unauthorised credit and debt of his cheques into the fraudulent account. Interest, therefore, is payable. For the purpose of this case, interest should run from 18th October 2001 the date the fraud was detected and exposed at a bank rate to the date of judgement. The parties shall agree what bank lending rate is payable, in default an assessment shall be made by the Registrar of the High Court after hearing both parties.

For being successful, I also award the plaintiff collection charges at the rate of 15% in terms of Legal Practitioners (Scale Minimum) Amendment Rules 2002 and 20% surtax and costs of this action as prayed.

**PRONOUNCED** in open court on the 20th day of November 2002.

W. M. Hanjahanja

**JUDGE**