IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3542 OF 2004

BETWEEN:

STANBIC BANK LIMITED……....PLAINTIFF

- and –

MARYAM ARAB AND ESAARAB
T/A E & M HALAAL BUTCHERY…….. DEFENDANT

CORAM: HON M. C. C. MKANDAWIRE
Mwagombo of counsel for the plaintiff
Kaphale of counsel for the defendant
Nancy Nyirenda – official interpreter.

JUDGMENT

Mkandawire J,

This is a rather vexing case. In their re-amended Statement of Claim, the plaintiff has at all the material times been an agent of First National Bank of South Africa which operates a scheme in terms of which it operates transactions resulting from the use of visa and MasterCard

financial service cards in accordance with the terms of its membership of Visa International Service Association and MasterCard International Incorporated.

The agency between the plaintiff and the principal was created to assist the latter and merchants in giving effect to the requirements of customers who use visa and MasterCard financial service cards upon purchase of goods and services.

By a written agreement dated 2nd April 2002, the defendants agreed with the plaintiff's predecessors ("Commercial Bank of Malawi Ltd") that they should become merchants under the aforesaid commercial arrangement and they were required under the agreement to deposit valid sales or credit vouchers with the plaintiff who would in turn honour the same and claim repayment from the principal.

The defendants had the following duties under the agreement:

a) To only honour every valid and current card bearing the visa and MasterCard mark presented in respect of a transaction (Clause 3.1).

b) In the event that a transaction is in excess of R200 for original card and R400 gold card to contact an authorisation centre of the Bank/principal in accordance with the arrangement advised to the merchant from time to time in order to obtain authorisation codes. (Clause 13.5).

It was also the implied duty of the defendants to take reasonable care to ensure that credit cards being used by their customers were genuine and make sure that the transaction between them and the customers were not fraudulent.

In terms of the agreement presentation for payment of a sales voucher by the merchant (defendants) was a warranty that all the terms and conditions of the agreement had been complied with and payment by the Bank in terms of the agreement was made on the understanding that such a warranty was given by the merchant (defendant) (Clause 13.5).

In terms of Clause 13.4 of the agreement acceptance by the Bank of a sales voucher and/or payment as envisaged by Clause 13.2 was in no way to be construed as being binding upon the Bank as to the validity of any sales voucher and the Bank was entitled to reject any sales voucher as being invalid as specified in Clause 12.1, and, thereafter, to debit the merchant's Bank account with the amount in question or otherwise to claim from the merchant such amount.

On or about 4th August, 2003, the plaintiff sent sales vouchers to the principal for them to effect payment of the sums thereof but before this could be done they discovered that some of the transactions done by the defendants and their customers using the credit cards under the agreement were fraudulent in that the cards were fake and authorisation codes obtained by the defendant were not genuine and for this reason the principal decided to terminate the agreement with the defendants.

By the time of the aforesaid discovery the plaintiff had, on trust that the defendant had fully and properly sought and obtained valid authorisation codes, already credited to the defendant's account number 0140058622900 maintained at Ginnery Corner branch with the sum of MK3,359,656.00 representing sales vouchers deposited which sum was generated by the defendants from their customers and paid by the plaintiff as a result of the use of fake and fraudulent credit cards and authorisation codes in breach of their implied duty of care and warranty in Clause 13.5.

In terms of Clause 12 , a sales voucher would be invalid if:

a) The authorisation number endorsed upon the sales voucher is not the authorisation number supplied by the Bank.

b) The transaction in respect of which it is issued is, for any reason illegal.

By reason of what has been said before the principal refused to pay the plaintiff the sum of MK 3,359,656.00. It was a term of contract between the plaintiff and the defendant that in the

event of any dispute between the merchant and the cardholder in relation to any transaction the plaintiff was specifically excluded from such dispute and the merchant had to undertake full liability therefore. The defendant has refused to reimburse the sum paid to them by the plaintiff pursuant to the fraudulent transactions which money they had already withdrawn by the time the fraud was discovered.

The plaintiff therefore claims having lost MK3,359,656.00 plus loss of interest on the said sum at the plaintiff's lending rates prevailing from time to time from the date the sum was due until payment and costs of this action.

In their re-amended defence, the defendants have said that according to the terms of the merchant agreement, their duties were as outlined in Clauses, 5.1, 5.2, 6.2, 6.4, 6.5, 6.6, 6.7, 6.8 and 6.10. They therefore deny the rest of the claims as made by the plaintiff in their statement of claim. They therefore contend that they complied with all their duties under the agreement and further contend that they have never been informed by the plaintiff or the First National Bank of South Africa Limited of a breach by the defendant of any of their duties under the said agreement. The defendants deny that there was any implied duty imposed on them under the said agreement or any implied duty the terms of which the plaintiff has pleaded in the Statement of Claim. It is the defendant's contention that they dutifully followed all the laid down procedures under the agreement when processing every transaction and obtained the First National Bank's prior authorisation every time any transaction exceeded the prescribed limit. They further contend that the plaintiff neither the principal queried any of the transactions presented for authorisation. On average, it took 72 hours before the defendant's account would be credited with funds. The defendants say they were not privy to any information the plaintiff and the principal relied upon to scrutinise details of cardholders, or to authorise transactions and placed reliance on both of them to take due care when giving the defendants authorisations.

It was an implied term of the agreement that the plaintiff and the principal would take reasonable care when authorising the same so as to detect any fraudulent transactions in good time so as to prevent loss to the defendants.

The defendants deny that they ever processed a transaction that used a card that was known or ought to have been known by them to be fake. The defendants state that the authorisation codes they obtained from the principal in title were represented by them to be valid ones and it is on the basis of such that they parted with their goods to the cardholders and that consequently, the defendants were entitled to be credited with the money representing the value of the transactions.

The defendants therefore say that their account was duly and properly credited with the sum of K3,359,656.00. They also say that there is not dispute between them and any cardholder of which they have been made aware of or for which any cardholder must receive any payment or compensation from the defendants. They therefore deny any liability to reimburse the plaintiff K3,359,656.00 or any interest thereon. They therefore deny any liability for costs.

In their Counter Claim, the defendants contend that if the plaintiff suffered any loss, the same was wholly caused or was contributed to by the breach of the implied contractual duties of the plaintiff and the principal or by their negligence. This was so because the plaintiff or the principal failed to exercise due care in authorising transactions. They also failed to exercise due care to see to it that should a fake card be used, it should inform the defendants at all times, or within a reasonable time, not to proceed to process that particular transaction or any further transactions with a particular cardholder. By reason of the breach of implied contractual duty or negligence pleaded, the defendants have suffered loss by parting with goods work MK3,359,656.00, interest on the said sum on commercial bank lending rates prevailing from time to time. The defendants therefore Counter Claim the said sum of MK3,359,656.00, interest thereon, and costs of this action.

The plaintiff replied to the Counter Claim. They deny that the defendants are entitled to MK3,359,656.00, and interest thereon,. They therefore pray that the same be dismissed with costs.

SURVEY OF EVIDENCE

There are two witnesses in this case. The plaintiff called Mr Gaver Chawanangwa Ziba, the forensic officer as its sole witness. On the other side, the defendants invited Mr Esa Arab as its witness. I shall first look at the plaintiff's case.

As can be seen from the so many documents tendered in this court, this case is fundamentally premised on these documents. It is therefore imperative that I commence looking at Mr Ziba's testimony from the perspective of such documentary evidence. The foundation of this case can be traced from the merchant agreement which is tendered in evidence. On the 8th of February, 2002, the defendant applied to be a credit card merchant. The letter of application is PEX1. On the 2nd of April 2002, the plaintiff as agent for First National Bank of South Africa (FNB) and the defendant executed a Merchant Member Agreement which contains terms and conditions of the relationship between parties. This agreement is PEX2. On the 11th July 2002, the plaintiff sent the defendant an imprinter machine, necessary stationery, authorisation procedure and Barclay's card credit scheme procedure manual for the defendant's use. The forwarding letter is PEX3. The procedure manual for merchants is PEX24. It is the evidence of the witness that in PEX3, the defendant was duly advised that he would need to obtain prior authorisation for any excess over and above the stipulated floor limits from the Local Authorisation Officer.

Through a letter dated the 6th of June 2003, the defendant sought clarification from the plaintiff on the correct procedure to be used in visa/master card transactions. This letter is PEX 4. The plaintiff responded through PEX5 and advised the defendant to continue following the procedure currently in use. They further advised the defendant to obtain the card number and passport number of the partner.

On the 8th of August 2003, the plaintiff received a letter from First National Bank advising them that all the recent transactions deposited by the defendant were identified as fraud. This letter is PEX6. By a letter dated 11th August 2003, First National Bank wrote the plaintiff saying that by virtue of Clause 15 of the Merchant Agreement, they were exonerated from any liability. The letter is PEX7. All the fraudulent transaction vouchers were tendered and are

marked as PEX8 – 23. The total amount of money in relation to these alleged fraudulent transactions is MK3,359,656.00.

The evidence of witness is that through PEX3, the defendant was specifically advised what to do but chose to operate contrary to what was stipulated by the plaintiff. Even the Barclays card credit scheme procedure manual for merchant PEX24 stipulates what the defendant had to do. The witness referred to several clauses in PEX2 such as 12.I.7, 13.4, 13.2, 12.1 all which stipulate the terms and conditions of this agreement. He further referred to Clauses 15.2 and 15.3 which stipulate as to what the plaintiff has to do in the event of a dispute. It is further the evidence of this witness that the defendant was exporting meat to Mozambique without following laid down Reserve Bank of Malawi Exchange Control procedures. These exports were therefore illegal. The witness tendered in court PEX25 a proforma invoice from the defendant as evidence of such illegal exports. He also tendered PEX26 a copy of the relevant page of the Reserve Bank of Malawi Exchange Control instructions. The witness finally tendered the statement of account which was sent to the defendant by them. It is PEX28.

The defendant's witness Mr Esa Arab confirmed the defendant having entered into a merchant agreement with the plaintiff. The merchant agreement is tendered as DEX2. He referred to clause 5.1 which deals with the issue of authorisation and the procedures to be followed as stipulated in Clause 5.2 and the rights of the Bank in Clause 5.3. He later on referred to Clause 6 which deals with sales voucher and credit voucher. He went Clause by Clause from 6.2 to 6.8 as to the procedure to be followed by the merchant when dealing with cardholders. The witness dealt with the issue of validity of card as stipulated in Clause 11. He then looked at the issue of validity of sales voucher which is governed by Clause 12. After having elaborated on Clause 12, the witness looked at the issue of depositing of vouchers and payment to the merchant which is governed by Clause 13. The next issue the witness covers in his statement relates to cardholder complaints and disputes which is covered in Clause 15. The witness confirmed having received all the necessary stationery and equipment for his trade as per the merchant agreement. He received these items through a letter which is DEX3 and he also confirmed having received a procedure manual (DEX4) and an Authorisation Procedure DEX5. He went on to say that as per EM5, he was advised that for a speedy service, he could obtain

Authorisation from the principal and that the telephone and fax numbers for the principal were enclosed thereon (EM5) by the plaintiff's predecessor. After all these documents were received the defence witness said that the defendant started transacting on the visa/visa scheme in May 2003. In June, 2003 he sought more clarification from the plaintiff as to how to operate the scheme. He thus wrote DEX6. He said that he was compelled to seek such clarification because of the instructions that had come from Mr Mfungwe and Mwalwanda from the plaintiff that he needed to collect more information from the clients/customers. The witness however denied knowledge of PE5 and said that he never received it. The witness explained that their main customer was MOZ Trading Company, a Mozambican company that was run by a Mr Klaus Riedl who was the Country Representative. He would pay by credit card and he also introduced to them other staff members of this company such as Felicity Bell and Flym who were Project Coordinator and Company Accountant respectively. It is the evidence of this witness that the company proposed to buy been in bulk with payments to be effected using credit cards for any of the above three people. These sales were to be conducted locally, thus they were local and not export sales. The clients could therefore collect the goods from the defendant's offices in Blantyre. They were solely responsible to process any export or other papers and licences they would require. The witness listed down all the transactions when they dealt with Moz Trading Company from May 2003 to 30th June 2003. These transactions were on the credit card basis. In total, they transacted to the tune of MK7,402,602.00. The witness tendered in court all the sales vouchers which are DEX7. On these sales vouchers, there is depicted a credit card imprints and the authorisation codes. Before processing any transaction, the witness would telephone the principal in South Africa to obtain and authorisation Code, which code was duly supplied by the principal. The plaintiff would also request the witness to ask the client (cardholder) some questions whose answer he would repeat to the principal. Thereafter, the principal would then provide the Authorisation Code. The witness also tendered in court cash sales for other transactions which were conducted on cash basis. These are DEX8. It is the evidence of the witness that when processing all these transactions, he meticulously followed all the instructions as per the Merchant Member Agreement as well as the Procedure Manual. He also used to compare the signatures on the card and sales voucher in order to be sure that they were similar. The witness said that whenever he sought Authorisation for the transaction, he was given and that whenever he deposited the sales voucher, they were honoured and the defendants' amount

was always credited with funds. All the Authorisation Members were issued by the principal and submitted on the sales voucher to the plaintiff who in turn would verify the Authorisation Members with the principal before crediting the defendants' account within 72 hours. The witness said that he did not know that the cards from the cardholders were blacklisted. The witness said that he was amazed to learn through DEX9 that there was fraud. Later on, he got a letter of termination which is DEX10. He also tendered DEX11, a letter from the principal and also tendered DEX12, the response he made. He later on reported the issue to the Police who however demanded that the cardholder should be the one to write fiscal police. As he was advised not to be in touch with the cardholders through DEX11, he kept quiet. On the 25th of August 2003, he went to his bank to obtain a statement which he tendered as DEX13. The statement showed that his account had been debited to the tune of MK3,359,656.00. Then on the very day, he wrote the plaintiff protesting such debits. The letter is DEX14. The plaintiff responded through DEX15. The witness said that he followed all the laid down procedures and got authorisation for the codes. He also says that he has not been queried by anyone about these cards. The witness further said that he has not been given particulars of fake credit card transactions that he is alleged to have processed.

On 31st August 2003, he did obtain another bank statement which is DEX16. It does confirm the said deductions. That is why on the 11th of September 2003, he wrote a letter of protest which is DEX17. The plaintiff responded through DEX18. The defendants' lawyers responded through DEX19. The defendants also tendered DEX20 and DEX21 in which the plaintiff had credited their bank account with the funds it had debited over the credit cash issue. At this juncture therefore, I have narrated all the evidence from both sides. It was imperative to do that so that the matters in issue are put on the right perspective.

Before I further delve into this case, let me remind myself that the case before me is a civil one. It is therefore imperative at this juncture to refresh my memory with regard to the burden and standard of proof in civil cases. It is well settled by the case **of Miller v Minister of Pensions** (1974) 2 All ER 372 at page 374 where Denning J. Said:

> *"This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to*

*discharge a burden in a civil case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "**we think it more probable than not,**" the burden is discharged but if the probabilities are equal, it is not."*

The burden of proof rests upon the party who substantially asserts the affirmative of the issue.

The issues:

The main issue for determination of the Court in this case is whether the Plaintiff was justified in debiting the defendants bank account. In order to fairly determine this issue, the court will have to scrutinise the evidence and delve into the reasons for the debiting. In order to properly answer this question, the court will have to address several fundamental points. These are:

(a) whether indeed the cards were fraudulent as alleged in the pleadings.

(b) whether the defendant did not obtain authorization codes or used faked ones.

(c) whether the transaction was illegal.

Analysis of Evidence:

The case before me did commence with pleadings. The practice is very clear that the court cannot make any finding on a matter which is not pleaded. In the instant case, there was a lot of talk in evidence by Mr. Ziba witness for the Plaintiff that there were fraudulent and faked cards used. Unfortunately the pleadings did not specify the fraud and the type of fraud that they were talking about.

There was also a lot of talk of implied terms of the merchant agreement. Unfortunately, the plaintiff had also not pleaded the issue of implied term which they wanted to rely upon in this case. It is therefore difficult for this court to import an implied term into the merchant agreement which term was not specifically pleaded by both parties. In the case of **Malawi Railways Limited vs P.T.K. Nyasulu** MSCA Civil Appeal No. 13 of 1992, the Court was very clear on this point. I further note that the issue of illegality cannot be sustained. When I look at the pleadings, I find that the plaintiff did not specifically raise it in any particular details. It would thus be unfair for this court now to adjudicate over an issue which was not particularly pleaded. Moreover, when I look at all the documentary evidence before me, there is nowhere in the letters written by the Principal as well as the plaintiff where the issue of illegal export of beef is raised.

The only point left for determination therefore is with regard to whether the defendant did not obtain authorization codes or used faked ones. In order to appreciate the issue of authorization of codes, I have deliberately taken myself back to the Merchant Agreement, which is PEX No. 2. The Merchant Agreement is the genesis of this case and all the operations between the plaintiff and the defendant were governed by it. Certainly, it would be wrong for any party to import anything into this agreement unless that thing was documented with full knowledge and consent of both parties. Clause 5.1 of this agreement is very fundamental. It goes as follows:

> *"In the event that a Transaction is in excess of the limit prescribed in 3.4(or such other limit as may be notified by the Bank from time to time), the Merchant shall contact an Authorization Centre of the Bank/Principal in accordance with arrangements advised to the Merchant from time to time."*

Clause 5.2 continues by providing what the merchant needs to do after obtaining the authorization code.

From my reading of clause 5:1, the merchant now the defendant had discretion whether to obtain the authorization codes from the Authorization Centre of the Bank or Principal. To

that end, the defendant was provided with MSA authorization procedure document which is DEX 5. On this document, there is endorsed in ink both telephone and fax numbers of the Principal. From the evidence on record, the defendant on most of the transactions on PEX 8 to PEX 23, used to phone straight to Johannesburg and obtain the said authorization codes. This as per DEX 5 was in order and the plaintiff did not controvert it.

Up to this far, there was nothing unprocedural as this was permissible under the Merchant Member Agreement. The vexing question however is as to whether these authorization codes were valid or not.

In order to answer this very fundamental question, I have to re look at the evidence of Mr Ziba, PW 1. It is very clear from Mr. Ziba's testimony that he did not directly handle any of the transactions on PEX 8 – 23. His evidence was that he only interviewed the bank officials especially Zione of the International Department at the plaintiff's bank. He further went on to state that he did not speak to any one from First National Bank of South Africa but that someone in the Bank was doing that and reporting to him. Pausing here, I looked at the evidence of Mr Ziba with a pinch of salt. Much as he is a forensic officer and an expert in that field in his own right, but I found that most of what he dwelt on was thriving on a sea of hearsay. From his evidence, it was not clear as to why the codes found on PEX8 – 23 are said to be unauthorized ones. I would have thought that someone from First National Bank in South Africa who was dealing with the issuance of these codes should have availed himself or herself so that this court should have a better perspective. Further than that, I found this case rather interesting in the way the plaintiff had arranged its witnesses. The person from the International Department from the local bank here was not even made available so that this court should have heard for itself as to why they were challenging these codes. It is also interesting to note that much as there was talk of Messrs Mwalwanda and Mfungwe, these two senior bank officers were not to be paraded. I thought that there were lots of issues in this case which needed particular clarification from them. Much as the plaintiff's witness Mr. Ziba had tendered in several documents, in the absence of proper explanation by principal witnesses of those documents, the plaintiff's case was full of disjointed logical flow. I should emphasize the point here that although there is that belief that a document speaks for itself, but where there is a controversy such as the one at hand, the author of

the document should come forward to clarify the issues. It was therefore very difficult for this court to appreciate the plaintiff's case from the letter written by First National Bank REX 6 to Zione Manjawira without any proper elaboration. The impression the plaintiff gave to this court is that they had made a very casual approach. Certainly, they should have done more and better by bringing the key witnesses to Court so that, there is proper explanation on the allegations made against the defendant. I am therefore not satisfied on a balance of probability that the codes used on PEX 8 – 23 were unauthorised.

I therefore find that the plaintiff was not justified to debit the defendant's account using clause 13.4 of the MMA (PEX 2) as read with clause 12.1 thereof. The plaintiff's claim therefore fails with costs.

DELIVERED in open court this 14th day of November, 2006 at Blantyre

M. C. C. Mkandawire

JUDGE