THE HIGH COURT OF SWAZILAND

Civil Case No.1644/03

In the matter between: STANDARD BANK

SWAZILAND (LTD) And Plaintiff

LUSD3A TRANSPORT SERVICES (PTY) LTD **Defendant**

CORAM **: MASUKUJ.**

For Plaintiff **: Adv. D.A. Smith S.C. (Instructed by Robinson Bertram)**

For Defendant **: Mr C.S. Ntiwane**

JUDGEMENT

3? March 2004

This is an action in which the above named Plaintiff sued the Defendant for the payment of an amount of E180, 904.72, interest thereon at the rate of 28.50%, from 21st May, 2003 to the date of final payment, compounded monthly in arrears.

The action arose from a payment in the sum of El90, 000.00 by the Plaintiff, on the Defendant's instructions against a foreign cheque which the Defendant had deposited with the Plaintiff for collection and which cheque was subsequently found to be bad and payment was stopped. Shorn of all intricacies the Defendant in its plea denied liability, averring that, the Plaintiff acted recklessly and/or with gross negligence by misrepresenting to the Defendant that the cheque was good, when the Plaintiff knew that the Defendant relied upon it entirely for advice in respect of the transaction in question.

From the exhibits filed of record, together with the pleadings and the oral evidence led by ' both parties, the following factors are common cause: -

(a) The Plaintiff is a financial institution duly registered in terms of the Financial Institutions Order, 1974, having its principal place of business at Mbabane.

(2) The Defendant is the holder of account number 0140034471701, opened in December 1991, with the Plaintiffs Big Bend Branch.

(3) On or about the 7th May 2003, the Defendant deposited cheque number 0030571924 drawn in its favour on Client Business Services Inc. which held an account with Fleet Bank Connecticut in the United States of America.

(4) The said cheque is dated 17th February, 2003 and is in the amount of S55 500.00 US (Fifty five thousand and five hundred United States Dollars.)

(5) The cheque was sent on collection and the Defendant was then advised that it would have to wait for a period of about six (6) weeks before the effects could clear.

(6) The cheque, when converted to the local cunency amounted to E426, 204.00, which amount was subsequently credited to the Defendant's account.

(7) On the 21st May 2003, the Defendant's Director Mr Andrew Luigi Sciolla, on enquiry was advised that he could withdraw against the amount standing to the Defendant's credit and he withdrew an amount of El 90.000.00 by a cash cheque of even date, bearing number 00003802.

(h) That the Defendant, in his dealings with the Plaintiff in relation with transaction was attended by Mr Sibongiseni Ginindza, of the Plaintiffs Big Bend Branch.

(i) On the 23rd May, 2003 the credit entry of the amount of the cheque i.e. E426, 204.00

was reversed after receipt of information that the cheque in question was bad.

It is clear from the foregoing that the Plaintiffs claim is in respect of the amount of E190, 000.00 which was drawn by the Defendant on the 21st May 2003, as aforesaid, before the Plaintiff discovered that the cheque was bad and reversed the credit according to normal barilcing practice.

Incidence of Onus

The incidence of onus in a particular case is a matter of substantive law and it is based upon the elastic hybrid of experience and fairness. See ELECTRA HOME APPLIANCES VS FIVE STAR TRANSPORT 1972 (3) SA 584 (WLD) at 584.

At the commencement of the action, it was agreed that the incidence of onus in this case lay on the Defendant and this obviated the need for the Court to make a Ruling in terms of the provisions of Rule 39 (11) of the Rules of Court, as amended. In the particular circumstances of this case, it proved fair, convenient and practical for the Defendant to adduce evidence first, it being common cause that the Plaintiff did pay the Defendant, the amount of E190,

000.00 and on the latter's instruction. In the circumstances, it was incumbent upon the Defendant to lead evidence why it should not be held liable to the Plaintiff for the amount in question. If the situation were otherwise, it would call for the Plaintiff to prove the negative as it were.

Defendant's Evidence

In support of its case, the Defendant led the evidence of one of its Directors, who was intimately involved in the transaction under scrutiny, Mr Andrew Luigi Sciolla, hereinafter referred to as "Sciolla". He testified that in September 2002, he went to the Swaziland Development and Savings Bank (Swazi Bank) to solicit a loan of E300, 000.00 for upgrading the Defender's vehicles which he used for transport purposes at Maloma Colliery. It was Sciolla's further evidence that whilst at the Swazi Bank, he met a fellow businessman, one Makhosonkhe Dlamini, of Siteki, who advised of a South African company that extended loans to small businessmen. Dlamini was requested by Sciolla to give him contact numbers of the said company.

A week later, Dlamini called Sciolla and they went to the Royal Swazi Sim where"tSey met the said company's representatives. Sciolla submitted documents in support of the application and was given forms which he duly completed. The company's representatives, who were of South African extraction were a Mr Computer Simelane, a Mr Pule and a Mr Khumalo. They indicated that they would revert to him in due course.

In March, 2003, they called Sciolla and delivered the good tidings that the loan application had been successful. A meeting was again scheduled for the Royal Swazi Sun where a cheque of U.S. Dollars 55,500.00 was issued to him. The cheque appears in bundle "A" at page 10 of the exhibits, which were handed in by consent. It was Sciolla's further evidence that he was further caused to sign documents for the repayment of the loan.

Sciolla then went to the Plaintiffs Big Bend branch and there met one Sibongiseni Ginindza, whom he described as a cashier and presented the said cheque to him for purposes of depositing the same. Sciolla testified that he enquired from Ginindza if the cheque was genuine and to which Ginindza replied positively. The cheque was then deposited in the Defendant's account. The following day, the Bank called and asked Sciolla to fill up a form required by the Central Bank of Swaziland and he did so assisted by Mr Ginindza. It was Sciolla's evidence that he was asked byGinindza about the *causa* for being given the cheque and to which Sciolla stated that it was a loan agreement. Ginindza required documents proving Sciolla assertions that the cheque was in respect of a loan.

Sciolla testified further that he then produced the agreement he had sighed with the company's representatives at Lugogo and handed the same to Ginindza, who informed him that he would have to wait for the clearing process which may take fourteen to twenty-one-days. He testified that on the 19th March, 2003 whilst in Manzini, he received a call on his mobile telephone from Mr Ginindza, informing him that the cheque had been cleared and that the Defendant's account had been credited with the equivalent of the amount of the said cheque in local currency.

Sciolla's further testimony has it that on the 23rd March 2003, he went to the bank and asked for an interim statement to verify that the credit entry relating to the said cheque had indeed been made. Ginindza gave him a copy and it reflected a credit of E426, 204.00 in respect of

the said cheque and before that credit, the account had a credit balance of E28, 278.65. This testimony was given after Sciolla's attention was drawn to Exhibit' "B", a "statement fforrfthe Plaintiff. I should point out that after seeing this exhibit, Sciolla indicated that he had erred regarding the date on which he went to the Bank for the interim statement. This he said, must have been on the 21st March.

Sciolla testified further that he then asked Ginindza to re-assure him that the amount of E426, 204.00 had been credited to the Defendant's account so that he could start planning the mode of repaying the debts and to repair the vehicles in question. Ginindza assured Sciolla that all was in order and that Sciolla could withdraw against the credit balance. Sciolla testified that he then received a call from Simelane, who told him that his company's account had been debited with the amount of the cheque. Sciolla arranged a meeting with Simelane which took place on the 22nd March at the Royal Swazi Sun. According to Sciolla, the purpose of this meeting was to discuss the account as he was apprehensive that the dollar/Emalangeni rate was continuously increasing. Sciolla stated that after working out the figures, he found that he needed only E250, 000.00 for the repair of the vehicles.

During the meeting with Simelane, it was agreed *inter partes* that Sciolla could refund some of the amount to Simelane as the amount of the cheque was in excess of the Defendant's needs. Sciolla testified that it was agreed that he would refund El90, 000.00 to the "lender", which would leave the Defendant free from repaying the loan for a period of four (4) years. It was his evidence that the Defendant was, in terms of the agreement, to pay an amount of US Dollar 500 monthly and which would translate to about E4, 000.00 per month at that time.

Sciolla's further testimony was that on the 23rd March, he met Simelane at the Plaintiffs Big Bend Branch and on arrival, he asked for Ginindza. When Ginindza came, Sciolla informed him that he was desirous of making a part-payment to the "lender" and asked Ginindza if he could so do. Ginindza's answer was in the affirmative, as the money was already credited to the Defendant's account. He testified further that Ginindza did see Simelane at the bank and Simelane did at some stage speak to Ginindza when the question of making the part-payment by a bank guaranteed cheque was refused by Simelane, who insisted on cash, reasoning that bank guaranteed cheques had presented problems in South Africa previously.

A cash cheque was then drawn on the Defendant's account in the said amount of El90, OOcT.OO. Simelane, after taking possession of the money departed'for South ATEHcX ^Sciolla testified that he never made any withdrawal for his own benefit from the said account. He ' testified that a week later, he received a telephone call from his bankers informing him that the cheque in question had been stopped. He testified that the account was from that time "frozen" and various cheques made out on behalf of the Defendant before the transaction involving the troublesome cheque were returned.

Sciolla testified that he did not know that the cheque in question had been stolen or fraudulently drawn. He testified further that the acknowledgement of debt in bundle "A" was presented to him for signature. This acknowledgement was the one given to Plaintiff in support of the assertion that the Defendant had obtained a loan from the "lender". Sciolla finally stated that he tried to contact Makhosonkhe Dlamini before the trial but was advised that he was away on business.

Sciolla was cross-examined at great length and in points of detail by Mr Smith. I do not intend to revisit the cross-examination, save to highlight a few critical aspects. I will thereafter give my impressions on Sciolla as a witness.

In cross-examination, Sciolla testified that he was bom into business and that he conducted a business since 1990. It was his evidence that part of his business dealings was to deal with cheques. He agreed *ex post facto* that the transaction involving the cheque was a fraud and that the cheque negotiated to the Defendant had been fraudulently drawn. It was put to Sciolla that he was party to the fraud and various questions were put to him to'demonstrate that, but Sciolla remained steadfast that he was not party to the fraud but that he was an innocent victim of the fraudsters.

The impression that Sciolla created as a witness was not favourable. He was unimpressive and I say so for the following reasons. Whilst there are portions of his evidence which are reliable and credible, I am of the view that on some crucial areas, he contradicted himself, showed signs of overheating in respect of others and there are also instances where he lied unabashedly under oath. This was more pronounced under cross-examination. I may well add that his oral evidence was in some respects at variance with his evidence given in respect of a summary judgement application filed by the Plaintiff in this very matter. His evidence

was also not fully consonant with the pleadings, a problem that he lays at door of the Defendant's attorneys of record. ' ~ '. ~ ~ ~

■ First and foremost, Sciolla's evidence on the dates when some of the incidents occurred is at variance with the documentary evidence handed in by consent. His evidence is that he dealt with the "lender's" representatives in March 2003 and was advised on the 19th March, 2003, by telephone, that the Defendant's account had been credited with the effects by the Plaintiff. He testified that as a result of the telephone call, he spoke to Simelane, the "lender's" representative on the 22" March, regarding the "repayment" of El90,000.00. It is abundantly clear on the documentary evidence that by that time, the cheque in question had not even been deposited, it being common cause that the cheque was only deposited on the 7th May, 2003.

It is clear from the evidence that Sciolla needed about E300, 000.00 for the upgrading and repairs to the vehicles. That is the amount of money that he set out to borrow from the Swazi Bank. In my view, he has not given a plausible explanation of why he, on receipt of the cheque far in excess of his needs he gave an amount of El90, 000.00, thereby leaving an amount less than the Defendant's researched requirements and needs. Faced with this reality, he made reference to a cheque of E96, 000.00 from Maloma in my view was clearly an afterthought because if his evidence is,to be believed, the Defendant had a contract with Maloma and this amount would clearly have been budgeted for and taken into consideration in determining the amount of the loan necessary for the project.

Furthermore, Sciolla did not know the name of the 'lender'. At one stage, he said it was Dolphin and after looking at the documents, he said it was Client Business Services. One would expect a businessman of Sciolla's calibre to readily know the company he dealt with on a number of occasions, more so when a fraud had been perpetrated by its supposed representatives. He exhibited grave signs of hesitation and uncomfortableness in proffering answers on this issue. This will become of more relevance later in the course of the judgement.

It is also noteworthy that when asked whom he dealt with as the avowed representatives of the 'lender', Sciolla was not consistent in his answer. In chief, he testified that there was a Pule, Simelane and Khumalo. In cross-examination, he omitted Khumalo and said it was

Mkhwanazi. He realised that he had painted himself in a corner and then said he had erred. I note that one ofthe people who signed for and on behalf of the creditor is "A rvffffiGEEL", of whom no mention was made.

When taxed by Mr Smith on his dealings with foreign currency, he testified that he was not *au fait* with the same and stated categorically that other than the Republic of South Africa, he had never travelled outside this kingdom and therefor had never previously had need for U.S. Dollars. Later, under cross-examination, he testified that he travelled to Mozambique and obtained 380 U.S. dollars. Clearly, he had been untruthful in two respects. Firstly, that he had never travelled outside Swaziland to any other destination save the Republic of South Africa. Secondly, that he had never had occasion to buy foreign currency and was therefor totally ignorant of the requirements for obtaining foreign currency.

I also note that he also failed to explain satisfactorily why he was given a loan far in excess of his requirements and in a foreign currency, when the lender was a South African company. He also became fidgety when asked why he only deposited the cheque op. the 7th May, 2003, when he had received it early in March around the 8th or the 9th. His answer was not convincing, reasoning that he was waiting for the relevant documents. His explanation of the events regarding the depositing of the cheque differed materially from the averments made in ,? the affidavit resisting summary judgement. As indicated earlier, this was shifted to the attorneys but it is common cause that the attorneys would only have acted and drafted the papers on Sciolla's instructions. They would not concoct their story. In any event, Sciolla signed the affidavit and swore to its contents being true and that he understood them.

There are various issues which I need not elaborate on which lead me to the conclusion that I made of Sciolla's as a witness. The record is replete with these. From the entire circumstances of this case, it is not out of place to conclude that Sciolla may have been party to the fraud. There are too many loopholes and the answers he gave on some crucial issues, as indicated above, were derisory. There is no need to make any finding on whether or not Sciolla was a party to the fraud but the following issues *in casu* would have raised the eyebrows ofthe wary, I dare say even of the drowsy and sleepy, namely:-

1. That an S.A. Company would pay a cheque in U.S. Dollars. Denel Aviation as its name suggests is not a company in money lending business.

That the amount of the cheque was far in excess of the amount borrowed. fmoTe that Sciolla does not even have a copy of the application form allegedly completed by him.

(8) The amount of the cheque differs from that reflected in the acknowledgement of debt. Sciolla, as the party to pay on the Defendant's behalf, should have detected this.

(9) The interest to be paid was very high, particularly considering that it was to be paid in U.S. Dollars.

(10) That the 'creditor' would, in terms of the acknowledgement aforesaid, come across to collect the various instalments over one hundred times, a situation that clearly boggles the mind.

(11) Why the lender would want to receive money it had loaned and in a currency that it did not lend it in. In this wise, they insisted on cash and even refused a bank guaranteed cheque.

After Sciolla's evidence, the defence closed its case.

In support of its case, the Plaintiff called Ginindza. He testified that he took receipt of a cheque from Sciolla and that after some time the Defendant's account was credited. Sciolla then came and asked for a statement and when seeing that the account had been credited, he asked if he could withdraw against it and he was given a green light. He confirmed that Sciolla presented a cash cheque of El 90, 000.00 to the bank.

On that day, he indicated that he wanted the said amount of E190, 000.00. When questioned why he needed that amount, he told Ginindza that he was purchasing a bus from Phakama. When it was proposed that he writes a cheque because cashing the money would be expensive, he insisted on cash and refused a bank cheque or even a transfer. The Bank eventually relented.

Ginindza testified that the figures on page 20 of Bundle "A" reflect the currency-denominations and the amount thereof. He further testified that Sciolla" appTnae"d~his signature thereon and that Sciolla normally wrote on the back of the cheque why the money ' was being paid. That is why 'Phakama' featured in that cheque, meaning that Sciolla had given that as the reason for that payment..

Ginindza's evidence is in my view not very crucial, regard had to the matter confronting the Court. The question would be whether on its own evidence, the Defendant has managed to discharge the onus upon it. One issue though I need to mention in respect of Ginindza's evidence relates to the inscriptions on the cheque for El90, 000.00.

When questioned as to who normally makes the inscription on such cheques, his answer was that it is usually the drawer, who is required to sign at the back as did Sciolla in this case. Ginindza testified that in respect of this cheque, he was not certain whether Sciolla had written the inscriptions thereon but assumed that Sciolla was the author. Sciolla, on the other hand testified that it was Ginindza.

The main focus is on the word "Phakama" and in my view, it is inconceivable that Ginindza would have manufactured that name and story. It is beyond doubt that Sciolla was asked the reason for drawing such a large cash cheque and the answer given, according to Ginindza does make sense that Sciolla was purchasing a bus. It would appear out of place for the Bank to choose that name when according to the evidence, they could not have benefited from the booty as the 'lenders' were only know to Sciolla. The story given by Ginindza is in this regard the most plausible and could convince the Bank of the genuiness of the transaction, because it would have been difficult for Sciolla to say that he wanted to refund the money to his 'financiers', a story that would have raised the Bank's alarm bells regarding the *bona fides* of the transaction.

The Legal Principles Applicable.

The starting point, in considering the issue at hand is the relationship between the bank and its customer in relation to current accounts. In STANDARD BANK OF S.A. LTD VS ONEANATE INNVESTMENTS 1994 (4) SA 510 (C) at 530, that relationship was described in the following terms: -

> *"The law treats the relationship between banker and customer is acohtfaclUaTonW. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. Although historically the original objective of a depositor was to ensure the safekeeping of his money, over time jurists have considered characterising and explaining the basic relationship as one of depositum, mutuum or agency. All of these approaches have on analysis proved to be inadequate. It is now accepted that that the basic relationship, albeit not sole, between banker and customer in respect of a current account is one of debtor and creditor.* "See also STANDARD BANK OF SA VS SARWA (2002) 3 ALL S.A. 49 at 54 (per van der Walt A.J.). See also head note of ABSA BANK BPK VS JANSE VAN RENSBURG 2002 (3) 701 (SCA). "

This position also finds support in the work of F.R. Malan *et al*, "Malan on Bills of Exchange" 4th Edition, Butterworths, 2002, where the learned authors state the following at page 335 -336: -

> *"The relationship between bank and customer must be classified and explained in terms of these general principles. This relationship is based on contract and involves, as has often been said, & debtor and creditor relationship, in terms of which the bank becomes the owner of moneys deposited on the customer's current account and obliged to pay cheques drawn on it by the customer...The contract founding this relationship is not one of depositum, nor can all its consequences be explained by the principles of mutuum that govern individual loans made by the customer to the bank when he makes deposits on his current account. Because of the complexity of the relationship, it has often been called a contract sui generis... However, in essence the contract between the bank and customer obliges the bank to render certain services, the so-called services de caisse, to the customer on his instructions and for this reason it can be classified as contract of mandatum. The bank customer relationship is based on a comprehensive mandate in terms of which the customer lends money to the bank on current account, the bank undertakes to repay it on demand by honouring cheques drawn on it and to perform certain other services for the customer, such as the collection of cheques and other instruments, and the keeping and accounting of his*

current account."

It is common cause *in casu* that the Defendant was the holder of a current account with the • Plaintiff and this relationship, as described above therefor obtained.

The second issue is whether the Plaintiff was entitled to debit the Defendant's account in circumstances where payment was made on a cheque deposited by it and which was for some reason or other dishonoured or stopped. The Defendant contends that it did not have an overdraft facility with the Plaintiff. In my view, the answer to this question must be found in a resolution of the Defendant dated 10th December 1991, in which it authorised the Plaintiff to carry out certain transactions. This is Exhibit A 1" and it reads as follows: -

> *"It was resolved 'that an account be opened at the Big Bend branch of Barclays Bank of Swaziland Limited and that the said Bank be hereby authorised and requested to pay all Cheques, Bills of Exchange, Promissory Notes and other negotiable instruments purporting to be signed, made or accepted on behalf of the Company, whether such account be <u>in credit or otherwise, to hold the Company liable on all Cheques.</u> Bills of Exchange, Promissory Notes, other negotiable instruments and all agreements, indemnities and documents in connection with all the usual banking transaction*, including amongst others the lodging and withdrawal of moneys on Fixed Deposits or on Savings Account, the pledging by the Company of any of its property, the issue of Letters of Credit, Drafts and Telegraphic Transfers, provided that such Cheques, Bills, Promissory Notes or other documents are signed by....."* (Underlining my own) -

From a plain reading of the said resolution, it is clear that the Defendant thereby entitled the Plaintiff "to pay all cheques....and to debit the same to the account to be kept by them...., whether such account be in credit or otherwise, to hold the company liable on ail cheques..." This in my view is the basis upon which the Plaintiff was entitled to hold the Defendant liable for monies paid by the Plaintiff *in casu* and this constituted the relationship, in part between the parties. It cannot be now denied as the Defendant now tries to do, that this document was ineffectual. It is valid and binding and had largely governed the relations between the parties for more than twelve years.

The Defendant's facile attempt to escape liability *in casu* cannot be countenanced. In this regard, the remarks by Zutman A.J. in AJ3SA BANK VS'l'W BLUMBERG~AND WILKINSON 1997 (3) SA 669 (SCA) at 675 - 6 are apposite. The learned Judge of " Appeal stated the following :-

> *"It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon .... It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the less if the uncleared effects were not met. This cannot be so. "*

In an ancient case of CUTHBERT VS ROBARTS, LUBBOCK & CO [1909] 2 Ch 226 at 233, the following timeless principle was enunciated by Cozens-Hardy Mr: -

> *"If a customer draws a cheque for a sum in excess of the amount standing to the credit of his account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money. "*

The above principles are in my view good and apply *in casu,* save to record that'firstly in this case the effects could not be said to have been uncleared in the sense mentioned by Zulman J.A. Secondly, that when the Defendant drew the cheque in question, he had gained the impression that the account was in credit. See also ELLIOT CHICCO KUNENE VS NEDBANK (SWAZILAND) LIMITED APP. CASE NO.34/99 (unreported per Leon J.P.).

It is clear in my view that subject to the averment that the Plaintiff acted negligently, there is no reason in law which could preclude the Defendant from paying the amount claimed.

I now turn to address the averment that the Plaintiff acted negligently in allowing the Defendant to \ vithdraw against the cheque. In its particulars of clatm, the DefenxEurTnfSde the following averrals at paragraph 11.2 to 11.4: -

> 11.2 Defendant avers that it is not liable to Plaintiff in the sum claimed or at all in that it never borrowed the money in as much as it never benefited from same.
>
> 11.3 Defendant further avers that Plaintiff was reckless and/or negligent in dealing with the cheque and also in advising Defendant that the cheque was good and and had been honoured and is not entitled to claim from defendant in this regard."

I am ofthe view that the avenals in paragraph 11.2 are taken care of by the contents of Annexure "A 1" and the excerpts quoted from the judgements of Zulman J.A. and Cozen -Hardy M.R above. It would be unconscionable to allow the Defendant's contention in this regard to stand. The fact that the Defendant did not benefit from the proceeds of the cheque in question cannot, in my view, enure to its benefit. The fact of the matter is that it was the Defendant which drew the amount of E190, 000.00. Turning to paragraph 11.3, I am ofthe view that there was no evidence led which could remotely suggest the manner in which the handling of the cheque by the Plaintiff could be said to have been reckless and/or negligent. In my view, the matrix of the evidence showed that the Plaintiff dealt with said cheque in its capacity as a collecting banker. The manner in which it fell below the requisite standard was not avened nor proved by admissible evidence.

The balance of paragraph 11.3 suggests that the Plaintiff acted negligently in advising that the cheque was good and had been honoured. From my notes, it does not anywhere appear that the Plaintiff ever advised that the cheque was good. The evidence suggests that the Plaintiff advised the Defendant that his account had been credited and that he could withdraw against the healthy balance reflected therein. Did the Plaintiff act negligently or recklessly in so doing?

The starting point, in answering this vexed question in my view should start with Exhibit A

I I A", being the Plaintiffs' *pro forma* used in the collection of foreign cheques. This form

was duly filled by or for tie Defendant and Sciolla signed for the Defendant. In that form, above the signatures, is the following inscription: - ---— — -

> *"KB. Proceeds of cheques will be credited under reserve when paid. While acting in good faith and exercising reasonable care, the Bank, as your agent will not accept responsibility that the depositors/account-holders have a lawful title to cheques e.t.c, collected."*

It is an ineluctable fact that in relation to the fraudulent cheque, the Plaintiff acted as a collecting agent and in terms of the reserve quoted above, the Plaintiff insulated itself against liability, if an eventuality like the one in issue materialised, i.e. that the cheque was subsequently found to be bad. The deposit in issue was in my view accepted subject to this understanding, which should have put any depositor on notice, hence the use of the word N.B. to preface the condition. In my view, that paragraph was inserted to shield the Plaintiff from liability in cases such as the present, regard had to its role as the collecting banker as stated above.

In this regard, it would not be out of place to quote from the trenchant remarks of Steyn J.A. In STANDARD BANK OF SWAZILAND LTD VS NTIWANE, MAMBA AND PARTNERS APP. CASE NO.5 /02. The facts of that case were not substantially dissimilar to the ones presently under scrutiny. At page 11 of the unreported judgement, the learned Judge of Appeal stated the following: -

> *"There was no evidence to which we were referred that there was any agreement entitling Mr Mamba to draw cheques against the credit entry generated by the cleared bill. It is true that the Bank permitted cheques to be drawn on the account as credited. However, in doing so it did not act pursuant to any contractual obligation, but in the ordinary course of its business as a collecting bank and in accordance with its banker/client relationship in respect of an account which was at that time in credit. When, subsequently, it was advised by the drawee bank that the bill was tainted by fraud as set out above, it once again, in reversing the credit did so in its capacity as collecting banker and not in breach of any contractual obligation or undertaking to its client. "*

The Court proceeded to quote from the case of STANDARD BANK OF SOUTH AFRICA VS*ONEANATE INVESTMENTS (IN LIQUIDATION) **1998** (lTSA **811** (SCS) **aTpage 823** where the following, which is relevant *in casu* appears: -

> *"Entries on bank accounts may reflect valid juristic acts, but that is not necessarily so. Whilst in general it may be said that entries in a banker s books constitutes prima facie evidence of the transactions so recorded, this does not mean that in a particular case one is precluded, unless say by estoppel, from looking behind such entries to discover what the true state of affairs is. So, for example, if a customer deposits a cheque into its bank account, the banker would upon receiving the deposit pass a credit entry to that customers' account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit it had previously made. So, too if a customer deposits banknotes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the banknotes were forgeries it can again not be successfully contended that the bank would be precluded from reversing the credit entry. "*

See also NEDBANK (SWAZILAND) LIMITED VS NTIWANE, MAMBA AND PARTNERS CIV. APP. NO**.4/02** an unreported judgement of Zietsman **J**.A., at page 7.

Two things deserve mention. First, the defence of estoppel, which must **be** specifically and fully pleaded, was not pleaded by the Defendant to warrant any consideration. Secondly, in the STANDARD BANK OF SWAZILAND Case *{supra),* there was a delay'of forty-four days before the reversal of the credit, which was the basis for the allegation of negligence on the Appellant's part in that case. *In casu,* the reversal was effected a few days after discovering that the instrument was tainted by fraud. There can therefor be no similar complaint in the instant case.

In his summation, Steyn **J.**A. stated the following at page 13, which is fully applicable *in casu:* -

> *"It seems to me that appellant s counsel is correct when he submitted that the appellant's sole obligation was to collect the proceeds of the bill.. The tacit*

underlying assumption was that the bill was genuine and not tainted with fraud. "

The conspectus of the evidence in this case justifies a similar conclusion. The Defendant's case, as I understood it, was not that the Plaintiff knew or had reason to believe that the cheque was bad, but that not withstanding had permitted the Defendant to make withdrawals with full knowledge of the consequences thereof to the Defendant. Ginindza testified that the Plaintiff had no knowledge that the cheque was bad when the withdrawal was sanctioned. There is nothing to gainsay Ginindza's evidence in this regard and in my view it must stand. Had the situation been otherwise, one could be justified in upholding the Defendant's defence.

I can find no better way to conclude than to again quote from Steyn J.A.'s judgement *(supra),* yet again at page 14:-

> *"At no stage did the bank communicate any facts or make any representations to Mr Mamba which were not in accordance with facts known to them and in conformity with conventional banking practice. "*

In NEDBANK (SWAZILAND) LTD VS NTI\VANE,MAMBA AND PARTNERS

(supra), at page 8, Zietsman J.A. had this to say:-

> *"In the present case, the crediting of the respondent's account by the appellant was done in the normal course of the appellant's business and it did not amount to a representation which precluded the appellant from reversing the credit when it discovered that the cheque was a fraudulent cheque. "*

These conclusions are in my view very apposite *in casu* and are fully reflective of the appropriate and relevant considerations in this case.

Regarding the Defendant's averments in paragraph 11.4, to the effect that the Plaintiff owed a duty of care to the Defendant in relation to the foreign cheque, it should be mentioned that there is nothing on the evidence to indicate the respects in which the Plaintiff allegedly fell below the duty required of it. This was not averred in the pleadings.

In addressing this issue, it must be pointed out that the Plaintiff acted as a collecting banker, wtto"se duties were stated as follows by Gubbay J.A. In ZIMBABWE "SANKJoNG CORPORATION LTD VS PYT<AMTD MOTOR CORPORATION (PVT) LTD 1985 (4) SA 553 (ZSc)at 565 F-1:-

> *"The collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it is being collected on behalf of the person entitled to receive payment; the paying banker does has no knowledge of that ....if the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so. He can allow a reasonable period of time to elapse before paying out to his client the funds represented by the cheque, thereby permitting either enquiries to be made as to the depositor's title, or the drawer an adequate opportunity to instruct the drawee bank to stop payment on the cheque. By exercising, reasonable diligence in this regard the collecting banker is able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by an unlawful possessor with comparative ease*"*

It would appear to me that the Defendant failed on the evidence to show that the Plaintiff failed to carry out its duties of a collecting banker. There was nothing on the cheque that could have caused the Plaintiffs alarm bells to ring. The cheque was sent on collection for a reasonable period and all the formalities required by the Central Bank were followed. It is noteworthy that the duties reflected above are owed, not to its client as the Defendant or some other person but to the true owner of the cheque. See INDAC ELECTRONICS (PTY) LTD VS VOLKSAAS BANK LTD 1992 (1) SA 783; STANDARD BANK OF S.A. LTD VS HARRIS AND ANOTHER 2003 (2) SA (SCA) 23 and ABSA BANK LTD VS MUTUAL & FEDERAL INSURANCE CO. LTD 2003 (1) SA (WLD) 635.

In view of my conclusions above, it is clear that the Defendant's defence should fail and the Plaintiff is to succeed in its claim. The question is whether the Plaintiff did lead evidence to prove the amount of the claim. Mr Ntiwane submitted that it failed to do so and further

submitted that it is not clear how this amount is reached considering that at the time of tl "crediting of the "cheque, there was an amount of E28, 278:65 standing fd'tfie Lietendant' credit.

Mr Smith on the other hand, whilst conceding that no evidence on the amount of the claim was led, submitted that among the documents handed in by consent, is the bank statement which reflects the amount owed by the Defendant to the Plaintiff.

I agree with Mr Smith's submission in this regard and further note that the Defendant, whilst denying liability to pay the amount claimed, did not, in paragraphs 10.1 and 10.2 of it's plea, contest the amount owing being El80, 904.72. The said paragraphs read as follows;-

> *"10.1 Defendant only admits that Plaintiffs statement reflected that Defendant's current account had a debit balance of El80,904.72. Plaintiff is put to proof of its allegations.*
>
> *10.2 Defendant avers that the sum of E180.904.72 was not lent and advanced as alleged but came about because of the facts alleged at paragraph 7 hereof. "*

It is clear from a reading of the said paragraphs that the Defendant admitted the statement as correctly reflective of the balance but denied liability therefor. Now that the Court has found that the Defendant, notwithstanding its denial of liability, is liable, then the undisputed amount due by the Defendant to the Plaintiff is the E 180.904.72, as reflected in the Particulars of Claim and judgement is accordingly made in the Plaintiffs favour in that amount.

Interest

On the question of the interest payable, Mr Ntiwane correctly submitted that the Plaintiff had not led any evidence to show wny the interest is claimed at the rate of 28.50% per annum. Mr Smith fairly conceded this. In ABSA BANK BPK t/a VOLKSKAS BANK V. RETIEF [1999] 1 ALL S.A. 68 (NC), the question was considered whether the Court can take judicial notice of the fact that commercial banks charge interest. The case is unfortunately reported

in Afrikaans and I have no recourse to a translation. The Editor's Summary however contains some useful conclusions, as follows, at page 69:-

> *"….The Court also considered other cases dealing with interest charged on overdrawn accounts and held that the bank's discretion with regard to determining the interest rate was not so notorious that the Court could take judicial notice of that custom. The Court held that although it had accepted that banks levied interest on overdrawn accounts, a bank was not entitled to charge interest in the absence of an agreement regarding such interest. There had to at least be an implied agreement regarding interest. In the instant case, the bank's trade practice could be an implied term ofthe contract between the client and the bank. The bank would have to prove that this was an implied term. "*

In the absence of any evidence led, and there being no indication ofthe bank's trade practice and therefor no implied term between the parties, it is my view that interest shall be charged at the normal rate of 9% per annum, calculated from 21st May to the final date of payment.

Costs

The ordinary rule regarding costs is very* clear and trite. The costs follow the event. There is no need to depart from this position. The Defendant, as the unsuccessful party must pay the costs. Mr Smith applied that the costs of Counsel, as stated in Rule 68 (2) be included. Mr Ntiwane opposed this application, reasoning that from the nature of the case, it was unnecessary to instruct Counsel.

I differ. This is a case that had some intricacies that would have necessitated that Counsel be instructed. I note that in the STANDARD BANK VS NTIWANE MAMBA & PARTNERS *(supra),* Counsel was instructed by both parties. I accordingly direct that on taxation, the Taxing Master is not bound by the amounts set out in the tariff.

Conclusion

In sum, the Plaintiffs claim is granted in the sum of El 80.904.72, with interest at the rate of ' 9% stated above. Costs be and are hereby awarded to the Plaintiff, subject to the provisions of Rule 68 (2) ofthe Rules of Court, as amended.

T.S. MASUkU
JUDGE