THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO.415 OF 2019

TRANSLINK LIMITED :: PLAINTIFF

VERSUS

STANDARD CHARTERED BANK UGANDA LIMITED :::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

Translink Limited (hereinafter referred to as the "Plaintiff") instituted this suit against Standard Chartered Bank Uganda Limited (hereinafter referred to as the "Defendant") claiming negligence and breach of contract in the alternative and seeking an order for payment of the sum of **USD 13,675 (Thirteen Thousand Six Hundred and Seventy-Five United States Dollars)**. More specifically the Plaintiff is seeking the following reliefs;

a) A declaration that the Defendant is liable for negligence against the Plaintiff.
b) In the alternative to prayer (a) above, a declaration that the Defendant is liable for breach of contract.
c) Recovery of the sums **USD 13,675 (Thirteen Thousand Six Hundred and Seventy-Five United States Dollars)**.
d) General damages.
e) Interest on all monetary awards at a commercial rate from the date of the cause of action until payment in full.
f) Costs of this suit.
g) Any other relief as this Honourable Court may deem fit in the circumstances.

Background

The Plaintiff instituted this suit on 15th May 2019. The parties were in a customer-bank relationship. Plaintiff's claim against the Defendant is guilty of negligence because it failed to carry out the timely countermand instructions of

the Plaintiff to pay Nanjin Chuangwei Household Electron-Halifax Bank, UK resulting in the Plaintiff losing **USD 13,675**.

The Plaintiff claims breach of contract in the alternative against the Defendant alleging that the Defendant failed in its obligation to the Plaintiff to obey the Plaintiff's counterman but rather became evasive and occasioned the Plaintiff a loss of **USD 13,675**.

As a result of the lost amount which the Plaintiff deemed to have been a direct consequence of the Defendant's negligence and/ or breach of contract, the Plaintiff is also claiming general damages and interest on all the monetary awards this court may grant at a commercial rate from the date of the cause of action until payment in full as well as costs and any other reliefs the court deems fit.

The Defendant filed a Written Statement of Defence (WSD) on 31st May 2019. In a summary the Defendant's defence is that;

1. The Plaintiff through its Chief Financial Officer, Hiten Shah, self-initiated an online payment of USD 13,675 in favour of Nanjin Chuangwei Household Electron – Halifax Bank, UK (the beneficiary) at around 3:08 pm on 25th October 2018.

2. The Defendant avers that the funds were processed and deposited in the beneficiary's account in accordance with the Plaintiff's instructions.

3. The Defendant avers that the Plaintiff's CFO later requested the Defendant's employee to recall the payment both orally and through an email which was received at 3:59 pm on 25 October 2018 from Mr. Hiten Shah.

4. That around 4:14 pm on the same date, the Defendant sent a recall message to its investigation services team in Chennai, India. The following day on 26 October 2018, the Defendant contacted its correspondent bank requesting it to recall the funds paid through its Premier Service Manager, Ms. Patricia Kirabo Egessa.

5. On Monday 29 October 2018 the Defendant's correspondent bank contacted the beneficiary's correspondent and requested that it recall the funds paid by was later advised that the funds had already been paid to the beneficiary by the time the countermand was made.

On this basis, the Defendant argues in paragraph 6.1 of the WSD that both it and its officials acted with due diligence and fulfilled every duty of care expected of them in the circumstances of this transaction.

Further, in paragraph 6.3 of the WSD, the Defendant avers that it urgently and with immediate dispatch effected the Plaintiff's instructions to recall the funds and in paragraph 6.4 the Defendant argues that it is not liable whatsoever for the actions and/ or omissions of the beneficiary, the beneficiary bank, and the beneficiary bank's correspondent bank after they received the recall message from the Defendant's correspondent bank (which was effectively on Monday 29 October 2018.

The Defendant maintains that by the time the Plaintiff issued their countermand instruction (on 25 October 2018), the beneficiary's account had already been credited as instructed by the Plaintiff's CFO, and from that time the Defendant had no capacity to return the funds to the Plaintiff's account.

Thus the Defendant equally denies the allegations of breach of contract in paragraph 7 of the WSD. It argues firstly that no breach of action arises because the Defendant fulfilled its obligation to comply with all of the Plaintiff's reasonable instructions when it initiated the recall of the funds as soon as the Plaintiff formally communicated its intention to recall the funds, and secondly that as a consequence of this it has no obligation to pay the Plaintiff any funds which are in the control and possession of another bank and/ or individual.

Representation

At the last hearing of this case on 21 May 2021, the Plaintiff was represented by Counsel Nelson Walusimbi and the Defendant was represented by counsel James Zeere.

The Plaintiff presented one witness that is PW1 (Amar Thakrar, the Plaintiff's Director) and the Defendant presented one witness that is DW1 (Patricia Kirabo Egessa, the Defendant's Premier Service Manager, Client Services Group).

At the end of the hearing, the parties were directed on the timelines for filing and serving written submissions which submissions were filed and have been considered in arriving at this Judgement.

Issues for Determination

The Parties agreed on the following issues for determination, which issues are hereby adopted;

1. Whether the Defendant is liable for negligence?
2. Whether the Defendant is in the alternative liable for breach of contract?
3. Alternatively, whether the Defendant is liable for breach of the banker-customer obligations?
4. Whether there are any remedies available to the parties?

Resolution

Issue One: *Whether the Defendant is liable for negligence?*

Negligence implies an absence of intention to cause the harm complained of. It means careless or unreasonable conduct. **Black's Law Dictionary 11th Edition 2019** defines Negligence as;

> *"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances."*

Actionable negligence consists of the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the Plaintiff has suffered an injury to his person or property (see *Nabwami Grace v Attorney General Civil Suit No.223 of 2015*).

In *Nabwami Grace v Attorney General (Supra)* Hon. Justice Ssekaana Musa highlighted the ingredients for negligence as follows;

1. The Defendant was under a legal duty to take reasonable care towards the Plaintiff to avoid the damage complained off;
2. That the defendant committed a breach of that duty;
3. That due to the breach of duty the Plaintiff has suffered damage.

The burden of proof in an action for negligence is on the person who complains of the negligence and in civil suits such as this one that proof is weighed on a balance of probabilities. Essentially, the Plaintiff must show that they were

injured by an act or an omission for which the Defendant is liable. There must be proof of some duty of care owed to the Plaintiff by the Defendant, and breach of that duty and (as a result of that breach) consequent damage suffered by the Plaintiff.

On the question of proof, the established principle derived from **section 101(1)** of the **Evidence Act Cap.6** is that he who alleges a fact must prove that fact. The section provides as follows;

> *101. Burden of proof*
>
> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*

Negligence as a tort is complex in that sense because issues like the presence and extent of the duty of care, whether or not that duty was in fact breached, causation, and remoteness between the breach and the loss/ damage suffered by the Plaintiff all have to be analysed.

In the present case, it is not disputed that the parties had a customer-banker relationship from which a duty of care arose owed by the Defendant to the Plaintiff. It is generally known and understood that in the course of their business banks make contractual undertakings to their customers to, among other things, safeguard and manage the money and manage transactions with respect to that money as instructed by the Plaintiff. But having said all of that, the duty of care is always to be exercised within reasonable limits and of course, in accordance with the law. Thus industry practices dictate that a bank is under an obligation to take *reasonable care* to avoid inadvertently causing loss or damage to its customers.

In explaining the extent and nature of the duty of care owed by banks to customers, Hon. Justice Hellen Obura cited *"The Law Relating to Domestic Banking" Volume 1* by G.A. Penn, A.M. Shea, and A. Arora at page 65 in *Makua Nairuba Mabel v Crane Bank Limited Civil Suit No.380 of 2009* which provides that:

> *"It is not the case that a banker has a duty to honour all his customer's instructions. Rather, there is a duty to honour all instructions which the banker has, at the time of the original contract, or subsequently, undertaken to honour, and this depends on any specific undertakings in a particular case, and on the general "holding out" of those things which the banker will do, which arises from the nature of the banker's business..."*

The nature of the banker's duty is also stated at page 66 of the same book to the effect that:

> *"The duty is to obey the mandate, and in obeying it to do so with reasonable care so as not to cause loss to the customer. Negligence is not only a direct and actionable breach of duty but may also deprive the banker of statutory protection against his customer (in debt or damages) or a third party (in conversation) where he pays the wrong person"*

When it comes to the standard of care expected of banks, the Plaintiff's counsel relied on the case of ***Jessica Kakooza v Ecobank Uganda Limited Civil Suit No.44 of 2014*** in the Plaintiff's written submissions, in that case, Hon. Justice B. Kainamura cited with approval the case of ***Lloyds Bank Ltd v E.B. Savory & Co [1933] AC 201*** where it was stated that:

> *"The standard by which the absence or otherwise of negligence is to be determined must be ascertained by reference to the practice of reasonable men carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud."*

In the Plaintiff's written submissions, counsel for the Plaintiff submitted that from the facts at hand the Defendant neither paid out the suit sums per the initial erroneous instructions nor honoured the countermand of its customer, the Plaintiff.

In response to the above allegations the Defendant's counsel in paragraph 2.1 of the Defendant's written submissions submitted firstly that the Defendant disagrees that it failed to honour its instruction to pay and secondly that, in fact, the Defendant honoured its duty to countermand. On this basis, it was argued that the claim of negligence is unsubstantiated.

On the fact that the Defendant honoured the instruction to pay the Defendant's counsel referred to paragraph 4 of DW1's witness statement in which DW1 adduced an audit trail (Joint Exhibit G) of the payment instruction which was initiated at 3:08:28pm EAT and within 30 seconds had been processed through the Defendant's correspondent bank in New York. And further that within the same time period the Defendant's correspondent bank in New York had routed the payment to the beneficiary bank hence completing the payment. I have perused Exhibit G and find that to be an accurate summary of the information presented there.

The Plaintiff's counsel sought to challenge the admissibility and reliability of the audit trail in the Plaintiff's written submissions in rejoinder arguing firstly that it is a partial record and is not complete, that there is no audit on record which was completed, and finally that the audit trail was never certified and alluding to the fact that the stamp from Standard Chartered Bank Uganda Limited's Customer service group is not enough to constitute certification.

I disagree with the Plaintiff's counsel. As a starting point, I view the information presented in Exhibit G as sufficient for the purpose for which the audit trail was adduced in evidence. In paragraph 4.2 of her witness statement DW1 explains that the audit trail is extracted from the online banking system and cannot be modified or edited. She further explained that the system only provides the opinion of printing or viewing the information. The relevant transaction, in this case, is to be identified using the reference number "20181025ST0780181025016800003" which appears at the top of the trail of the transaction on page 38 in the joint trial bundle. The information presented is complete in my view because it presents all the details from the initiation of the transaction on 25 October 2018 at 12:08:28 Hrs (15:08:28 EAT) to the Defendant's correspondent bank in New York processing the payment within 30 seconds and sending the acknowledgement at 12:09:00 Hrs (15:09:00 EAT).

In paragraph 4.5 of DW1's witness statement, she explains that the information presented in the audit trial shows that transaction was processed and effected by the Defendant's online banking system within a minute. And having issued the instructions by 12:08:28 Hrs, the Defendant had effected the payment to the beneficiary bank by 12:09:00 Hrs.

On this basis the Defendant's counsel argued in paragraph 2.4 of the Defendant's written submissions, the money was no longer within the control of the Defendant and the possibility of any countermand was exclusively in the hands of the beneficiary and the beneficiary bank. Thus DW1 stated in paragraph 4.6 of her witness statement, that by the time she received the recall instruction from the Plaintiff at 15:59 as evidenced on page 40 of the joint trial bundle, the Defendant was no longer in control of the funds and control lay in the hands of the beneficiary bank.

Whilst PW1 sought to argue during cross-examination that in his banking experience as a customer he knows that online transactions were not paid through immediately, this assertion is not at all substantiated by any evidence and also goes against my general knowledge of industry practices in digital banking which is that online banking transactions are usually instantaneous.

I am led at this stage to return to the principles of negligence I laid out at the beginning of this issue and the reasonable standard of care expected of banks in exercising their duty of care to customers. In this instance, I note that between 15:08 when the instruction to pay was initiated by the Plaintiff's officials and 15:59 when the recall message was received by the Defendant, 51 minutes had passed. This is an extended period of time during which, at the time of recalling, I am convinced that the money had already reached the beneficiary's account.

In assessing the test of "reasonableness" in this context, had the recall message been issued to the Defendant sooner and the Defendant have failed to immediately act on it, then the Plaintiff's cause of action would hold more weight. But in this instance, I have not been convinced, on a balance of probabilities, that the Defendant or its officials did not exercise as much reasonable due care as would be expected of a bank in similar circumstances.

When it comes to the issue of countermanding the transaction, the Defendant's counsel submitted in paragraph 2.14 of the Defendant's written submissions that the bank's duty to countermand a payment only exists when the countermand instruction is given before the bank has effected the payment instruction and it is not reasonable to hold a bank liable for not countermanding an instruction which it received after the payment instruction was already complied with. The logic/ basis for this, I would imagine, is that at the point of payment matters are effective 'out of their hands' and therefore, as a practical consideration, it would be unreasonable to place burdens on banks to countermand a transaction after the payment has already been made.

Defence counsel relied on the South African case of *Save Trading CC and Ors v The Standard Bank of SA Ltd (21/2003)[2004] ZASCA 1; 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) (27 February 2004)* where it was held that once a customer has instructed the bank to pay and the bank has effected the payment instructed, the money credited belongs to the beneficiary and it has to be kept to the beneficiary's benefit such that a reversal of the same exclusively depends on the beneficiary's consent.

> *'...how can a bank retransfer an amount transferred by A into the account of B back into the account of A without the concurrence of B? Mr Shaw could not suggest any ground on which this can be done; there simply is none. Once transferred, the money or credit belongs to B and the bank has to keep it at B's disposal"*

Thus, counsel for the Defendant submitted that in this case, the Defendant fulfilled its duty to pay as instructed by the Plaintiff and therefore had no duty

countermand the transaction as the payment had already been effected by the time the countermand instruction was received. Having proven that payment was made on instructions received by the Defendant from the Plaintiff's official and considering that these instructions were recalled 51 minutes after they were issued, at which point (as I am convinced by the evidence presented by the Defendant) payment had been made to the beneficiary, I am inclined to agree with the Defendant's counsel.

The fact that there is no obligation on the bank to reverse/ countermand a transaction after the money has been paid out is further evidenced by the fact that the Defendant's terms which were introduced in evidence as joint Exhibit A state in paragraph 4.6 that the Defendant will try to stop or cancel a transaction when asked by a customer but will not be responsible to do so if they cannot do so. Having effected payment within a minute of receiving the instruction and the recall instruction coming 51 minutes after the initiation of the instruction, I am convinced that this was one of those situations envisaged in paragraph 4.6 of the Defendant's terms where it simply could not stop a transaction that had already been completed. The duty to countermand the transaction therefore could no longer be reasonably borne by the Defendant after 12:09:00 Hrs (15:09:00 EAT) when the payment was completed.

At that point, practically speaking, the money was no longer in the Defendant's control or even the control of its correspondent Bank in New York. At that time the funds were being held by the beneficiary's bank and therefore, the Defendant cannot be held liable for negligence in this case for failure to countermand the transaction.'

On this basis, I am inclined to resolve the first issue in the negative and find that the Defendant is not liable for negligence because it honoured its instruction to pay and did what it could to honour its duty to countermand.

Issue Two: *Whether the Defendant is in the alternative liable for breach of contract?*

Issue Three *Alternatively, whether the Defendant is liable for breach of the banker-customer obligations.*

Issues 2 and 3 are directly related and shall therefore be resolved together. Section 10(1) of the Contracts Act, 2010 defines a contract as an agreement made with the free consent of the parties with the capacity to contract, for a lawful consideration with a lawful object, with the intention to be legally bound.

Breach of contract is defined in Black's Law Dictionary 5th Edition on page 171 as a situation where one party to a contract fails to carry out a term. Breach occurs where a party neglects, refuses, or fails to perform any part of its bargain or any term of the contract without a legitimate excuse (see ***Future Stars Investments (U) Limited v Nasuru Yusuf Civil Suit No.0012 of 2017***). Further, the conditions for a breach of contract to arise were articulated in the often-cited ***Nakawa Trading Co. Ltd v Coffee Marketing Board HCCS No.137 of 1991*** where it was stated that a breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract.

As already mentioned in the first issue, in civil suits the Plaintiff bears the initial burden of proving the claim they bring to court on a balance of probabilities. Once the Plaintiff has put their case forward, the burden then shifts to the defendant to disprove the Plaintiff's claim based on the evidence they have on hand.

In order to prove breach of contract and win in the context of a civil suit, a Plaintiff would need to prove the existence of a contract pursuant to which the Plaintiff enjoyed rights, the breach of that contract by the Defendant and therefore hampering of those protected rights, and damage arising out of the breach to justify the reliefs they are seeking.

In this case, there is no dispute as to the fact that a contractual relationship of bank–customer existed between the Plaintiff and the Defendant. The Dispute is as to whether the Defendant breached the terms of their contractual relationship and should therefore be liable for the money lost by the Plaintiff at the hands of a third party.

In the Plaintiff's written submissions, whilst counsel for the Plaintiff presented authorities establishing the contractual relationship that exists between customers and banks, he led no evidence as to the breach of this contract in this instance or why the Defendant should be liable for the consequential loss suffered by the Plaintiff. In arguing the Defenant's liability for breach of banker–customer obligations, counsel for the Plaintiff argued firstly that the bank had a duty to act in accordance with the lawful requests of its customers in the normal operation of its customer's account. And secondly that the Defendant neither failed to act in accordance with its lawful requests because it neither paid the suit sums out as initially erroneously instructed nor countermanded.

Having resolved the first issue as I did with a finding firstly that the Defendant has adduced enough evidence to show that the money was in fact paid out and secondly that, on this basis, the Defendant no longer retained the duty to reverse

the transaction once paid out, I am inclined to disagree with the Plaintiffs submissions in this regard.

In the Defendant's written submissions the Defendant counsel argued that having shown that the Defendant complied with the Plaintiff's instruction to pay, there is no basis for the argument that there was a breach of contract or breach of the banker-customer obligations.

Having found as I did in resolving the first issue, I am inclined to find against the Plaintiff in resolving the second and third issues with a finding that the Defendant is neither liable for breach of contract nor is it liable for breach of the banker–customer obligations in these circumstances.

Issue Four: Whether there are any remedies available to the parties?

On this issue, the Plaintiff's counsel prayed that it be granted the remedies it sought in instituting the suit, which remedies I listed at the beginning of this judgement and shall not reproduce here. On the other hand, the Defendant's counsel argued that the Plaintiff is not entitled to any of the remedies it seeks because it has failed to prove that the Defendant was either negligent or in breach of contract or breach of the banker-customer obligations.

Counsel for the Defendant argued that the Plaintiff is not entitled to the refund of USD 13,675 (Thirteen Thousand Six Hundred and Seventy Five United States Dollars) because the funds were paid out according to instructions that were received by the Plaintiff through its officials and that it is them who were responsible for the mistake which led to the loss of the funds. In cross-examination, PW1 admitted that the error in the case was made by the Plaintiff's CFO and that he only discovered his mistake when he recalled the person whose payment he had approved was in the UK and not China as intended.

Counsel for the Defendant further argued that the Plaintiff is not entitled to the award of general damages because any loss they suffered was not caused by the Defendant or its agents but rather the Plaintiff's own CFO when he initiated a payment to the wrong person and PW1 when he authorized the payment to a person they didn't intend to pay. That the Defendant simply effected their instructions as initiated and it would be unreasonable to compel the Defendant to pay damages for the mistakes of the Plaintiff's agents were, in any event, the Defendant has not been held liable for negligence or breaching its contractual obligations to the Plaintiff.

Having resolved issues 1 – 3 as I have, I am inclined to agree with the Defendant's counsel. The Plaintiff has failed to prove its claims and the balance of probability tilts more favourably to the Defendant based on the evidence which was adduced.

CONCLUSION

Having resolved issues 1 – 4 as I find that the Plaintiff's claim fails with a finding firstly that the Defendant is neither liable for negligence nor breach of contract or breach of the banker–customer obligations.

As a consequence, I make the following orders and declarations;

1. It is hereby declared that the Plaintiff has no cause of action against the Defendant.
2. It is hereby declared that the Defendant is not liable for negligence, breach of contract or breach of banker–customer obligations.
3. The Plaintiff is hereby ordered to pay the Defendant's costs in this suit.

I so order.

Jeanne Rwakakooko
JUDGE
30/1/2023

Judgment delivered on the 16th day of March, 2023