IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI CJ., ODER, KAROKORA, MULENGA AND KANYEIHAMBA JJ.S.C.

CIVIL APPEAL NO.9 OF 2004

BETWEEN

NILE BANK (U) LIMITED::APPELLANT

AND

TRANSLINK (U) LIMITED::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from judgment and orders of the Court of Appeal (Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine and Twinomujuni JJ.A) at Kampala in Civil Appeal No. 39 of 2002 dated 27th May 2004)

JUDGMENT OF MULENGA JSC.

Until 1996, Translink (U) Ltd., the respondent in this appeal, maintained two current bank accounts in Uganda shillings and United States dollars respectively at a branch of Nile Bank Ltd., the appellant in this appeal. In 1997 the respondent filed a suit in the

High Court, alleging that the appellant, in breach of contract, refused it to operate the accounts and wrongfully closed them. It prayed for -

- a declaration that it was entitled to operate the accounts and an order that the appellant credits the accounts with amounts wrongfully de*b*ited;
- general damages for *b*reach of contract; and
- costs.

The appellant defended the suit and counter claimed from the respondent shs.11,472,682/- due on an overdraft. The High Court dismissed the respondent's suit and entered judgment for the appellant on the counter-claim with interest and costs. The respondent appealed to the Court of Appeal, which allowed the appeal and made orders to which I will revert later in this judgment. Let me first summarize the background that led to this litigation.

In April 1995, a dispute arose between the appellant and the respondent on what amount the latter deposited on its shilling account on 23rd November 1994. While the respondent asserted that it deposited shs. 30m/-, the appellant asserted that it received only shs. 10m/-. In order to resolve the impasse, the appellant agreed to credit the respondent's shilling account with the disputed sum of shs. 20m/- upon the respondent undertaking to indemnify the appellant if the on going police investigation proved conclusively that the disputed sum was not deposited. It was agreed that in that eventuality, the sum so credited would be treated as an overdraft attracting no interest. The respondent executed a deed of indemnity dated 18th April 1995, Exh.P3, and the appellant credited the shilling account with the disputed amount.

On 14th August 1996, the respondent, without reference to that outstanding agreement, notified the appellant by letter, Exh.P6, that it had decided to close its two bank accounts. It demanded for the closing balance to be remitted by drafts. The appellant refused to comply with the demand. First, in a letter dated 30 August 1996, the appellant pointed out that the immediate closure of the accounts would prejudice the appellant's rights under the indemnity. It requested for time to ascertain if it should accede to the demand or should set off the balances against the overdraft deemed under the deed of the indemnity. Later, in a letter dated 19th September 1996, it advised the respondent -

- that the police investigation (copy of whose report was forwarded) and its own internal investigation had arrived at the concurrent conclusion that the appellant did not receive the disputed sum of shs. 20m/-;
- that consequently, under the terms of the indemnity, the shs.20m/- credited on the respondent's account, was to be treated as an overdraft; and
- that the appellant would realize only shs. 8,527,319/- from the balances on the respondent's two bank accounts.

The appellant concluded the letter thus -

> ***"By this letter you are hereby requested to make arrangements for the settlement of the outstanding balance of Ushs.11,472,681/-. We look forward to your positive response and we hope that the whole exercise will be smoothly concluded with an option for you to maintain your account with us."***

The copy report forwarded was a memo dated 5th September 1996 from the Investigating officer to the ACP/Crime, Exh.P4, concerning the investigation. In a letter dated 24th September 1996, the respondent's advocates protested the appellant's stance. Without any reference to their client's previous decision to close its accounts, the advocates, asserted -

- that the police report in Exh.P4 was inconclusive;
- that the respondent strongly objected to the consolidation of its accounts and to not being permitted to operate its accounts;
- that the appellant was in breach of the banker/customer relationship; and
- that the indemnity was binding and enforceable, but could only be invoked upon conclusive proof that the shs.20m/- was not deposited.

They also wrote to the police protesting that the report in Exh.P4 was not objective but was tailored to favour the appellant. About two months later, the respondent filed the suit in the High Court pleading that the appellant was in breach of the terms of the deed of indemnity because its decision to appropriate the said balances was not based on a conclusive police report envisaged in the

deed of indemnity, but on a mere progress report. The respondent further pleaded that following the police investigations, employees of both the appellant and the respondent were charged with theft, but that the respondent had failed to find out the results of their trial in court.

I am constrained to observe that although clearly, the substantive core issue between the parties was ***"whether the respondent deposited the disputed amount on its bank account,"*** it was sidelined in the courts below. This is apparent from the parties' respective pleadings and presentations of their cases, as well as from the framing and resolution of the issues by the courts below, where focus was directed more on construction of the deed of indemnity, Exh. P3, and description of the police report, Exh. P4, than on the said core issue. The respondent's suit was virtually based on the said deed of indemnity and no averment was made in the plaint that that disputed sum was deposited on the account. Hence the issues framed at the trial were in brief -

1. whether Exh.P4, amounted to the conclusive investigation (report) in writing;
2. whether the defendant was entitled to invoke the deed of indemnity;
3. whether the plaintiff is entitled to the relief sought in the plaint;
4. whether the defendant is entitled to the prayers in the counterclaim.

The learned trial judge found for the appellant on the two main issues principally because he held that Exh. P4 contained a conclusive police report. In the Court of Appeal, Twinomujuni J.A., who wrote the lead judgment, found that the first three grounds of appeal raised a single issue namely -

> ***"whether the decision of the respondent to confiscate moneys on the appellant's accounts in the respondent's bank was in accordance with Clause 2 of the Deed of Indemnity …."***

In brief, his answer to that issue was to the effect that the police report on which the appellant relied to "confiscate" the consolidated balance on the respondent's accounts was not a conclusive report within the meaning of the

deed of indemnity, and that consequently, the confiscation was premature. The fourth ground of appeal raised the issue whether the respondent was entitled to operate its bank accounts. His answer to this was indirect. He held that the respondent's attempt to close the accounts was strange and highly suspicious and that the appellant, as a prudent banker, was entitled to resist the attempt, but was not entitled to pay itself from the respondent's accounts on strength of the inconclusive report in Exh.P4. Lastly the court held that the fifth ground concerning the counter-claim, did not arise and had to fail because -

> ***"The event which could have allowed the (bank) to make the counter-claim, i.e. the conclusive report from the police, has not yet occurred."***

The final orders of the court were framed in the lead judgment thus -

> ***"In light of the above findings and in order to do justice to both parties I would order a return to the status quo that existed on 13 August 1996, a day before the appellant applied to close the accounts with the respondent. I think, however, that the respondent is entitled to prevent the operation of the accounts until the police issues a conclusive report. The account will be deemed to have remained open with the balances that were on them on 19th September 1996. Any interest that was due will be deemed to have continued to accrue till this matter is concluded in accordance with the Deed of Indemnity. Because of the holding that it was the ill timed demand of the appellant to close his accounts that triggered confiscation of his accounts and therefore this suit, I would order that each party bears its own costs here and in the High Court."***

The two grounds of appeal to this Court (excluding argumentative phrases) are that-

> ***1. The learned Justices of Appeal erred in fact and in law when they held that a police report dated 5th September 1996 did not***

amount to a conclusive finding as envisaged by a deed of indemnity between the parties....

2. ***The learned Justices of Appeal failed to properly evaluate the evidence on record, which established that the prosecution of suspects in relation to the matter in dispute between the parties had***
been concluded.....

Mr. Byenkya, learned counsel for the appellant, argued the two grounds separately. The essence of his submission on the first ground of appeal was that pursuant to the deed of indemnity, the parties bound themselves to wait for the police investigation to establish conclusively if the disputed amount was not deposited, whereupon the sum of shs. 20m/- credited on the respondent's account was to be treated as an overdraft. For the purposes of the deed, the investigation was to establish only one fact, namely whether the respondent's servants banked the disputed amount or not. The parties did not concern themselves with results of any prosecution that might arise from the police investigation. According to learned counsel, the contents of the report in Exh. P4 showed conclusively that the disputed amount was not banked as alleged by the respondent's servants. He criticized the Court of Appeal for concerning itself with the nature or form of Exh. P4 rather than the substance of its content. Instead of considering if the report proved that the disputed amount was banked or not, it relied on extrinsic matters to hold that it was not a "conclusive" but only a "progress" report. On the second ground of appeal Mr. Byenkya submitted that contrary to the holding by the Court of Appeal, the evidence on record showed that the prosecution in the Magistrate's court was completed. He argued that this misconception of the evidence led the court to conclude wrongly that the parties ought to await completion of a prosecution that is no longer pending.

For the respondent, Messrs. Lwere, Lwanyaga & Co. Advocates lodged written submissions under r.93 of the Rules of this Court. On the first ground of appeal they supported the findings by the Court of Appeal that the police had not issued a report that was "conclusive" within the dictionary meaning of that word. In their view, Exh.P4 was an internal police communication on progress of an investigation. The fact that it was not copied to the respondent as the complainant who instigated the police investigation, or to the appellant, leads to the inference that the police did not intend to treat that internal communication as a final report to be relied upon by either party to the deed of indemnity. Although Exh.P4 referred to a handwriting expert report that exonerated the appellant, that alleged report was never produced in evidence. Besides, following the respondent's protest against Exh.P4, the police issued another inconclusive report showing that the appellant's servants who were allegedly exonerated were subsequently charged and prosecuted together with the respondent's servants. A conclusive report would have included the result of the prosecution as the final finding of the investigation. On the second ground of appeal, the learned Advocates submitted that the Court of Appeal was correct to hold that the prosecution, which ensued from the police investigation, had not been concluded because some of the suspects had absconded before being tried. They stressed that no evidence was adduced to substantiate the appellant's claim through counsel that its servants had been acquitted in the magistrates' court. According to available evidence four suspects were prosecuted and only one was discharged. The Court of Appeal found that the prosecution of the others was incomplete or outstanding. The learned Advocates stressed that this Court, as a second appellate court, must not interfere with findings of fact by the first appellate court unless the latter came to a wrong conclusion due to misapprehension of the evidence. They submitted that the Court of Appeal considered the issues and evidence properly and came to the correct conclusion, and they urged this Court not to interfere with its findings.

As I indicated earlier in this judgment, the decision of the Court of Appeal is based on that court's finding that Exh.P4 was a progress report and not the "conclusive police report" supposedly envisaged under the deed of indemnity. This is evident in the lead judgment where after noting the dictionary definitions of the word "conclusive" and asking himself if any of the definitions fitted the memo in Exh.P4, Twinomujuni JA wrote

> ***"In holding that the memo was conclusive report of the police, the learned trial judge stated:-***
>
> ***'The indemnity bond must be interpreted strictly in accordance with the golden rule of interpretation. The provision in the bond about the Police Fraud Squad is not ambiguous or vague so that we go behind to find out whether by 'the conclusive report' meant the final finding of the court. In my opinion, after the handwriting expert had given his report the Police Fraud Squad was within its powers to issue its conclusive report pursuant to the deed of indemnity.***
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> ***My finding on the first issue is in the affirmative. Exh.PIV was the Police Squad conclusive report envisaged in the indemnity deed.' With the greatest respect, I am unable to agree that ...Exh.PIV.... was a conclusive report. The Director of C.I.D. called it a progress report. Even D/AIP Begumisa himself did not believe that he had made a conclusive report. He recommended that it be forwarded to the respondent merely "for information and update". In fact on 9th January 1997 he wrote another internal memo on the same matter to his boss. It is entitled:***
>
> ***"THEFT AND RELATED OFFENCES: A PROGRESS REPORT"***
>
> ***The contents of this memo have already been reproduced above ...It is significant to note that in this report he stated:-***
>
> ***I wish to inform you that four people, that is to say two bankers of Nile Bank and two employees of Translink were charged, later one of***

the bankers (MWINE ENOCK) jumped bail, and this created a delay in proceedings with the rest.' Though the first memo claimed that the handwriting expert had exonerated Nile Bank, the latter memo reveals that further investigations had taken place which led into two employees of Nile Bank to be charged with subject matter of the investigation.

I have already remarked that although this case was reported to the Police by Translink (U) Limited, the police have never sent to him any report "conclusive, progress" or otherwise.

There is another disturbing aspect of the deed of indemnity. I do not think it would have been possible for the police to issue a "conclusive" report on the case unless there was no evidence to prosecute anyone. Once they took a decision to prosecute two employees of Nile Bank and two of Translink, it was impossible for the police to issue a conclusive report unless the prosecution was concluded in court."

For clarity I would summarise the reasons given for the finding that Exh.P4 was a progress and not a conclusive report, as follows -

- In the letter dated 13.9.96 forwarding Exh.P4 to the appellant, the Director of CID described Exh.P4 as "a progress report";
- The officer who authored Exh.P4 described a subsequent memo, which he wrote on the same subject on 9.1.97 as "a progress report";
- Although Exh.P4 claimed that the' appellant had been exonerated, other investigations led to the appellant's two employees being charged; and
- After the decision to charge servants of both the appellant and the respondent, it was impossible for the police to issue a conclusive report until the prosecution in court was concluded.

It is apparent from the foregoing that in the view of the Court of Appeal the parties' intention was to resolve their dispute on the basis of a final report to be compiled by the police after conclusion of their investigation and any resultant prosecution in court. Does that view conform to what the parties expressed in

the deed? It is a trite rule of interpretation that in construing the intention of the parties to it, the court must discern the intention from the words in the document. It ascertains the intention of the parties as expressed in the document.

The pertinent potion of the deed reads thus

-"NOW We, TRANSLINK (U) LTD:

1. ***Do HEREBY apply that you immediately credit our account with the disputed amount of shs.20,000,000/=...***
2. ***DO HEREBY COVENANT that in the event o f the investigations currently being conducted by the Police Fraud Squad prove conclusively in writing that the said amount o f shs.20,000,000/=(shillinss twenty million) was never deposited by M/S TRANSLINK (U) with NILE BANK LTD then the said amount shall be treated as an overdraft granted by the NILE BANK LTD to M/S TRANSLINK (U) LTD attracting no interest."*** (Emphasis is added).

With the greatest respect to the learned Justices of Appeal, I find that their view of the intention of the parties is not in consonance with the parties' intention as expressed in the deed. The parties did not, expressly or by implication, refer to a final or concluding police report as the basis on which their dispute would be resolved. My reading of the deed is that the stipulated eventuality, upon which the parties agreed the dispute would be resolved, was not a final police report, but rather conclusive proof from the police investigation, that the respondent never deposited the disputed sum on its account. It is upon such proof that the sum of shs.20m/- was to be treated as an overdraft attracting no interest. To illustrate this point, I think it helps to paraphrase the pertinent sentence in issue thus -

> ***"in the event (that) the investigations.....prove conclusively in writing that the said amount of shs.20,000,000/- was never deposited...***"(Emphasis is added)

It appears to me that the use of the expression ***"in the event the investigations prove conclusively in writing"*** the parties plainly meant that the sum of

shs.20m/- credited on the respondent's account would be treated as an overdraft if the investigations established that the respondent had not deposited the said sum on its account. Even the respondent's Managing Director appears to have understood the provision in that way, for in his evidence in chief he described it albeit in converse form, as follows -

> ***"The (indemnity) document provided that if the police investigation found that the sum of shs.20m/- was actually taken and received by the Bank, then it would be my money."***

Much as it is a common expectation for police criminal investigations to lead to prosecutions in court, I see nothing in the deed that would compel me to infer that the parties' intention, as expressed in the deed, was to await conclusion of the court prosecution resulting from the police investigation. Admittedly, the deed does not stipulate the mode of determining the conclusive proof. Nor does the deed make it clear in whose writing the conclusive proof was to be. In my view, however, that is not a bar to either party asserting as a fact, at any stage even prior to that fact being proved in court, that the police investigation has proved conclusively that the sum in question, was or was not deposited. What was envisaged in the deed was not a final report after conclusion of the case, but conclusive proof of the fact that the money was or was not deposited. In my opinion it is immaterial that Exh.P4 was described as a progress report. Clearly, the first, second and fourth reasons relied on by the Court of Appeal were misconstrued. What matters is whether the report constituted conclusive proof in writing that the disputed sum was never deposited on the respondent's account. It is in that context that I proceed to examine the report in contention.

In Exh.P4 dated 5 September 1996, the Investigating Officer wrote -

> ***"RE: THEFT AND RELATED OFFENCES***
>
> ***Reference is made to the above subject matter.***

This case was reported here on 17.03.95 by the Managing Director of Translink (U) Limited. Inquiries commenced and suspects appeared in Court on 2.5.95.

<u>Brief Facts</u>: - It is alleged that 30 million shillings were taken to Nile Bank on 23rd November 1994 by three workers of Translink to be deposited on the account of Company. A deposit slip reading 30m/- duly stamped and signed by purportedly the bank and was taken back to the company by the workers confirming the deposit on reconciling the bank statement by the Managing Director (Translink). It was found that instead of 30m/-, 10 million was credited on the account.

<u>FINDINGS</u>:- The deposit slip (Exhibit) from Translink (U) Limited, the specimen of the suspected bank official purported to have signed the deposit slip and the stamp sample from the bank were taken to the Hand-writing Expert for comparison to establish the author of the signature. The Handwriting Expert report was secured Exonerating the bank, that is to say the stamp impression on the deposit slip (Exhibit) was different from the genuine stamp impression of Nile Bank and the author of the signature on the deposit slip was not the same author of the specimen signature of the suspected bank official.

<u>These findings indicate that the Translink workers banked only 10,000,000/- and forged the stamp, signatures o f the bank officials, to purport that they banked 30,000,000/-;</u> and this forms the basis for charging them." (Emphasis is added).

According to this report, the police investigation found proof that the respondent's workers had not banked shs.30m/-, as they claimed, but had banked only shs. 10m/-. Basically, the proof so found is the finding by the handwriting expert that the bank pay-in slip, which was the purported evidence

of depositing the larger amount, was forged. In my view, in absence of any contradiction, that would be conclusive proof, albeit circumstantial, that the disputed amount of shs.20m/- was never deposited on the respondent's bank account. The Court of Appeal appears to have taken a different view because of surmising that subsequent to the handwriting expert report there was further investigation that led to employees of the appellant being charged. In the excerpt from the lead judgment reproduced earlier in this judgment, Twinomujuni JA said -

> ***"Though the first memo claimed that the handwriting expert had exonerated Nile Bank, the latter memo reveals that further investigation had taken place which led into two employees o f Nile Bank to be charged with the subject matter of the investigation."***

With due respect I think this is another incidence of misconstruing evidence. The first memo alluded to is Exh.P4, dated 5th September 1996, and the latter memo is Exh.P5 dated 9th January 1997. The learned Justice of Appeal construed the two memo's as if they were consecutive reports on progress of investigation as at the two dates, meaning that the charging of the appellant's employees alluded to in Exh.P5 was subsequent to the handwriting expert report, and resulted from further investigations carried out between the two dates. The record makes it quite clear that from the beginning of the dispute the employees of both parties were suspected and charged. It is because of that fact that the respondent, through his advocates protested in Exh.P15 dated 24 September 1996, against the content of Exh.P4 as tailored to favour the appellant. They wrote, inter alia, -

> ***"Employees of both Translink (U) Limited and Nile Bank Limited were charged in court and the matter is still subjudice. In fact, one of the employees of Nile Bank Limited jumped bail and there is an arrest warrant for him. … There is no mention of these facts in the report which renders it inconclusive."***

It seems to me that the memo in Exh.P4 was not intended to be a comprehensive report of all that had transpired in the course of the investigation. It was written at the prompting of the appellant as is evident from Exh.P8 dated 19 September 1996, in which the appellant informed the respondent -

> ***"Upon your instructions to close your accounts, the bank re-kindled its internal investigation and established that it never received the said amount. We went further to request the C.I.D. Fraud Squad to give us their report touching upon the same matter. The said report was in conformity with the bank's findings. A copy o f the said report is attached hereto ...for your reference."*** (Emphasis is added).

Similarly, the later memo in Exh.P5 dated 9th January 1997, was not written as a comprehensive report of the investigation progress as at that date. It was written in response to the respondent's protest at the omission of details from Exh.P4. In his evidence at the trial, the respondent's Managing Director said -

> ***"On receipt of the police report (copy tendered as Exh.P4) I did not agree with its contents and wrote to my lawyers complaining. I instructed the lawyers to write to CID highlighting the various omissions. They did write to CID subsequently we were given another report by the police. It was sent to me by the police directly to our offices. ...It is dated 9th January 1997. (Tendered in as Exh.PS)"***

Incidentally, the learned Justice of Appeal overlooked this evidence, as well as an endorsement on Exh.P5 suggesting that both parties be given copy thereof, when he observed in his judgment that the police never sent to the respondent any report "**conclusive, progress** or otherwise". Be that as it may, there was no basis for the holding that investigations subsequent to the handwriting expert report led to employees of the appellant being charged. It is obvious to me the sequence was that subsequent to the four suspects being charged, the handwriting expert report "was secured exonerating the bank".

Lastly on this ground I have to comment briefly on the submission by the respondent's advocates that no reliance should be put on the handwriting expert report because it was not produced in evidence. I am unable to accept that submission. The available evidence about the expert report is secondary in that only a summary of its substance was inserted in the investigating officer's memo, Exh.P4. Significantly, however, it was the respondent who tendered that memo in evidence with consent of the appellant. If the respondent disputed its accuracy or credibility, the onus was on the respondent to adduce cogent evidence to discredit the expert report. No such evidence was adduced. The respondent cannot now turn round and shift the burden onto the appellant, as it were, that it should have adduced better or further evidence of the expert finding.

With the greatest respect I would hold -

- that it was a misdirection on evidence, on the part of the Court of Appeal, to hold that the indemnity deed could be invoked only after the magistrate's court had given a verdict in the criminal case that resulted from the police investigation; and
- that the said court erred on evidence to the extent it implicitly held that the police investigation did not conclusively prove that the respondent never deposited the disputed amount on its bank account.

In my opinion therefore, the first ground of appeal ought to succeed.

In view of my holding on the first ground I find it unnecessary to discuss the merits of the second ground in any detail. Whether or not the prosecution of the suspects in court was concluded would not affect the results of this appeal. I should observe, however, that there is on record evidence of Natwaluma Mubezi Samuel, DW2, to the effect that two bank employees (including himself) and two employees of the respondent were charged and that -

- he was prosecuted and was discharged in 1997 upon the court finding that he had no case to answer, but his co-employee jumped bail before trial;
- one of the respondent's employees was tried and acquitted and the second also jumped bail.

It is also on record that efforts made by the respondent and its advocates to obtain the results of the prosecution directly from the police and the Magistrate's court were fruitless. Even orders made by the High Court on application of the respondent during the trial of this case, first for the Director of CID to produce the police file, and later for Senior Principal State Attorney Byabakama Mugenyi, of the Directorate of Public Prosecutions, to produce both the police and the Magistrate's court files did not produce the desired results. The latter appeared before the court twice to say he could not trace the files. I am unable to understand why in apparent disregard of all that evidence and record, the Court of Appeal held that there was ***"a prosecution, which from the evidence on record, is not yet concluded"*** and ordered that it was in the interest of justice to *b*oth parties to return to the status *b*efore the respondent attempted to close its accounts. With due respect this is tantamount to failing to resolve the dispute that the parties looked to the court to determine.

In the result I would allow this appeal and set aside the judgment and orders of the Court of Appeal. I would substitute a judgment dismissing the respondent's suit and upholding the appellant's counter-claim for shs. 11,472,681/-, with interest at the court rate from the date of this judgment till payment in full. I would award costs of this appeal and in the courts below to the appellant.

JUDGMENT OF ODOKI, C.J,

I have had the benefit of reading in draft the judgment of my learned brother, Mulenga, JSC, I agree with him that the appeal should be allowed with the orders he has proposed.

As the other members of the Court also agree, this appeal is allowed with the orders as proposed by the learned Justice of the Supreme Court.

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment of my learned brother, Mulenga, JSC, and agree with him that the appeal should be allowed with the orders he has proposed.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my brother, Mulenga, JSC and I agree with him that this appeal be allowed with the orders he has proposed.

JUDGEMENT OF ODER, JJSC

I have had the benefit of reading in draft the judgment of Mulenga, JSC. I agree with him that the appeal should be allowed with the orders he has proposed.

Dated at Mengo this 22nd day of June 2005