

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: I 143/2014

In the matter between:

FAIDA TRADING & CLEARING ENTERPRISES CC

PLAINTIFF

and

NEDBANK NAMIBIA LIMITED

DEFENDANT

Neutral citation: *Faida Trading & Clearing Enterprises CC v Nedbank Namibia Limited* (I 143/2014) [2018] NAHCNLD 66 (23 July 2018)

Coram: CHEDA J

Heard: 5 – 6 June 2018

Delivered: 23 July 2018

Flynote: A party that seeks to rely on an indemnity clause should ensure that it is free from all other actions or commissions which are questionable. Public policy dictates that a party cannot benefit from its own errors and hide behind the indemnity clause.

Summary: Plaintiff a long standing client of defendant instructed defendant to do an overseas money transfer to Amazing Grace Exports, but, instead transferred it to a wrong account number, contrary to defendant's clear instructions. Defendant's employee used a scanned document, the original of which, had been destroyed by

plaintiff's representative in her presence. When asked on whose authority she had done so, she sought to rely on instructions from emails which turned out to have been hacked. Defendant sought to rely on an indemnity clause. Court held that the employee should have verified by phone as to who was sending her the said e-mails in light of the fact that she had plaintiff's number. This failure was both a breach of a contractual relationship with plaintiff and was also negligence on Ms Kooper's part. Plaintiff succeeded.

ORDER

1. Plaintiff's claim against defendant in the sum of US\$39300 with interest a *tempora morae* is granted.
2. Defendant shall pay plaintiff's costs in the following terms:
 - 2.1. One instructing and one instructed counsel up until the close of plaintiff's case.
 - 2.2. One counsel for the opposition and arguing for absolution from the instance as well as for the defendant's case.
3. The costs should be taxed.

JUDGMENT

CHEDA J:

Introduction

[1] Plaintiff issued summons against defendant for a breach of contract or alternatively negligence. The action was defended.

The parties

[2] Plaintiff is a close corporation duly incorporated according to the laws of Namibia. Defendant is a banking institution registered in accordance with the provisions of the Banks Act, No. 23 of 1965.

[3] Plaintiff who had been doing business with defendant issued out summons against defendant in the following manner:

- a) An order declaring that the defendant owes plaintiff an amount of US\$39300.
- b) Interest on the aforesaid amount at the rate of 20% per annum interest a *tempora morae* from the date of summons until date of final payment.
- c) An order directing the defendant to pay to the plaintiff the aforesaid amount together with the aforesaid interest.
- d) Costs of suit; and
- e) Other alternative relief.

[4] The claim arises from money which was paid by defendant to a wrong account which defendant denies. Defendant entered an appearance to defend. It pleaded that indeed plaintiff had attended at its offices in Windhoek for an overseas money transaction. While it admitted that verbal instructions for such transaction were given, it averred that they were later revoked in defendant's employee's presence, one Mr Emmery Bizimana. It is further its averment that plaintiff had subsequently given defendant the correct banking details through e-mails. Defendant acted on the basis of the said details and was represented by Raviola Kooper. Defendant therefore, denied liability for a breach of contract or negligence. In addition, thereto, it relied on an indemnity agreement which was signed by defendant which indemnity excused defendant from liability in the event of such eventualities.

Evidence led in support of the plaintiff's case

Plaintiff's case

[5] Plaintiff opened its case by calling one Mr Bizimana, managing director for the Plaintiff and he testified that he had been a customer of defendant for a reasonably long time. On or about 18 March 2013, he, representing plaintiff went into defendant's premises and was attended to by Ms Kooper who is an employee of the defendant. Mr Bizimana wanted to effect an electronic payment from plaintiff's account to a foreign company, to wit, Amazing Grace Exports on account no. 2341922737.

[6] At the time of this transaction, Mr Bizimana noticed that he could not give full instructions to the bank as he was not in possession of the necessary banking details of Amazing Grace Exports. At that juncture he had in fact completed a money transfer application form referred to as form A. He then noticed that the form in question contained the wrong information of Amazing Grace Exports. Upon noticing this error he decided to abandon the transaction pending the acquisition of the correct banking details of Amazing Grace Exports.

[7] He then tore up both the incorrect transfer form and the incorrect invoice. This was in the presence of Ms Kooper. After destroying them, he then asked her to immediately contact defendant's branch in Oshikango for the correct bank account as he had previously made deposits into the Amazing Grace Exports account. Ms Kooper was indeed furnished with the correct details by her Oshikango branch.

[8] Mr Bizimana subsequently signed the new transfer form which had been completed by Ms Kooper. This was after she had obtained correct details regarding Amazing Grace Exports as he was now in possession of the correct details. This information had been sent to Ms Kooper and she acknowledged receipt of the same, but, did not use it.

[9] It later turned out that Ms Kooper did not send money to Amazing Grace Exports, but, to the same account which Mr Bizimana had instructed her not to use. He asked her why she had done so and she advised him that she had received

further instructions from his office through e-mails. Mr Bizimana denied ever giving her further instructions via e-mails.

[10] It was further his evidence that Ms Kooper had told him that she had retrieved his initial transfer application form from her scanner, which he found to be odd.

[11] He was of the view that defendant through its employee Ms Kooper either acted fraudulently or negligently to his prejudice. It was further his evidence that Ms Kooper unlawfully retrieved a wrong transfer form, which form, she was aware had been previously withdrawn. By acting on the said information, she acted contrary to his instructions.

Defendant's Case

[12] Defendant called its sole witness, one Ms Kooper. She worked as an Administration Officer and a business banker for defendant for over 10 years and she has known plaintiff's representative Mr Bizimana for a long time. She told the court that with regards to overseas transfers the process is done by an application referred to as form A, which form is completed and signed by the client. Without this completed form no overseas transfer can be effected or authorised.

[13] She confirmed that Mr Bizimana destroyed the initial form as it had incorrect details of the recipient and its bank details. He threw this form in the dustbin in her presence. It was further her evidence that Mr Bizimana subsequently corresponded with her and authorised her to proceed with the transfer on the basis of the previous details which he had advised that they were incorrect. She used a scanned copy of the incorrect form A. In fact she had kept the scanned copy in the scanner with incorrect recipient's details showing the recipient as Alicia J Guiles instead of Amazing Grace Exports.

[14] It was also her evidence that after Mr Bizimana had noticed the incorrect details, he asked her to contact defendant's Oshikango Branch to obtain correct details as he had conducted a similar transaction before at that branch. This she did and was given the correct details for Amazing Grace Exports. She, however, cancelled this second application which was signed by Mr Bizimana.

[15] It was further her evidence that it was the bank's requirement that all transfer applications must be signed by the client. She further testified that she received two different invoices with different account numbers from Mr Bizimana's email address. She acknowledged that she transferred money to the Alicia J Guiles account on the instructions of Mr Bizimana.

[16] She further told the court that a forensic investigation was carried out, but, the findings were not disclosed to plaintiff or Mr Bizimana and this was not discovered by defendant despite numerous requests by plaintiff's legal practitioner to do so. She further testified that after this mishap, there were negotiations between plaintiff and defendant whereby defendant had considered compensating plaintiff for its loss.

Consideration of the evidence

What comes out clearly in this matter is that:

- a) plaintiff and defendant had a longstanding business relationship;
- b) plaintiff had previously transferred money to Amazing Grace Exports through defendant's Oshikango branch;
- c) Mr Bizimana noticed that the initial form A which he had completed and signed in the bank was coming out with incorrect recipient bank details and he specifically advised Ms Kooper not to proceed and he tore it up and threw it in the dustbin in front of Ms Kooper;
- d) Mr Bizimana advised Ms Kooper to contact her Oshikango branch for correct details which she did;
- e) subsequent to this, Ms Kooper proceeded to retrieve the scanned copy which copy she had retained in her scanner. This form again had the same incorrect information, but, she continued to use it, despite the fact that Mr Bizimana had advised her not to do so.

- f) Mr Bizimana did not know that Ms Kooper had retrieved the scanned copy for use to transfer money.
- g) Ms Kooper processed the application and used the same details which she had been verbally advised not to use;
- h) Ms Kooper received some e-mails purportedly coming from Mr Bizimana, which Mr Bizimana disputes;
- i) plaintiff suffered a loss in the sum of US\$39300 as a result of defendant's action;
- j) after this mishap, defendant engaged the services of a Forensic Investigator who compiled a report which defendant refused to discover; and
- k) defendant further commenced negotiation proceedings with plaintiff, with a view of compensating it, but, nothing came out of these negotiations. Defendant again refused to discover the results of the said proceedings despite numerous requests by plaintiff's legal practitioner to do so.

[17] Looking at the evidence presented, I find that, Mr Bizimana was clear in his testimony. He was honest. He was not shaken under cross-examination and was above all honest in his evidence in that he advised Ms Kooper not to proceed with the initial form A application. The fact that he tore it up in front of her is a clear indication that he did not want her to proceed on the basis of the incorrect information which for some strange reason was now showing on the application form.

[18] At that point Ms Kooper was aware that plaintiff did not approve of the information which was on the initial form. She was asked to obtain correct information from defendant's Oshikango branch, which she did, but, disregarded it at some point and preferred that which was coming through the e-mails.

[19] The question then is, did Ms Kooper act on proper instructions? In my view she did not. Ms Kooper was aware that plaintiff disputed the initial information and it

also emerged that she knew the owners of Amazing Grace Exports as she had met them in Windhoek. There was, therefore, no mistake as to the identity of Amazing Grace Exports was made by Ms Kooper. Upon receiving the contradictory information from Mr Bizimana through e-mails, she sought clarification through e-mails and not by phoning him which she could have done with ease since she had his contact details. This she did well after the money transfer had been effected.

[20] Ms Kooper had been dealing with Mr Bizimana for a long time, it would have made sense for her to verify the new and contradicting instructions by phone. This she did not do. She had seen Mr Bizimana expressing his displeasure about the contents of the initial form, that was coming from her scanner and he personally destroyed it in front of her. She however, ignored all this and opted to do what she had not been asked to do.

[21] It is worthy of note that the transfer took place on the 18 March 2013 and the purported emails were on the 19 – 22 March 2013 a day or so after. Plaintiff denies sending these emails to Ms Kooper. What, therefore, comes out screaming is that Mr Bizimana did not authorise Ms Kooper to transfer money to Alicia J Guiles and that defendant was negligent in the circumstances. Defendant denied this claim.

[22] Ms Kooper admitted that plaintiff was not happy with the initial form A as he tore it in front of her, but, she retained a copy in her scanner and used it without verifying with plaintiff whether he had now changed his mind. Ms Kooper has a wide experience in the banking industry and should have taken reasonable steps such as calling Mr Bizimana on his mobile phone in light of the wide spread fraudulent activities in the banking industry. She should have been suspicious of this sudden change of heart from a man who had specifically asked her not to use the information that was showing in form A, she obtained the correct details from her Oshikango branch, but, ignored them, when she was supposed to use them.

[23] There is evidence before the court that defendant attempted to compensate plaintiff, but, it is not clear why it was abandoned. In addition thereto, forensic experts carried out investigations, but, defendant declined to furnish plaintiff with its findings despite being requested to do so. Ms Kooper's evidence was not convincing. She was not prepared to tell the truth in the circumstances. Her evidence

is rejected as being untruthful and was designed to cover-up her negligence and/or fraudulent activities. In the circumstances I find that Ms Kooper concealed the truth in this matter. The court cannot accept her lack of knowledge in the circumstances. To do so will be to allow her to indulge in deliberate diligence in ignorance.

[24] I am convinced that in light of the consistence, credible and demeanour of Mr Bizimana's evidence, plaintiff has proved on a balance of probabilities that defendant breached a contract between them or alternatively acted negligently and it suffered financial prejudice as claimed in the summons. Plaintiff's version of events cannot be faulted and I accept it in its entirety.

[25] It is trite that before a court can decide whether defendant failed to take reasonable steps to guard against foreseeable harm, it must determine what would be in the circumstances considered reasonable. Banks are under a legal obligation to treat their clients' accounts with meticulous care considering the nature of their relationship. They are therefore expected to check for irregularities. In this case the irregularities manifested themselves in clear terms, namely, that the scanned form A contained information which was inconsistent with client's most recent and clear instructions. This led to plaintiff tearing up this form in the presence of Ms Kooper. No clear indication of one's displeasure and disapproval can surpass this. After Mr Bizimana had left, Ms Kooper started receiving instructions with the same information which Mr Bizimana had rejected.

[26] Surely on seeing this irregularity, Ms Kooper's antenna should have been raised as an indication of a red flag. Ms Kooper was reasonably expected to verify with Mr Bizimana telephonically regarding the changed instructions. Her failure to act reasonably, places her actions and/ or omissions below the standard of a reasonable person in the circumstances.

[27] To compound Ms Kooper's problems, she failed to stop Global Trading from proceeding with the application bearing in mind that at that stage plaintiff had advised her that the information on the form was incorrect. She was, therefore, negligent in the circumstances.

[28] Defendant's negligence is patent. Defendant acted as an agent and the duties of an agent are to *inter alia*:

- (a) to perform the mandate fully and faithfully;
- (b) to be honest and to show good faith;
- (c) to exercise due care; and
- (d) to act in accordance with the principal's instructions (my emphasis). Consequently where an agent fails in this respect, then he/she is liable for any loss suffered by the principal. Ms Kooper's negligence extends and engulfs defendant in a vicarious manner.

[29] I find that the parties had a contractual relationship and defendant breached the contract of safeguarding plaintiff's funds. At the same time defendant's employee was negligent. In light of her experience, she was aware of the prevalence of cyber crimes in the banking sector. For that reason, she should have taken adequate steps to protect plaintiff's funds. She was therefore negligent in the circumstances and consequently liability attaches to defendant.

[30] Defendant's defence is centred on the indemnity agreement or the exemption clause which it seeks to invoke in order to evade delictual liability. It argued that plaintiff had signed an indemnity agreement and therefore it should bear the consequences of Mr Bizimana's signature to the agreement which he elected to sign. Defendant, the argument goes, should be bound by it and they referred the court to the matter of *Samuel v Jacobs* 1928 AD 356 where this principle was dealt with at length.

[31] An indemnity clause or agreement is a guarantee against any anticipated loss which another may suffer in the event of a contractual dispute. In other words, it serves to hold the other harmless. Our courts are loathe to allow a party to wriggle out of a contract without just cause.

[32] Mr Bangamwabo for plaintiff referred me to case authorities which hold that the principle of indemnity should not be available to fraudulent situations or those that are against public policy. This principle was well articulated in *Wells v SA Alumenite Co.* 1927 AD 69 at 72, where Innes CJ stated:

'...on grounds of public policy, the law will not recognize an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The courts will not lend themselves to the enforcement of such a stipulation: for to do so would be to protect and encourage fraud.'

(my emphasis)

[33] Again in *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 835 Henning J remarked:

'In spite of the emphatic language of the exemption clause in this case, it appears to me that the parties could hardly have intended that the Plaintiff (party in whose favour the exemption clause was) would be exonerated from liability if it fails to perform its obligations at all; or if its performance proved useless, or if it committed a breach going to the root of the contract....'

In this case the court went further and made it clear that the courts will not excuse the liable party on the basis of the indemnity agreement *per se*.

[34] Further to this approach, in an almost similar matter in *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C) the court refused to enforce a sub-clause which exempted liability on the part of a security company for loss and damage from what was described as "liability from whatsoever cause". In that case the fire had been caused by the company's employee.

[35] It is clear, therefore, that the indemnity clause is not a be-all and end-all. The court looks at the role the party seeking to rely on it, played in the matter. A party cannot act fraudulently or negligently, but, still benefit from its own unlawful conduct. Its role plays an important factor in the determination thereof.

[36] Defendant through its employee Ms Kooper acted in a manner which was contrary to the express instructions of plaintiff. This resulted in the actual and

financial prejudice of the plaintiff. It was this conduct which was a fundamental breach of their contract.

[37] In my view, the fact that plaintiff had, signed an indemnity contract should not be used as a shield where there is a flagrant and brazen derelict of duty or negligence. In as much as it cannot be used to cover fraudulent activities, negligence, is in my view also included. In addition thereto, public policy does not allow that genuine innocent parties should be held victim to such nefarious conduct.

[38] It was plaintiff's argument that defendant acted contrary to its instructions. It was further argued that, if defendant maintains that it acted according to the instructions, then it did not act reasonably, in other words it acted negligently and it is that negligence which resulted in plaintiff losing money. It is clear that Ms Kooper used an unsigned form to effect transfer of money from plaintiff's account. It is not clear why she did so. She could not give a satisfactory answer as to why she did not seek clarification about this transaction.

[39] The transaction was sensitive and defendant's failure to put in place checks and balances in the system through Ms Kooper is inexcusable. It is common cause that banking business is about protecting public interests, therefore, public trust and confidence should be maintained and is therefore sacrosanct. The fact that banks by their very nature are in a fiduciary relationship with their clients, clients demand trustworthiness and a highest degree of diligence from them.

[40] Defendant cannot escape liability in those circumstances and I therefore find that plaintiff has proved defendant's liability on a balance of probabilities. In the result the following is the order of court:

1. Plaintiff's claim against defendant in the sum of US\$39300 with interest a *tempora morae* is granted.
2. Defendant shall pay plaintiff's costs in the following terms:
 - 2.1. One instructing and one instructed counsel up until the close of plaintiff's case.

- 2.2. One counsel for the opposition and arguing for absolution from the instance as well as for the defendant's case.
3. The costs should be taxed.

M Cheda
Judge

APPEARANCES

PLAINTIFF: Bangamwabo
 of FB Law Chambers, Windhoek

DEFENDANT: Shikongo
of Shikongo Law Chambers, Windhoek