

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 1996. SC.51/1993
CORAM:- M. L. UWAIJ CJN, E. O. OGWUEGBU,
U. MOHAMMED, Y. O ADIO, A. I. IGUH, JJSC

UNION BANK OF NIGERIA LTD APPELLANT
AND
AUGUSTINE NWOYE RESPONDENT

APPEALS - *Concurrent findings of fact - Where not supported by evidence Supreme Court will interfere.*

BANKING - *Cheque - That has not been cleared - Does not put a customer's account in funds.*

BANKING - *Banking custom - Burden of proof thereof - Lies on whoever alleges that custom.*

BANKING - *Liability of Bankers - For dishonouring a cheque- When does it arise.*

FACTS

The respondent who maintains a current account with the Asaba Branch of the Appellant bank, issued a cheque for the sum of N15,000.00 to Ifeatu Onuorah and Company. Although the respondent had paid some cheques and a bank draft into his account, they have not been cleared as at the date of his issuing the cheque in question. The appellant therefore, refused to honour the cheque for insufficient funds. The respondent who felt injured in his credit and trade, instituted the suit leading to this appeal against the appellant claiming N100,000 as special and general damages for wrongful dishonour of his cheque or in the alternative N100,000 special and general damages for negligence.

The trial court found for the respondent in the sum of N48,000 special and general damages for wrongful dishonour of his cheque. Appellant aggrieved by the decision, appealed to the Court of Appeal which dismissed the appeal. The appellant has further appealed to the Supreme Court formulating four issues.

ISSUES FOR DETERMINATION

“(a) Had the respondent sufficient funds in his account as at 184 to meet his cheque for 15,000. If he did, the appellant will be liable

returning the cheque unpaid. But if he had no sufficient funds in his account, then the Appellant will not be liable for returning respondent cheques unpaid.

(b) When was the respondent's A.C.B. draft for N8,000 Exhibit 51 cleared at the Central Bank in Benin City? Etc. see p. 412

HELD (Unanimously allowing the appeal per lead judgment MO-HAMMED JSC) Liability of bankers

1. If the receipt of exhibit 52 amounted to giving clearance of the draft cheque for N8,000.00 then the appellant shall be liable. It seems to me that the Court of Appeal was not quite sure as to the liability of the appellant. The liability arises in contract when a banker refuses to pay customer's cheque when the customer holds in his account an amount equivalent to that endorsed on the cheques. (p. 415 D)

Cheque - That has not been cleared

2. I must point out positively that a cheque which has not been cleared, where clearance is necessary, does not put the account of a customer in funds. (p. 416 B)

Banking custom - Burden of proof

3. It is relevant to observe that the respondent pleaded banking custom respect of clearance of draft cheque, but the evidence adduced went contrary to the pleading. It has long been established through several decision that whoever alleges banking custom must prove it. (p. 416 E)

Concurrent findings - Not supported by evidence

4. In the result, I agree that the concurrent findings of fact made by the two lower courts, in this case, are not supported by the evidence before the trial court. At the time the cheque of the respondent for 15,000.00 was present to the Union Bank Asaba the account of the respondent had no sufficient funds to meet the amount. The appellant was not therefore liable in damages for the dishonour of the respondent's cheques. (p. 416 F)

NOTABLE POINT OF INTEREST

IGUHIJSC

1. When bank will ordinarily dishonour a cheque

A bank will ordinarily not honour a customer's cheque if funds in his account are insufficient to meet the cheque. It seems to me that the defendant/

appellant on the facts of this case, was entitled to dishonour the plaintiffs cheque, Exhibit 35 as it was not established that he had sufficient funds in account to satisfy the said cheques. (p. 418 E)

REPRESENTATION

E. O. Ebohon for the appellant

Chief O. B. Onyali, for the respondent

CASES REFERRED TO

Balogun v. National Bank of Nigeria Limited (1978) All NLR 63 at 70

Ashubiojo v. African Continental Bank (1966) All N.L.R. 482

Capital and Counties Bank v. Gordon (1903) A.C. 240 at 249

Omoregbe v. Edo (1971) 1 All N.L.R. 82 at 289

LEAD JUDGMENT BY MOHAMMED JSC

The plaintiff, who is respondent in this appeal maintained a current account with the Asaba branch of the appellant bank. On 2nd July, 1984, the respondent issued a cheque for N15,000.00 to a trading partner, one Ifeatu Onuorah & Company. The cheque was presented on 11th July, 1984 for payment. But it was dishonoured because as at the time the respondent had only N7,621.24 standing as balance in his current account. The respondent who believed that at the time he had enough money in his account to meet the said cheque felt greatly injured as to his credit and trade. He pleaded that he suffered loss and damage.

Consequently, the respondent instituted the present action against the appellant claiming the sum of N100,000.00 being special and general damages for wrongful dishonour of his cheque. In the alternative, he claimed for N 100,000.00 special and general damages for negligence. At the end of the trial, and in a considered judgment, the learned trial judge agreed that the respondent was entitled to damages for the appellant's wrongful dishonour of his cheque. The court thereafter awarded the respondent N28,266.00 as special damages and N11,734.00 as general damages.

Being dissatisfied with the decision, the appellant bank appealed to the Court of Appeal. The Court of Appeal, per the judgment of Isa Ayo Salami, J.C.A. with which Ogundare, J.C.A. (as he then was) and Ejiwunmi, J.C.A. concurred, dismissed the appeal. The appellant has now come before this court on four grounds of appeal. The following four issues have been raised for the determination of the appeal:

“(a) Had the respondent sufficient funds in his account as at 11/7/84 to meet his cheque for N15,000.00. If he did, the appellant will be liable for

returning the cheque unpaid. But if he had no sufficient funds in his account, then the Appellant will not be liable for returning respondent's cheque unpaid.

(b) When was the respondent's A.C.B. draft for N8,000 Exhibit 51 cleared at the Central Bank in Benin City?

B *(c) Was it necessary in accordance with banking practice and procedure to clear drafts drawn on other banks before crediting the proceeds to customer's accounts?*

(d) Was the Court of Appeal correct in their findings having regard to the very serious conflicting findings by the Justices of the Court of Appeal in this case. "

C Respondent's issue 1 is the same as appellant's issue 2. In issues 2 and 3 learned counsel for the respondent questioned whether Exhibit 51A was rightly admitted in evidence by the High Court and whether an appeal against such admission could lie when there was no ground of appeal against it in the lower court. Before I proceed I would like to explain that the
D learned counsel for the appellant did not question the admissibility of Exhibit 51A in the issues raised against the grounds of appeal.

Learned counsel for the appellant, Mr. Ebohon, argued all issues raised by the appellant together. It is however very clear that the main issue, in this appeal, is issue 1. The simple and straight forward question is
E whether at the time the cheque of N15,000.00 was presented to the appellant's branch at Asaba for payment the respondent had sufficient funds in his account to meet the amount. If on the 11th July, 1984, when the cheque was presented the amount standing as balance in favour of the respondent, in his account, was not sufficient to meet the sum of N15,000.00
F to be cashed, the appellant would not be liable. It is the case of the respondent that at that time he had enough funds to meet the cheque.

In order to give an accurate picture of the case of the respondent it is relevant to reproduce an extract from the evidence the respondent gave before the trial High Court. In the testimony, the respondent explained how
G he deposited up to N19,671.24 in his account by the 10th of July, 1984. He described how he made his lodgments in the following words:

"As at 28/6/84 I had in my current account with the defendant bank the sum of N9,038.24. Between 2/7/84 and 10/7/84 I made many lodgments.

I can recognise the bank teller with which I made lodgments of
H *N191: marked Exhibit 14, N1,700 bank draft: marked Exhibit 15, N8,000 bank draft A.C.B. Asaba marked Exhibit 16.*

On 5/7/84 I made lodgment N500 cheque A.C.B. Asaba Exhibit 17; N2,000 bank draft; tendered: Exhibit 18, on 6/7/84 I made lodgment

N3,003 in cash. Tendered and marked Exhibit 19 N5,660, Union Bank draft and marked Exhibit 20.

On 10/7/84 I paid in N620 Union Bank Asaba cheque, It is Exhibit 21. As at 10/7/84 I have in my account N19,671.24."

The appellant admitted, through the evidence of Mrs. Juliet Adaobi Madubueze, who was the branch manager of the appellant bank in Asaba at the material time, that the respondent had made lodgments to the tune of N19,671.24. However, some of the lodgments were made through bank drafts and cheques which had not been cleared, by the 11th July, 1984, when respondent's cheque of N15,000.00 (Exhibit 35) was presented. Mrs. Madubueze gave a detailed account of the lodgments in the following testimony:-

"As at 6/7/84 the draft which I sent to Benin-City had not been cleared. I saw Exhibit 35 again on 11/7/84 the cheque was returned unpaid with reason "effect uncleared". It means that although the customer had made some lodgments into his account, not all the lodgments had been cleared to cover the amount on Exhibit 35. The A.C.B. draft for N8,000 had not been cleared. The draft was sent to Benin for clearing on 9/7/84. There was also another cheque for N350 - a Benin cheque, which had not been cleared too.

There were two other drafts which had not also been cleared. Exhibit 10 is the ledger of the plaintiff. There was a cheque for N1700 paid in on 2/7/84 had not been cleared as at 11/7/84. There was another draft for N200 from Co-operative Bank Awka, paid in on 5/7/84. It had not been cleared on 11/7/84.

As at 11/7/84 the plaintiff's account as per Exhibit 10 was in black, to the tune of N19,671.24.

This is so as all the lodgments had been credited to his account even though some had not been cleared. The true balance of the plaintiff account was N7,621.

The bank manager explained further in her evidence that draft cheque from A.C.B. Asaba for N8,000.00 was cleared on 13/7/84; draft cheque from Cooperative Bank, Awka, for N2000.00 was cleared on 20/7/84 and another cheque from the same Co-operative Bank, Awka, for N1,700.00 was cleared on 18/8/84.

Mrs. Madubueze gave further clarification about draft cheque for N8000.00. The cheque was sent to A.C.B. Asaba for clearance. However, instead of clearing it, A.C.B. Asaba sent to the appellant, through a letter, Exhibit 54, enclosing a draft for N86,285.46 drawn on A.C.B. Ring Road, Benin. The letter reads:

"EXHIBIT (52)

6th July, 1984

*The Manager
Union Bank of Nig. Ltd.
Asaba.*

Dear Sir,

B *We enclose herewith our Draft No. DX/573480 dated 6/7/84 for the sum of N86,285.46 drawn on our Ring Road Branch in settlement of your cheques sent to us for clearing.*

NOTE OUR REMARKS BELOW

Being your c/c No. 48, 40, 56, 55 and 32/84 now paid

C *Kindly acknowledge receipt on the duplicate copy.*

Yours faithfully,

For: African Continental Bank Ltd.

(Sgd.) for Manager."

D The cheque for N86,285.46 had to be cleared by A.C.B. Ring Road, Benin before the appellant could be able to possess the proceeds in the draft. This has been made clear through the evidence of PW4, Iro Nwafor Uloaniche, the then Branch Manager of A.C.B. Asaba where he said:

E *"It is the usual procedure for our Ring Road branch to settle drafts issued by us. The same applies to Union Bank - the defendant. There is a clearing centre in Benin where all the banks settle their indebtedness. The clearing centre in Benin is the Central Bank. Exhibit 52 has to be cleared/ settled at the Central Bank Benin City. Not until the proceeds as per Exhibit 52 are settled by A.C.B. Ring Road Benin City, the defendant would not be in possession of the proceeds of the Exhibit.*

F *Each local bank in Bendel has an account with the Central Bank in Benin City.*

In respect of Exhibit 52 the proceeds therein will be debited to the account of A.C.B. and credited to the Account of the Defendant at the Central Bank. Thereafter our head office in Benin will notify the Union Bank Asaba as well as A.C.B. Ltd., Asaba (that the) draft is cash."

G In spite of the above expert opinion on banking practice from PW4 who is the respondent's witness both the learned trial judge and the Court of Appeal made specific findings that on 6/7/84 when A.C.B. Asaba, acting under the instruction of the appellant bank, wrote Exhibit 52 enclosing draft for N86,285.46 drawn on Ring Road Asaba in settlement of appellant's bank cheques that would amount to giving clearance to the draft cheque of
H the respondent for N8,000.00. What remained were bank to bank transactions. The learned trial judge held that on 6/7/84 the cheque for N8000.00 (Exhibit 51) was cleared when the appellant received the letter, Exhibit 52.

The Court of Appeal affirmed the High Court finding in the following words:

“The issuance of the second draft DX 573480 dated 6th July, 1984 is primarily the responsibility of the African Continental Bank for which it could be held liable in any eventuality and solely the making of the appellant. The Asaba branch of the appellant, having received draft No. DX 573480 dated 6th July 1984, which is shown by the covering letter; Exhibit 52, that it included the proceeds of Exhibit 51, N8,000.00, was duty bound to honour the respondent’s cheque for N15,000.00, exhibit 35 on 11th July, 1984 when it was represented. The reason being that when that N8,000.00 was award (sic) to N7,641.23 credit balance the appellant conceded the respondent had more than N15,000.00 to his credit. This amount owed it by the bank was adequate to satisfy the value of the cheque.”

The two lower courts were of the view that receipt of Exhibit 52 by the appellant and entries of the N86,285.46 in the ledger of the appellant tantamount to clearance of cheque for N8000.00 which was included in the draft cheque of N86,285.46. Therefore the appellant was duty bound to honour the respondent’s cheque for N15,000.00. But this, with respect, is an erroneous conclusion. If the receipt of exhibit 52 amounted to giving clearance of the draft cheque for N8,000.00 then the appellant shall be liable. It seems to me that the Court of Appeal was not quite sure as to the liability of the appellant. The liability arises in contract when a banker refuses to pay a customer’s cheque when the customer holds in his account an amount equivalent to that endorsed on the cheque. See: *Hirat Balogun v. National Bank of Nigeria Limited* (1978) All NLR 63 at 70; also *Ashubiojo v. African Continental Bank* (1966) 2 All N.L.R. 203. The Court of Appeal referred to the case of *Capital and Counties Bank v. Gordon* (1903) A.C. 240 at 249 and, quite correctly, found that the opinion of Lord Lindley was not relevant to the facts of this case. In that opinion Lord Lindley said:-

“It must never be forgotten that the moment a bank places money to its customer’s credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right.”

The Court of Appeal referred to counteracting stipulations in the tellers used for payment of money in the appellant bank which the respondent admitted reading, and which warned customers that the bank reserved the right, at its discretion, to postpone payment of cheques drawn against uncleared effects which might have been credited to the account. The Court of Appeal thereafter concluded as follows:-

“It is no longer open to the respondent, on the clear and unambiguous wordings of the counter-acting stipulation, to canvass the argument

that the respondent's account was in credit to the tune of N19,671.00 on 10/7/84. The respondent is estopped from pursuing this submission any further because it is common ground that some of the instruments that put the respondent's account in credit were attributable to the uncleared effects which had been credited to the account. He also with his eyes wide open subscribed to the stipulations when he paid in the cheques."

Still the Court of Appeal accepted that the appellant was liable. I must point out positively that a cheque which has not been cleared, where clearance is necessary, does not put the account of a customer in funds.

There is evidence from both the plaintiff and defendant's witnesses, who were bankers, on the banking procedure in respect of clearance of draft cheques. In this case A.C.B. Asaba did not clear draft cheque of N8,000.00 which was sent to it by the appellant. As I mentioned earlier, the bank sent to the Union Bank Asaba, the appellant, a draft cheque for N86,285.46 drawn on A.C.B Ring Road., Benin. The correct banking procedure, as has been explained by the bankers, is that the amount in the draft cheque, even if credited to a customer's account, is not equivalent to cash lodgments. The customer has to wait until after the cheque has been cleared in the clearing House within the Central Bank before it could be regarded as cash.

It is relevant to observe that the respondent pleaded banking custom in respect of clearance of draft cheques, but the evidence adduced went contrary to the pleading. It has long been established through several decisions that whoever alleges banking custom must prove it. See *Missri v. British Bank of West Africa*, an unreported decision of this court; appeal No. 301/66, delivered on 30th June 1967.

In the result, I agree that the concurrent findings of fact made by the two lower courts, in this case, are not supported by the evidence before the trial court. At the time the cheque of the respondent for N15,000.00 was presented to the Union Bank Asaba the account of the respondent had no sufficient funds to meet the amount. The appellant was not therefore liable in damages for the dishonour of the respondent's cheque.

This appeal succeeds and it is allowed. The judgments of both the High Court and the Court of Appeal are hereby set aside. The claim of the respondent is accordingly dismissed. If any monies including costs had been paid in consequence of the decisions of the High Court and the Court of Appeal, in this case, such monies shall be refunded to the appellant. The foregoing shall be the judgment of the Court. The appellant is entitled to the costs of this appeal which I assess at N1,000.00.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Mohammed, J.S.C. I entirely agree with it and have nothing to add.

I therefore allow the appeal. I set aside the decisions of the lower Courts. In their place I enter judgment for the Defendant/Appellant and dismiss the claim by the Plaintiff/Respondent. I adopt the rest of the order in the said judgment. B

OGWUEGBU JSC

I have read in advance the draft judgment delivered by my learned brother Mohammed, J.S.C., and I agree with the reasons which he gave for allowing the appeal. I too will allow it and abide by the order as to costs made in his judgment. C

In view of the evidence of P.W. 4 and D.W. 2 on the banking practice in relation to draft cheques, the learned trial judge should not have found for the plaintiff/respondent and the court below was in error to have affirmed the findings of the learned trial judge which were not supported by the evidence before him. D

In view of the pieces of evidence coming from P.W. 4 and D.W. 2, the defendant/appellant will not be in possession of the proceeds of the draft cheque until its account is credited and that of the A. C. B. Ltd., debited at the Central Bank of Nigeria, Benin City which is the Clearing House. E

ADIO JSC

I have had a preview of the judgment delivered by my learned brother, Mohammed, J.S.C., and I agree that the appeal succeeds. I too allow it and I abide by the consequential orders, including the order for costs. F

IGUH JSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother, Mohammed, J.S.C., and I agree entirely that there is merit in this appeal. H

The main issue that has arisen for determination in this appeal is whether the plaintiff had sufficient funds in his account as at the 11th July, 1984 to cover his cheque for N15,000.00 drawn on Exhibit 35 which was returned unpaid. If the answer is in the affirmative, his action succeeds

otherwise it will be liable to dismissal.

The parties appeared agreed that the key to resolving this issue lies with whether the plaintiff's A.C.B. Ltd., Asaba draft for N8,000.00, Exhibit 51, was cleared as at the said 11th July, 1984. On the undisputed evidence before the trial court, the said A. C. B. Ltd., Asaba draft was forwarded to the defendant bank, namely, the Union Bank of Nigeria Ltd., Asaba in the afternoon of Friday, 6th July, 1984. On Monday, the 9th July, 1984, being the next working day, it was forwarded by the defendant to its head office, Benin City for clearance by the Central Bank of Nigeria, Benin City.

There can be no doubt that the said draft, Exhibit 51, as between A.C.B. Asaba and A.C.B. Benin City was, on the evidence cash but, certainly, not as between the defendant bank and A.C.B. Asaba until the draft was cleared at the Central Bank of Nigeria, Benin City. The facts of this case are not such as involves the credibility of witnesses. It is plain to me, on the uncontroverted evidence before the court, that the plaintiff failed to establish that Exhibit 51 was cleared as at the 11th July, 1984. In my view, the findings of both courts below to the contrary, being totally unsupported by evidence led at the trial, must be regard as perverse. See Sebastian S. Yongo and Another v. Commissioner of Police (1992) 8 N.W.L.R. (Pt. 257) 36 and Paul O. Omoregbe v. Ehigiator Edo (1971) 1 All N.L.R. 282 at 289.

A bank will ordinarily not honour a customer's cheque if funds in his account are insufficient to meet the cheque. It seems to me that the defendant appellant on the facts of this case, was entitled to dishonour the plaintiff's cheque, Exhibit 35 as it was not established that he had sufficient funds in his account to satisfy the said cheque.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Mohammed, J.S.C., which I adopt as mine that this appeal succeeds and it is hereby allowed by me. The judgments of both courts below are hereby set aside and the plaintiff's case is dismissed. I abide by the order for costs contained in the lead judgment.