

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO**

**(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, AND
MULENGA, JJ.SC)**

CIVIL APPEAL NO. 4 OF 2004

BETWEEN

STANBIC BANK UGANDA LTD ::::::::::: APPELLANTS

AND

UGANDA CROCS LIMITED ::::::::::: RESPONDENTS

(Appeal from the decision of the Court of Appeal in Kampala (Okello, Engwau and Kitumba, JJ.A) dated 27/1/2004 in Civil Appeal No. 47 of 2003)

JUDGMENT OF ODER, JSC.

This is a second appeal, brought against the decision of the Court of Appeal, which upheld the judgment of the High Court in Kampala (Okumu-Wengi, J) allowing the respondents' suit against the appellant.

The background of the case regarding which the High Court and the Court of Appeal made concurrent findings of law and fact is briefly as follows: On 21st November,

1990, Dr. Alex Babitunga (now deceased) and some Zimbabwean investors incorporated the respondent (the company), with the object of rearing crocodiles for purposes of export business. In the process, the company, opened in Kampala two bank accounts with the appellant (the bank) in January, 1991. One account was for foreign currency (U.S Dollars), and the other was a local currency (Uganda Shillings) account. Both accounts were to be operated according to the company's mandate. Dr. Alex Babitunga, the sole resident director, was specifically authorized to operate these bank accounts. There were also clear instructions to the effect that in the event of any changes the same would be communicated to the bank.

The Chairman of the Board of Directors of the Company, one U.H Bristow, subsequently advised the bank of some changes, introducing I.A. Cader, Vivian Hector Bristow, Anthony Douglas Bristow and Colin Neil Hewlett as directors of the Company and signatories to its bank accounts. The specimen signature cards were issued and certified by him. The cards were admitted in evidence at the trial of the suit as exhibits P6 (a), P6 (b), P6 (c) and P6 (d) respectively. The Bank was advised to honour cheques duly signed by any two of the authorized signatories. A

dispute between the company and the bank arose in respect of exhibit P.7 (b), the specimen signature card allegedly issued for Susan Margaret Howard Bristow (Susan) as a director of the company. The dispute arose because the signature of Dr. Alex Babitunga authenticating Susan's specimen signature card was apparently forged: In addition, the word **ALONE** was written on that card, being an alteration of **ANY TWO TO SIGN** which was previously written on the card. In addition there were cancellations on Exhibits P.6 (a) and P.6 (d) to the effect that the words **ANY TWO TO SIGN** to read **ANY ONE TO SIGN**. These cancellations were done to those specimen signature cards without any initials, signatures, authentication or stamping by the person or persons who cancelled them.

The specimen signature card issued for Susan was also backdated to 30.12.1991, a date prior to the death on 9.2.1992 of Dr. Alex Babitunga who allegedly authenticated it. The dispute led to the company filing the suit against the bank on the grounds, inter alia, that there had been a fraudulent change in the mandate, as a result of which the company's bank accounts were operated by unauthorized signatories to withdraw the monies claimed in the suit.

The company also alleged that the bank was fraudulent and had acted in breach of its duty to the company as its customer and had been negligent in permitting the company's accounts to be cleared of all the money in them without the company's authority. The company reported its complaint to the police, who investigated and reported the circumstances in which Susan came to acquire a mandate to operate the company's bank accounts.

In its defence to the suit the bank denied liability, contending, inter alia, that operation of the company's bank accounts by Susan had been authorized by Dr. Alex Babitunga before his death in 1992. The bank further contended that by paying out money, the debiting of which was being attributed to Susan, the bank was honouring instructions of its customer according to mandate. The trial court, however did not agree with the banks' contentions and evidence and found for the company, entering judgment in its favour for US Dollars **346,444,64** and Uganda **Shs: 181,375,893**. The company was also awarded costs of the suit.

The bank appealed unsuccessfully to the Court of Appeal. Hence this appeal. Nine grounds of appeal are set out in the memorandum of appeal.

They are:

1. The learned Justices of Appeal erred in law and in fact in disallowing the 1st ground of appeal on the ground that the trial judge ***"did consider that Suzan Margaret Howard Bristow signed the respondent's cheques with other directors of the company but that she did so without the authority of the company"***.
 2. The learned Justices of Appeal erred in law and in fact in not holding that the respondent was estopped from saying that Susan Bristow was not authorized signatory to the respondent's accounts.
 3. The learned Justices of Appeal erred in law and in fact in holding that the matters they referred to in their decision showed that ***"the bank acted irregularly and or negligently in the operation of the company's accounts."***
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4. In their answer to ground 4 of the memorandum of the appeal the learned Justices of Appeal erred in law and in fact holding that the respondent discovered Suzan Bristow's affairs through PW.1, who – ***"was really the directing mind and will of the company."***
 5. The learned Justices of Appeal erred in law and in fact in holding that the suit was not time barred.
 6. The learned Justices of Appeal erred in law and in fact in holding that: ***"In order to constitute a lawful mandate, Anthony Bristow was supposed to sign cheques with other signatories. When he signed alone, he was in my view, in breach of that authority. He was also in breach of that mandate when he signed with Suzan who was not an authorized signatory."***
 7. The learned Justices of Appeal erred in law and in fact in holding that there was no double award by the trial judge and that ground 7 fails.
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8. The learned Justices of Appeal erred in law and misdirected themselves on the burden of proof when they held that ***".... The burden of proof shifted to the appellant in view of the clear provisions of section 100 and section 102 of the Evidence Act. The bank should have called evidence to show that the payments /withdrawals from the Company Accounts were to discharge legal liabilities of the respondent"***.

9. The learned Justices of Appeal erred in law and in fact in holding that - ***"ground 8 fails."***

Dr. Joseph Byamugisha and Mr. Kanyeimbwa represented the bank and Mr. Kimuli and Mr. Bwanika appeared for the company.

Dr. Byamugisha, who argued the appeal, informed the Court at the commencement of his submission that the appellant was not appealing against the Court of Appeal's decision up-holding the trial Court's answers to issues No. 1 and No. 4 at the trial.

Issue No. 1 was ***"Whether the letter of 6/1/92 Exhibit P.7 (a) and the specimen signature card of Susan Margaret Howard Bristow Exhibit P.7 (b) were signed/executed by the late Dr. Alex Babitunga on behalf of the Plaintiff, and whether the same were lawfully presented to the defendant."***

Exhibit P.7 (a) was a letter dated 6/1/1992, purported to have been written by Dr. Babitunga, before he died, to the manager of the bank about the company's local and foreign currency accounts.

It said: -

"Please find enclosed duly completed specimen signature Form. Please be advised that Mrs. S.M.H. Bristow has recently been appointed a director of the Company."

Exhibit P.7 (b) a specimen signature card, purported to inform the bank that Mrs. Susan Bristow was a director of the company, and that the bank was authorized to honour and charge cheques or Bills made on the company's account provided that they were signed by

two directors. While it introduced Susan as a director of the company, it did not authorize her to be a signatory to the company's bank accounts.

In his answer to the first issue at the trial, which answer was up-held by the Court of Appeal, the learned trial judge, on the evidence available to him, found that signatures of Dr. Alex Babitunga appearing on exhibits P.7 (a) and P.7 (b) were forgeries. They were not signed by him. The learned trial judge also found that the purported specimen signature card for Susan was altered from **"two to sign" to "one to sign."**

Issue No. 4, which the learned trial judge answered in the negative, which answer was upheld by the Court of Appeal, was ***"whether the letter by Susan M.H. Bristow dated 27/7/93 constituted proper instructions/mandate regarding the operation of the plaintiff's bank account."*** The letter, admitted in evidence as exhibit P.8, was written by Susan M.H. Bristow, to the bank regarding the company's U.S Dollar account with the bank. It instructed the bank to: -

- (i) issue a bank draft in the sum of British Pound Sterling 5,250.00 in favour of Gailey and Roberts (U) Ltd;
- (ii) arrange a telegraphic transfer in the sum of US\$ 1,1315.00 to E.J. Brook & Company, Newark, N.J, USA;
- (iii) issue a bank draft in the sum of US\$ 27,471.00 in favour of Katebo Fisheries Ltd, and;
- (iv) transfer the sum of Ug. Shs: 115,000,000/= into the company's local account at the bank.

The last paragraph of the letter said:

- (v) ***"There appear to have been some problems with our signatories in the past, which we would like to clarify. We require only one signatory to sign transactions for both our local and US\$ account. We trust this clarifies matters, thank you for your assistance."***

The letter was signed by Susan M.H. Bristow, without indicating the capacity in which she did so.

It is my considered opinion that the appellant's acceptance of, and decision not to appeal against, the concurrent findings of the trial Court and the Court of Appeal on the two issues has a bearing on the appeal. It amounts to an admission by the appellant that Susan Bristow had no authority to operate the company's bank accounts with the bank, and that in so far as the bank honoured her signature and instruction to operate the company's accounts, ***"the bank acted irregularly and negligently in the operation of the company's accounts"***. In my view, this disposes of the first and third grounds of appeal, which should fail.

Dr. Byamugisha next argued ground five. He submitted that contrary to the concurrent findings of the trial Court and the Court of Appeal that the company first knew of Susan's fraudulent operation of the Company's accounts, without authority, from the Police investigation report dated 30.8.2001, (exhibit P.13); Susan's fraud was within the knowledge of the company long before that date.

Learned counsel contended that Paul Bakashabaruhanga

(P.W1) personally knew before the Police report (P.13) that Susan was operating the company's accounts without authority. This, for instance, is indicated by the resolutions passed by the Company's extraordinary general meeting chaired by P.W1 on 23.5.1997 (exhibit D4). The resolutions so passed showed that the company already knew of Susan's fraudulent operation of the Company's bank account. At that meeting it was noted that with effect from 12.5. 1997, Susan and her husband, Anthony Bristow, had ceased to be directors of the Company; and it was resolved that the couple should make financial accountability to the Company for the period 1.1.1992 to 31.8.1996 when they were managing the affairs of the company, and that the Board of Directors of the Company should use all legal means to secure such accountability from the couple including criminal proceedings. Learned counsel contended that P.W1 was the directing mind of the company. Consequently, the company's knowledge of the fraud more than six years before the suit was filed disentitled it from benefiting from the provisions of Section 25 of the Limitation Act (Cap.80). Learned Counsel contended that the matters complained of by the company occurred in 1995 and the suit was instituted in 2001 after six years had elapsed. During that period the

company was aware of Susan's activities but took no action. The suit was therefore time barred when it was instituted.

Mr. Kimuli, the Company's learned counsel, opposed the bank's grounds of appeal. He adopted the submissions he had made in support of the Company's suit and appeal in the High Court and the Court of Appeal respectively. He contended that the principles which govern the duty of a first appellate court and a second appellate court do apply to the instant case. The trial court and the Court of Appeal having made concurrent findings of fact, this court can only interfere with the conclusions of the Court of Appeal if the latter misapplied or failed to apply the principles set out in the relevant rules of procedure and in decided cases. Learned counsel contended that in the instant, case, there are no reasons for this court to interfere with the concurrent findings on issues of fact by the courts below. The authorities cited by the learned counsel include: ***Luwero Green Acres Ltd Vs. Marubeni Corporation, civil appeal No.19 of 1995. (SCU) (unreported) Banco Arabe Espanol vs. Bank of Uganda (1998) LLR 84 (SCU); Kifamunte Henry Vs. Uganda (1997) LLR 72 (SCU); Bogere and Another Vs. Uganda Criminal Appeal No.1***

of 1997 (SCU) (unreported;) Pandya Vs. Republic (1957) EA 336; Selle Vs. Associated Motor Boat and Another (1968) EA 123; Coghlan Vs. Cumberland (1898) Ch. 704 (CA); Thomas Vs. Thomas (1947) Ac 484 (HL), etc.

In **Banco Arabe Espanol** (Supra), this Court referred to what it had said in **Kifamunte Henry** (Supra) with approval:

"It does not seem to us that except in the clearest of cases, we are required to re-evaluate evidence like a first appellate court. On second appeal, it is sufficient to decide whether the first appellate court in approaching its task, applied or failed to apply such principles. See: D.R Pandya Vs. R (1957) E.A 336; Kairu Vs. Uganda (1978) HCB 123 This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as a first appellate court, the Court of

Appeal misapplied or failed to apply the principles set out in such decisions such as Pandya (Supra), Ruwala (Supra) Kairu (Supra)''.

The principles stated in this Passage in Kifamunte Henry apply to the instant case.

Under ground five of appeal, the company's learned counsel submitted that in the instant case, the Court of Appeal rightly up-held the trial court's findings that time of limitation began to run when fraud by Susan, was discovered by the company through the C.I.D report dated 30.8.2001 (exhibit P.13). Before that time the fraud was concealed, as there were alterations on exhibits P6 (a), P6 (c), P7 (a) and P7 (b) in possession of the bank and no outsider could have access to them.

To my mind the provisions of the Limitation Act (cap.80) applicable to ground five of the appeal are clear. Section 3 (1) of the Act provides that actions founded on contract or tort shall not be brought after the expiration of six years from the date on which the cause of action arose. Section 25 provides for postponement of the limitation of time prescribed by the Act where: -

- (a) the action is based upon the fraud of the defendant or his or her agent and,
- (b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) - the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it .

In the instant case, the cause of action was based on both contract and tort.

In **"Limitation of Actions"** by Michael Franks, Sweet and Maxwell Ltd, 1959, at page 202, the provisions of an English Limitation Act, equivalent to our Limitation Act (cap 80) section 25 are discussed. It is stated therein that: ***"With regard to the meaning of fraud, class (a) covers cases where the cause of action requires the allegation and proof of fraud, eg action for deceit and for rescission on the ground of fraudulent misrepresentation. It is thus of somewhat limited scope. Class (b) brings in cases where a non-fraudulent cause of action is willfully concealed"***

from the plaintiff by the defendant either from the outset or subsequently. The defendant's conduct may be downright dishonest, but it need not be dishonest or involve moral turpitude, provided that it is reckless, or in some way unfair or discreditable having regard to the relationship between the parties-conversely, a good motive will not prevent the defendant's conduct from constituting concealed fraud. It is clear therefore that class (b) is by no means limited to common law fraud or deceit, and extends, as did concealed fraud in equity, to cases where there are no active steps taken towards concealment. On the other hand, it will not suffice to show simply that the plaintiff was in fact ignorant of his cause of action. Concealment of it by the defendant, and by the defendant's fraud, must be established."

I agree with those views. In the instant case, I am unable to fault the finding of Engwau, JA, learned Justices of Court of Appeal, with which other members of the court agreed, when he said this in his judgment.

"Time started to run against the respondent from the date when the fraud was discovered although

PW1 was aware of what the CID had uncovered. Mr. Kimuli pointed out that the appellant was in possession of exhibits P6 (a), P6(c) and P7 (c), all of which were pleaded. The appellant was also in possession of exhibits P7 (a) and P7 (b). It was counsel's contention that the alterations on the specimen signature cards and exhibits P7 (a) and P7 (b) came to the knowledge of the respondent through the report (exhibit P.13). The plaint was filed on 7th March 2001, within time, according to counsel, as also found by the trial judge. I agree with those findings and I cannot fault the trial judge on the matter of limitation. The suit was not time-barred. See section 26 of the Limitation Act (cap.70). Time started to run against the respondent from the time fraud was discovered by the police report (Exbt.13)."

In the circumstances ground five of the appeal should fail.

The complaint in ground six is that the learned Justices of Appeal erred in law and in fact in holding that: ***"In order to constitute a lawful mandate, Anthony***

Bristow was supposed to sign cheques with two other signatories. When he signed alone, he was in my view, in breach of that authority. He was also in breach of that mandate when he signed with Susan who was not an authorized signatory." Learned counsel referred to Anthony Bristow's specimen signature card (exhibit P6 (d)), which mandated Anthony Bristow as a signatory. Issuance by the company of exhibit P6 (d), according to learned counsel, was in accordance with the company's resolution dated 14/11/1990, (Exhibit P.4 (b). The holding by the learned Justice of Appeal was, therefore, inconsistent with that mandate. With regard to the expression **"ANY TWO TO SIGN"** written in bold letters on top of exhibit P.6 (d), with the word **"TWO"** cancelled and replaced by **"ONE"**, learned counsel submitted that the bank should not be blamed for what apparently happened. Byarugaba Francis, (DW1), the bank's Internal Manager, testified that the apparent alteration was not done by the bank, and that, in any case, the alteration was of no consequence. The learned counsel then pointed out from exhibits P10 (a), D.16 and D.17 photocopies of numerous paid cheques shown as having been signed by Anthony Bristow alone or with Susan Margaret Bristow. The

cheques signed by Anthony Bristow alone, learned counsel contended, were properly honoured as having been validly signed.

In opposition to ground six of the appeal, the company's learned counsel submitted that in paragraph 1 of its written statement of defence the bank admitted paragraph 5 (n) of the company's plaint, in which it was pleaded that- "5 The facts giving rise to the cause of action arose as follows:

(n) Specimen signature cards for the above three signatories whose signatures were duly certified by Dr. Alex Babitunga, the Managing Director of the plaintiff, were submitted to the defendant. The aforesaid cards were endorsed **"Any two to sign."**

The **"three signatories"** in question were listed in paragraph 5 (m) of the plaint as:-

- i) Anthony Douglas Bristow,
- ii) Colin Neil Hewlett,
- iii) Vivian Hector Bristow,

(Underlining supplied).

The company's learned counsel submitted that the bank's admission of the company's pleading in question was of critical importance to the company's case. Learned counsel submitted that Anthony Bristow as an authorized signatory could validly sign cheques with another one authorized signatory, but not alone, nor with another person who had no authority, as he did with Susan. When the learned Justice of Appeal said that Anthony was supposed to sign cheques with "other signatories", it must have been a slip of the pen, according to learned counsel, because **"other signatories"** should have been **"another signatory"**. Anthony Bristow's mandate as pleaded in the company's plaint and admitted in the bank's written statement of defence was clear. He could sign only with another authorized signatory. The bank acted contrary to the company's instructions by honouring cheques signed by Anthony Bristow alone or by him and Susan, who was not authorized. Debit entries resulting from such cheques should not have been made on the company's account. In the circumstances learned counsel submitted that ground six should be rejected.

The passage from the judgment of the learned Justice of Appeal which gave rise to the bank's complaint in ground six of appeal was a conclusion reached by the learned Justice of Appeal in his consideration of ground six of the bank's appeal to that Court. The complaint in that ground was that the learned trial judge erred in law in holding that the sums of US\$ 345,444.64 and Ug. Shs: 181,373,893/= were drawn from the company's accounts in the period when the impugned signature of Susan Bristow was being honoured by the bank and awarding those sums to the respondent. In the Court of Appeal, the bank's learned counsel argued that Anthony Bristow was an authorized signatory and the learned trial judge should not have awarded to the company the moneys he had signed for as reflected in exhibits D.16 and D.17, Mr. Kimuli, who was also the company's learned counsel in that Court, countered the bank's contention by submitting that Anthony Bristow was a signatory only to the local account and he had to sign with another signatory, not alone. This was pleaded by the company and admitted by the bank in its pleadings: Consequently, when Anthony Bristow signed alone or with Susan, that did not constitute lawful mandate to pay the cheques or honour instructions.

The learned Justice of Appeal agreed with Mr. Kimuli's submission, hence the conclusion he reached which is objected to in ground six of this appeal.

As I understand it, the conclusion of Engwau, JA, under ground six in that Court upheld the learned trial judges finding of fact in that regard. It was consistent with the pleadings of the parties and the evidence available. According to the pleadings and evidence, Anthony Bristow was supposed to sign cheques with another authorized signatory; when, therefore, the learned Justice of Appeal said that “ **Anthony Bristow was supposed to sign with other signatories**”, he could have meant that Anthony Bristow was not supposed to sign alone, but with any other of the authorized signatories. It would be a misconstruction of the learned Justice of Appeal's holding to suggest that he meant that Anthony Bristow was supposed to sign with more than one other signatory. In my view, the holding of the learned Justice of Appeal to the effect that cheques signed by Anthony Bristow together with Susan were invalid and should not have been debited to the company's accounts cannot be faulted. The fact that Susan Bristow who had no authority signed the cheques with Anthony Bristow who had

authority did not validate Susan's signatures on the cheques. Consequently, ground six of appeal should fail.

Ground two of the appeal, which the appellants' learned counsel argued next, complained that the learned Justices of Appeal erred in law and in fact in not holding that the company was estopped from saying that Susan Bristow was not an authorized signatory to the company's account. Relying on section 114 of the Evidence Act, the bank's learned counsel submitted that the fact that Susan Bristow was signing with Anthony Bristow, who was a director, and subsequently signed with Fred Kamugira, another director, without the company protesting, but instead acquiescing to her signatures on the cheques, estopped the company from asserting at that late stage that Susan Bristow was not authorized. Learned counsel also relied on section 23 of Bills of Exchange Act (Cap. 68). Learned counsel contended that where Susan signed with another authorized signatory, her own signature was inoperative. Where she signed alone the directors of the company did not protest. The learned counsel also relied on sections 147, 153 and 157 (2) of the Companies Act (cap.110) and on **J. C. Houghton and Company Vs. Nothard, Lowe and Wills Ltd, (1928) A.C.1 (P.C.) and on Greenwood Vs**

Martin Bank Ltd (1933) AC. 5 (H.L.) With regard to provisions of the Companies Act in question, learned counsel referred to the testimony of Paul Bakashabaruhanga (PW.1) to the effect that PW1 and Fred Kagumira became active in affairs of the company after the latter was appointed a signatory to the bank accounts of the company; PW.1 was attending board and general meetings of the company; statement of affairs of the company was tabled from August 1992; adherence to the annual budgets of the company were enforced; and the balance sheet and reports of directors were tabled for the end of 1995. Minutes of the extra ordinary General meeting of the company held on 12.5.1997 (Exhibit D. 14) show that PW. 1 attended the meeting as an administrator of the Estate of Alex Babitunga (decease) and was appointed to chair the meeting.

The company's learned counsel made submissions in reply, which, he said, applied to the concurrent findings of the two courts below regarding fraud and estoppel. Learned counsel submitted that evidence of fraud by Susan, Exhibits P.7 (a) and P.7 (b), were in possession of the bank. So were Exhibits P6 (a) to P6 (d) on which there were alterations from **"any two to sign"** to **"any one to sign"**

or "alone" Susan Bristow was not an authorized signatory - a fact conceded by the bank in its pleading. She could not be a lawful signatory merely by signing with others who might be lawful or authorized signatories. Learned counsel submitted that the exhibits he has referred to having been in possession of the bank, and the company not being in the know the issue of estoppel did not arise. The exhibits and the alterations on the exhibits only came to the knowledge of the company through the Police Investigation Report, P.13. The company did not know, or it was not aware that Susan was signing. He contended that the cases of J.C. Houghton & Co. Vs. Northard, Lowe and Wills (supra) and Greenwood Vs. Martin (supra) are distinguishable, and do not apply to the instant case. Learned counsel contended that in the instant case estoppel under S.114 of the Evidence Act did not apply, because the company was unaware of Susan's fraudulent signatures on the cheques until the police investigation and report. Nor does section 23 of the Bills of Exchange apply because the company did not ratify Susan's action. Learned counsel submitted that another reason the principle of estoppel does not apply to the instant case is fraud, which the learned trial judge found was perpetrated by the bank against the company, and up-held by the

Court of Appeal. The bank cannot therefore benefit from the equitable doctrine of estoppel because its hands were not clean.

Conditions for application of the equitable doctrine of estoppel are set out in section 114 of Evidence Act (Cap. 6). It provides that when one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing. One of the conditions for the doctrine to apply is, therefore that the act or omission by the person against whom estoppel is to be set up, as a defence, must have been intentionally caused. In the instant case the fraud which the two courts below found had caused the bank to act to its detriment believing it to be true was unknown to the company until the police report (P.13). Consequently the defence of estoppel was not available to the bank against the company. For the same reason, the company cannot be said to have ratified what Susan Bristow did. In the circumstances Section 23 of the Bills of Exchange did

not apply either. I also agree with the submission of the company's learned counsel that the bank did not have clean hands to benefit from the equitable doctrine of estoppel.

In my opinion, the cases of **J.C. Houghton and Co. Vs Northard, Lowe, and Wills** (supra) and **Greenwood Vs. Martin Bank (Supra)** do support the company's case. They are against the bank's case. In the former case, two rival companies, the N. Company and W. Company formed the respondent company to take over certain branches of their business of fruit importers the shares of the new company being equally divided between the two old companies, and the board consisting of two directors of the N Company – namely M. and G. Lowe and two directors of W. Company. By a brokerage agreement embodied in a letter dated in July 1924, between M. Lowe and the appellant, a firm of fruit brokers, it was arranged that the appellant should make certain advances to the N. company and, should receive all fruits consigned either to N. company or to the respondent company and keep back 70 percent of the net proceeds in reduction of the advances, and it was stipulated the respondent company should subscribe to this arrangement. The appellants also

obtained a guarantee of the loan from the two Lowes and a third director of the N. company, who was also the secretary of the respondent company. This arrangement was not ratified by any agreement under the seal of the respondent company, but the secretary wrote to the appellants purporting to confirm the arrangement on behalf of his company. The directors of the respondent Company, other than the two Lowes, first became aware of the arrangement after it had been in operation for some months, and it was then put to an end. The appellants had obtained fruit consignment to the respondent company on board several ships without production of the bills of lading, on giving an indemnity to the ships, and they sued the respondent company for delivery of the bills of Lading. The respondents counter claimed for the proceeds of fruit belonging to them and not accounted for. It was held by the House of Lords, inter alia, that the respondent company were not estopped from denying the existence of the arrangement by the knowledge of the Lowes, in as much as they were parties to the wrong done to the company, or by the omission of the other directors to inspect the accounts of the company, which would have disclosed the arrangement. At page 15, Viscount Dunedin said:

"It only remains to consider whether negligence on the part of the unincriminated directors can form an estoppel against the company, I am of the opinion that it cannot. It is no part of director's duty to inspect account everyday. There was nothing in the circumstances to arouse the suspicions of the two directors as to the existence of any such agreement. As soon as they were all at home, the whole thing was found out and the arrangement stopped, and to hold that there was estoppel because Walker, during the month of August, near the end of it, did not inspect the accounts and found out the arrangements, would be, in my opinion, going much beyond what has ever been decided against a Company".

Applying this decision to the instant case, my view is that, it would be going too far to attribute knowledge of Susan Bristow's fraud to PW.1, the documents relating to which were in the exclusive possession of the bank. In the case of **Greenwood Vs Martin's Bank** (supra), the appellant's account alone was opened at the respondent bank. His wife forged several cheques, which the bank paid on the appellant's account. The appellant knew about the

forgery, but did not inform the bank in order to protect his wife. Eventually he told his wife that he would inform the bank, as a result of which the wife committed suicide. The appellant sued the bank to recover the monies they had paid out by honouring the cheques forged by his late wife. The bank successfully set up estoppel as a defence to the suit. Upholding the decision of the Court of Appeal, the House of Lords said inter alia:

"It may be said at once that there can be no question of ratification or adoption in this case. The necessary elements for ratification were not present and adoption, as understood in English Law, requires valuable consideration, which is not even suggested here. The sole question is whether in the circumstances of this case the respondents are entitled to set up an estoppel. Now the essential factors giving rise to an estoppel are, I think:

- (i) a representation or conduct amounting to a representation, intended to induce course of conduct on the part of the person to whom the representation is made;***

(ii) an act or omission by the person to whom the representation is made resulting from such representation or conduct;

(iii) a detriment to such person as a consequence of the act or omission. Mere silence cannot amount to a representation, but when there is a duty to disclose, deliberate silence may become significant and amount to a representation."

This case (Greenwood Vs Martin's Bank), too, does not support the bank in the instant case, because there was no representation or conduct amounting to representation to the bank by the company, who did not know that money was being paid out of its accounts without its authority until the police investigation report (Exhibit PO.13). This is different from what happened in Greenwood where the account holder knew about the fraudulent withdrawal of money from his account by his wife, which he concealed from the bank until the wife committed suicide.

In the circumstances, my opinion is that the facts of the instant case as established by the two courts below did not give rise to estoppel or adoption as a defence against the

company's suit. The two decided cases I have discussed above therefore do not apply. Nor, in my view, did section 23 of the Bills of Exchange Act provide the bank with a defence against the company's claim, because the company is not precluded in any way from setting up as a defence Susan's fraud or lack of authority in signing the cheques debited to the company's accounts; nor did the company ratify her action.

The bank's learned counsel further submitted that by virtue of the provisions of sections 147, 153(1), 157(1) and (2) of the companies Act (cap110) and from the company's audited account at the end of every year, the company's directors, including PW.1, ought to have known that Susan Bristow was signing the company's cheques without authority. The trial court and the Court of Appeal did not make any finding on the application of these sections of the Companies Act to the instant case. This should not be surprising, because the matter was not argued before them. I shall comment briefly on the appellant's submission in this regard. Firstly there was no evidence that PW.1 and the other directors were involved in the day-to-day management of the company affairs. On the

contrary, the minutes of the extra ordinary meeting of the company held on 12.5.1997 (Exhibit D.14) states:

" 0.5/97 Management of the company. It was noted that:

- (i) With effect from 31st August 1992, the following were the duly appointed directors of the company.**
 - (a) S.M.H Bristow (Mrs)**
 - (b) Anthony D. Bristow**
 - (c) Paul Bakashabaruhanga, and**
 - (d) Freddie Kamugira.**
 - (ii) The first two directors were the only active ones involved in the day to day management of the company,**
 - (iii). The Dormant directors did not have any inkling about the state of affairs of the company particularly finances, for example, the proceeds of the skin sale of October 1993 amounting to Us Dollars 108,538.85 as well as those of 1996 were no where to be seen.**
-

(iv) Since September 1994 the two Bristows ceased to live at the farm. A.D. Bristow left Uganda in February 1995 whilst Mrs S. M. H. Bristow settled in Kampaala (sic) not attending to the farm,"

In his evidence, PW.1 appears to confirm this on the one hand, but on the other he said that in 1995, Fred Kamugira became active particularly as regards finance.

Secondly PW.1's evidence that he was attending both general and directors meetings of the company did not, nor did other evidence, disclose what were discussed at those meetings consequently, there was no evidence that PW1 and other directors were able to know from the meetings the fraudulent activities of Susan Bristow.

In the circumstances, ground two of the appeal should fail.

In my considered opinion, my discussion and conclusions on grounds two and five of the appeal also dispose of ground four, which should also fail.

The appellants' learned counsel next argued grounds seven, eight and nine of appeal together. He submitted that the three grounds are based on the appellant's evidence that:

- (i) the deposits on the Uganda shillings account were transfers from the U.S. Dollar account. Exhibits D.16 and D.17 show how the monies on the Uganda shillings account and on the US Dollar account were used respectively. The monies were not lost.
- (ii) Many cheques were signed by Anthony Bristow and Fred Kamugira, who were authorized signatories. Consequently, cheques were not paid in breach of the contract between the bank and the company as its customer.
- (iii) Some cheques were paid to the company's creditors.

The learned counsel referred to the Report and Financial Statements of the company for the year-ended 31.8.1996 (Exhibit D.9). The report contains the report of the auditors, and a statement of the company's operation for

the years 31/12/1992 to 1996. Learned counsel submitted that under SS. 101 and 102 of the Evidence Act, the company had the burden to prove that the bank acted recklessly and negligently by paying cheques signed by Susan Bristow. In the instant case, that is where the company stopped. It should have also proved that it thereby incurred loss. This the company did not do. It left it to the Court to assume that loss ensued.

Under these grounds the company's learned counsel replied that as exhibit P.7 (c) showed, there was no person to operate the dollar account from 12.2.1992, because Collin Neil Hewlett had resigned from the company; Alex Babitinga had died, Anthony Douglas Bristow and Cader were living in Zimbabwe. Only one director, namely: Vivian Vector Bristow was in Uganda. Learned counsel contended that, as there was no person to operate that account, the bank should not have transferred money from that account to the local account from 12.2.1992. The Company was consequently entitled to recover from the bank monies which were debited on the accounts without its instruction. With regard to the amount of money lost by the company as a result of the bank's unauthorized payments out of the accounts, the learned counsel

submitted that as found by the two courts below the testimony of PW.1 and statements of account tendered in evidence as exhibits P. 12 (a), P. 12 (b), D.16, D.17 showed that the company lost money. On the bank's contention- that payments debited on the company's accounts were made to parties to whom the company owed debts as suppliers of goods or services to the company, the learned counsel submitted that the bank had the duty to adduce evidence to prove that withdrawals or payments from the company's accounts went to discharge the company's lawful liability. The bank did not adduce such evidence. Relying on the case of **B. Ligget (Liverpool) Ltd. Vs. Barclays Bank Ltd. (1927) All.E.R. 451**, learned counsel contended that the bank cannot benefit from the payments shown on exhibits D.16 and D.17 to have been made to various recipients. Mere indication of the payees, or beneficiaries of the cheques is not evidence of the company's lawful liabilities.

With regard to the Report and Financial Statements for The Year Ended 31.8.1996 (Exhibit D.9) on which the bank's learned counsel relied to show that the company incurred expenditures during the five years covered by that Report, the company's learned counsel adopted his submission in

the lower court to the effect that the bank called no witness to support its case that the total expenditure of shs 487,006 for the period 1992 to 1996 was legitimately incurred. Learned counsel concluded that Exhibit D.9 like exhibits D.16 and D.17 was of no use to the bank.

Legal principles which govern the relationship between a bank and its customer are well settled. The duty of a bank is to act in accordance with the lawful requests of its customer in normal operation of its customer's account consequently, a banker who has paid a cheque drawn without authority or in contravention of the customer's orders or negligently cannot debit the customers account with the amount. A banker is under a duty of care to its customer which may require him to question payment. See: **Banex Ltd Vs. Gold Trust Bank Civil Appeal No 29 of 1993 (SCU) (unreported), Harsbry's Laws of England, 4th Edition, volume 3 (1) paragraph 175.** If the banker pays and debits it's customers in reliance on signature being his customer's, which is not so, he cannot charge its customer with that payment. In paying cheques, a banker must not be negligent and cannot charge its customer with money lost through his negligence. See: **Pagets Law of Banking 11th Edition by Megrah, Butterworths, 1966 at page**

365 and 269; Consultant Surveyors & Planners Vs. Standard Bank (U) Ltd. (1984) HCB, where a red signal manifests itself the banker's duty may be even more stringent. See: **Barclay's Bank PLC Vs. Quin-acre Ltd & Another (1992) 4 All.E.R 331.**

In instant case the learned trial judge made a finding of the loss caused to the Company as follows:

"Consequently issue No. 6 is obviously answered to say that the bank unlawfully wrongly, recklessly and negligently honoured cheques signed by Susan Bristow to the detriment of its customer. There was evidence (Exhibit P.12 (a) and P.12 (b) to show that a sum of US\$ 345,444.64 and Ug. Shs: 181,373,893/= were drawn from the company's accounts in the period when the impunged signature of Susan Bristow was being honoured by the Bank. Indeed the bank has argued that it only honoured the customer's mandate, which mandate I have concluded to have been illegitimate. I only have to emphasize that the Bank in this case had to exercise due

care to ensure that what happened did not occur or if it did, to rectify it".

The Court of Appeal upheld the trial court's findings on the amounts of money paid out by the appellant from the respondent's bank accounts without the letters of authority. The finding were made by Engwau J.A in his lead judgment with which the other members of the Court agreed. He did so in disagreement with the appellant's complaints in grounds of appeal, numbers six, seven and eight. The gist of appellant's complaint in grounds six was that Anthony Bristow was authorized signatory and the trial judge should not have awarded the moneys he had signed for as reflected in exhibits D16, D17. Even if those cheques were signed by Anthony Bristow and Susan Bristow, both were signatories and the sums involved should not have been awarded to the respondent. Engwau J.A in his lead judgment found, rightly so in my view, that Anthony (Bristow was a signatory, but Susan was not. In order to constitute a lawful mandate Anthony was supposed to sign cheques with another signatory. When he signed alone, he was in breach of that authority. He was also in breach of that mandate when he signed with Susan who was not an authorized signatory. In the

premises, there was no justification in interference with the amounts awarded by the learned trial judge.

The gist of the appellant's complaint in ground seven was that the learned trial judge was wrong in holding that the credits on the Uganda shillings accounts were transfers from the US dollars accounts. Reliance was placed on exhibit D.17 for that. In the view of the appellant's counsel, it would amount to double award because Shs: 200 million came from the dollar account. The respondent's counsel replied that as from 12.2.1992 nobody had the mandate to operate the foreign currency account consequently if there were transfers from that account, those transfers were unauthorized.

The learned Justice of Appeal agreed with the submission of the respondent's counsel. The respondent's learned counsel further argued that according to exhibit D.17, the total amount on the dollar account was US 75,000. According to the learned counsel's calculation, the balance on the debit side would be US\$ 275,388, which was unlawfully debited to that account and that would have been the money due to the respondent. In this regard the learned Justices of Appeal found: -

"Whether not counsel is correct in his calculations, my finding is that there was no double award by the trial judge on the matter. In that regard ground 7 also fails."

I am unable to fault the learned Justice of appeal's finding in this regard.

The appellant's complaint in ground 8 was that issue No.7 at the trial was not determined. The issue was "whether the payments from the plaintiff's accounts were made to the plaintiff's creditor or for the benefit of the plaintiff." The appellant's learned counsel submitted that the payments, details of which appear on exhibits D.16 and D.17 were made to discharge the respondent's obligations. According to counsel, exhibit P.9 shows expenditures from 1992 - 1996 and, therefore, the respondent was not entitled to claim them. The respondent's learned counsel responded that the burden under sections 100 and 102 of the Evidence Act was on the appellant to show that they had mandate to effect those payments on behalf of the respondent. The appellant had not adduced any evidence at all to show that the payments from the respondent's accounts were to discharge its legal liabilities. The mere

indication of the payee's or beneficiaries of cheques or instructions as in exhibits D.16 and D.17 was not evidence of legal liabilities of the respondent. Those payments could have been made by way of gifts or as part of a fraudulent scheme to siphon the respondents' funds.

In this regard, the summary of the findings of the learned Justice of Appeal, Engwau, J.A, is found in the following passage of his judgment: -

"It was incumbent, in my view, upon the appellant bank to prove that the payments en-exhibit D.16 and D.17 and the expenditures shown in Exhibit D.9 were made with authority to the respondent's creditors/beneficiaries or for the benefit of the respondent company. This burden of proof shifted to the appellant in view of the clear provisions of sections 100 and 102 of the Evidence Act. The bank should have called evidence to show that the payment/withdrawals from the company accounts went to discharge legal liabilities of the respondent company. In the absence of such evidence, Exhibits D.16, D.17 and D.19, are of no use to the appellant's case."

After I had considered these grounds (seven, eight and nine), it became necessary for me to obtain from the parties to the appeal clarification of certain exhibits and evidence relevant to the determination of the issue of quantum of damages, which is the substance of the appellant's complaints in those grounds. Such clarifications appeared necessary from points raised by the appellant's learned counsel.

After the hearing of the appeal, the Court sought from the parties clarification of certain exhibits and evidence which we considered relevant to the issue of quantum of damages. Such clarifications appeared necessary from the points raised by the appellant's learned counsel.

The exhibits in question are D.16 and D.17. Pages 220 to 223 of exhibit D.16 are shown to have been signed by Anthony Bristow, who was an authorized signatory; by Susan H. Bristow, who was an unauthorized signatory; and by A. Bristow together with F. Kamugira, both authorized signatories. The clarification we sought was, whether those cheques shown as signed by the authorized signatories were counted against the bank or not. Pages 226 and part of page 227 of exhibit D.17 do not show who were the

signatories to the debit entries; whereas signatories on the second part of pages 227 are shown to be either Susan H Bristow alone or A. Bristow with Susan H. Bristow. The clarification we sought was whether all the debit entries on both pages of exhibit D 17 were unauthorized. We also sought clarification of where in the record were exhibits p. 12 (a) and p.12 (b) to be found. Exhibit p12 (a) was absent from the record altogether.

The Registrar of the Court conveyed to the Lawyers of the parties in writing the clarifications we had sought, and they replied, the respondents' lawyers doing so first.

In my opinion the clarifications filed by the parties mostly repeated the submissions made by them in this Court and the Court of Appeal. Exhibit P.12 (a) was filed by the appellant as a supplementary record. Further in my view, the clarifications do not affect the concurrent findings of the trial court and the Court of Appeal on the issue of the quantum of damages.

In considering the quantum of damages, an important factor, which must be borne in mind, is that all documents concerning the respondent's accounts were in the

possession and custody of appellant bank. Only the bank knew and was responsible for entries on the bank accounts. It bore responsibility as the banker to what entries were made on those accounts without respondent's authority.

In the circumstances I am satisfied that the Court of Appeal was justified in up-holding the trial court's conclusion that the bank was liable for the respondent's moneys claimed in the suit, namely US dollars 346,444,64 and Uganda shillings 181,375,893.

The appeal should therefore be dismissed with costs to the respondent in this Court and Courts below.

Dated at Mengo this th 17th day of August..., 2005.


A.H.O. Oder,
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENDO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND
MULENGA JJ, SC.)

CIVIL APPEAL NO. 4 OF 2004

BETWEEN

STANBIC BANK UGANDA LTD APPELLANT

AND

UGANDA CROCS LIMITED.....RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala
(Okello, Engwau and Kitumba, JJA.) dated 27 January 2004 in
Civil Appeal No. 47 of 2003]*

JUDGMENT OF ODOKI, CJ.

I have had the advantage of reading in draft the judgment prepared by my learned brother, Oder JSC. I agree with him that this appeal should be dismissed with costs to the respondent.

As the other members of the Court also agree, this appeal is dismissed with costs to the respondent in this Court and the Courts below.

Dated at Mendo this 17 day of August 2005


B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENDO

**(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA AND
MULENGA, JJ.S.C.)**

CIVIL APPEAL No.4 OF 2004.

BETWEEN

STANBIC BANK UGANDA LTD..... APPELLANT

AND

UGANDA CROCS LTD RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Okello, Engwau and Kitumba, JJ.A) dated 27/1/2004 in Civil Appeal No.47 of 2003]

JUDGMENT OF TSEKOOKO, JSC:

I have had the benefit of reading in advance the draft judgment prepared by my learned brother, the Hon. Mr. Justice A.H.O.Oder, JSC, which he has just delivered. I agreed with his conclusions and the orders which he has proposed.

I have observations to make concerning the value and importance of scheduling conference in Civil Cases. A suit in these proceedings was instituted in the year 2001. By then the Civil Procedure (Amendment) Rules, 1998 (S.I. 1998 No.26) had been operational for three years. By the time the trial began on 31/8/2001, lawyers in

this case were expected to know the scheduling conference procedure introduced by S.I. 1998 No.26 and the value and importance of such conference. None appears to have been held in this case.

The scheduling conference was introduced by the new Order XB of the Civil Procedure Rules. Because of Rule 1 (1) of that Order, a trial Court is expected to hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement. Because the central issue in this case is reconciliation of figures, I expected that at a scheduling conference stage, parties in this case should have produced properly audited accounts of the respondents as part of expert evidence and try to narrow down points of disagreement. That is the stage when proper issues would emerge and parties and the court would settle the real issues to be tried and determined.

It puzzles me that counsel for both parties were content with throwing at the trial judge just a mass of documents such as the numerous cheques which had been signed and paid out and numerous documents involved in the payments. In this case the amount of money claimed by the plaintiff or denied by the defendant was central. Since the transaction involved spanned over a period of time, it seems to me that the most helpful evidence would have come from the said experts (accountants or auditors) which would have

reflected what was paid out, through which cheques and how much of it was paid on the business transactions of the respondent and the time of payment.

Rather than calling Mr. Erongot (PW3) to testify only on banking practices, accountants or auditors should have been engaged to examine relevant documents and ascertain the money which was in dispute and produce a true position as the experts saw it.

As it is, parties left court to hazard a guess at what money was missing. No wonder that the learned trial judge arrived at the quantum in the manner he did. This forced us to seek clarifications from both parties. The clarifications provided have not helped matters either. This case is yet one of the increasing number of cases where parties do not help courts to decide cases by assembling and presenting relevant evidence with appropriate diligence.

Delivered at Mengo this.....17th.....day of August.....2005.


J.W.N. Tsekooko
Justice of the Supreme Court

Mr. Kanyebwa for Appellant
Mr. Kisuli for Respondent
Judgment delivered


THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENDO

**(CORAM: ODOKI, CJ.; ODER; TSEKOOKO; KAROKORA;
AND MULENGA; JJ.SC.)**

CIVIL APPEAL NO. 4 OF 2002

B E T W E E N

STANBIC BANK UGANDA LTD: APPELLANT

A N D

UGANDA CROCS LIMITED: RESPONDENT

*(Appeal from the decision of the Court of Appeal at Kampala
before (G. M. Okello, S. G. Engwau and C. N. B. Kitumba, JJA.)
dated 27th January 2004, in Civil Appeal No. 47 of 2003).*

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment prepared by my learned brother, the Hon. Justice A. H. O. Oder, JSC and I agree with him that the appeal has no merit and ought to be dismissed with costs here and in the courts below.

Dated at Mengo This: 17... day of: AUGUST....., 2005.



A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA

AT MENGGO

**CORAM: ODOKI C.J., ODER, TSEKOOKO, KAROKORA, AND
MULENGA JJ.S.C.**

CIVIL APPEAL NO. 4 OF 2004

BETWEEN

STANBIC BANK UGANDA LIMITED :::::::::::::::APPELLANT

AND

UGANDA CROCS LIMITED:::::::::::::RESPONDENT

*(Appeal from decision of the Court of Appeal (Okello, Engwau and Kitumba JJ.A) at
Kampala in Civil Appeal No. 47/03, dated 27th January 2004)*

JUDGMENT OF MULENGA JSC.

I had opportunity to read in draft, the judgment that my honorable and learned brother, Oder JSC, has just delivered. I agree with him that this appeal should be dismissed with costs to the respondent. For emphasis only, I wish to add brief remarks concerning the 7th, 8th and 9th grounds of appeal.

It is not necessary for me to outline here the facts and background of the appeal as they are adequately set out in the judgment of Oder JSC. It

suffices to say that the respondent company, which at all material times maintained with the appellant bank, two bank accounts in dollars and in shillings respectively, sued the appellant for, *inter alia*, recovery of sums of money that the appellant debited on the said accounts in breach of its mandate. The appellant's main defence was that the debits were in respect of payments made out of the accounts by authorized signatories. Further, in addition to other technical defences like estoppel and limitation on which I do not intend to comment, the appellant contended that the payments in respect of the debits complained of, were for the respondent's benefit, and that consequently the debits did not result into any loss to the respondent. That contention is the basis of grounds 7, 8 and 9 whose substance may for clarity be recast thus -

That the Court of Appeal erred –

- ***in failing to hold that the credits on the shilling account were transfers from the dollar account;***
- ***in holding that the burden was on the appellant to prove that the withdrawals from the said bank accounts were for discharging the respondent's legal liabilities; and***
- ***in failing to hold that the payments from the said accounts were to the respondent's creditors or for the respondent's benefit.***

There are two prongs in the submissions of counsel for the appellant in respect of these grounds of appeal. The first is that the respondent had the burden to prove, not only that the withdrawals from its bank accounts were in breach of mandate, but also that they resulted in loss to the respondent. The second is that compensating the respondent for the sums withdrawn from both accounts would amount to double compensation because the sums on the shillings account were transfers from the dollar account.

With due respect to learned counsel for the appellant, there is no basis for the latter prong. I have not found any evidence on record showing the source of the credits on the respondent's shillings account. The only semblance of such evidence is Exh.D17, which is a list of debits made on the dollar account between 13.1.93 and 8.11.95. Out of about 80 debits, 14 are classified as transfers to the local currency account, i.e. the shillings account. In my view, that is not proof that all the sums credited to the shillings account were sourced from the dollar account.

The Court of Appeal considered the issue of the burden of proof and in my view rightly held in effect that upon the respondent showing that the withdrawals from its accounts were made in breach of mandate the burden shifted to the appellant to prove its claim that the withdrawals were for discharging the respondent's liabilities or otherwise for the respondent's benefit, and did not occasion loss. In this regard, the appellant relied mainly on Exhs. D16 and D17. The former is a list of debits made on the shillings account between 6.1.93 and 31.12.96; while the latter as I have just noted is the list of debits on the dollar account. The appellant compiled both lists for the purpose of the suit and while the suit was pending hearing. Both lists commence from January 1993 apparently because the bank's records for 1992 were destroyed. In my view the lists do not assist the appellant to discharge its burden to show that the debits were in respect of payments to discharge the respondent's legal liabilities or otherwise for its benefit. Their inadequacy may be illustrated in two respects. On both exhibits many debits are listed with no indication of the signatory that made the payment. Secondly none of the listed payments is supported by any invoice^{or} other evidence to show that the payee is a legitimate creditor of the respondent.

The nearest I would have considered to be acceptable are debits for ledger fees and other bank charges, but they ^{are} negligible and were not pursued in the submissions.

In conclusion I would hold that the Court of Appeal did not err in upholding the award of damages made to the respondent by the trial court. The appellant has not made out a case for disallowing or reducing it.

DATED at Mengo the 17th day of August 2005.



J.N. Mulenga,

Justice of the Supreme Court.