

TANZANIA / JUDGMENT

20071030 TZHC Dar es Salaam

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1 IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
 COMMERCIAL CASE NO. 97 OF 2005 NATIONAL OIL (T) LIMITED..... 1ST
 PLAINTIFF EXIM BANK (T) LIMITED 2ND PLAINTIFF VERSUS
 STANDARD CHARTERED BANK (T) LIMITED DEFENDANT

JUDGMENT

Date of Final Submission - 8/10/2007 Date of Judgment - 30/10/2007 MASSATI. J The First Plaintiff in this case, is an oil Company dealing with the distribution of petroleum products in and outside Tanzania. The 2nd Plaintiff and the Defendant are both commercial banks operating in Tanzania. The First Plaintiff alleges that sometime in April 2005, it drew a cheque on the 2nd Plaintiff in the sum of shs.175,809,754/= in favour of the Commissioner for Customs and Excise, in discharge of its tax obligations. The cheque was presented to the Defendant, cleared and debited in the 1st Plaintiff's account by the 2nd Plaintiff. However, as at July 2005, that sum had not reached the beneficiary payee, the Commissioner for Customs and Excise, as the latter wrote . r,t: _,:3: ·(mJ Was the account of MSG· International Tanzania JN THE HIGH COURT OF TANZANIA (COMMERCIAL OMSION) Umltd, credited with the proceeds of the cheque? AT PAR I;\$ SAWM COMMERCIAL a.s·E NO. 07 OF 2005 (Iv) Whether the Defendant endorsed cheque No. 815213 drawn by the 1st PlalnUII and payable to the NATIONAL OIL (TJ UMITTO..... 1ST PLAINTIFF. EXIM BANK (T) UMITED ,,, •... 2ND PLAINTIFF Commissioner for Customs and Exdse for dearano:, VERSUS. _ _ _ . _ · through the clearance house? STANDARD CHARTERED BANK (T) UMITED..... DE~ND~NT

- (v) Whether the cheque No, 815213 drawn by SKY OIL JUDGMENT INVESTMENTS for the sum of Tshs.175,809,754/c In Date of Final Submission - 8/10/2007 . favour of MSG ·International Tanzania .Umltd, does Date of Judgment·J0/f0/2007 exist? (vi) ~ Whether the Defendant wrongfully converted the The First PlalnUII In this case, Is an oil Company dealing with · proceeds of cheque No. 815213, drawn by the 1st the distribution or petroleum products In and outside Tanzania. The PlalnUII In raVQ\lr of the Commissioner? 2nd PlalnUII and the Defendant are both commercial banks operating In Tanzania. (vii) . Whether the 1st PlalnUII handled the drawn and signed cheque No. 815213 negligently? The First Plaintiff alleges that sometime In April 2005, It drew a · · cheque on the 2nd PlalnUff In the sum of· shs.17S,809,754/c in (viii) · To what rellers are the parties? favour of the Commissioner for

Customs and Excise, In discharge of Its tax obligations. The cheque was presented to the Defendant, Although the _plaint was d ~ and filed by MS. EPITOME deared and debited In .the 1st PlalnUffs account by ·the 2nd. Plalntlff. · ADVOCATES, and Mr. Mwandambo appeared In the lnUal stages for · However, as at July 2005, that sum had not reached the benefldary the PlalnUffs, the trlal was ably ainducted by Mr. Lutema, learned payee, the Commissioner for Customs and Excise, as the latter·wrote ·eounselI ror the Plaintiffs and Mr. Duncan, learned Counsel ror the a· letter to demand the assessed· tax. It was then that the Plaintiffs Defendant On record, 4 witnesses testified for the PlalnUffs and 5 belleVed that the Defendant wrongftlly converted the proceeds of the .ror the Defendants. A total of 3. d.ocumentary exhibits were tendered cheque In question. So on 6th October 2005, the Plaintiffs .filed the for the Plaintiffs; whereas, the Defendant deposited a total of 6 present Joint action against the oerendant for a reftlnd· of the said documentary exhibits, although the first two were extracted from the shs.175,809,75'4/=, general damages for conversion, Interest ~nd Plalnttffs' witness PW3, SAUM HASHAM. costs. From the evidence on record, the cases of eac:11 or the .parties However, the Deiendant would hear none of this. In a tersely can be summed up as follows. worded statement of defence, the Defendant disputes the cheque In question or that It was ever drawn In favour of the commissioner of PW1 ASP SALUM KISAI said he was assigned to Investigate Customs nor to have endorsed,, the cheque and collected the the case regarding the loss of cheque No. 815213 drawn by the 1st proceeds thereor, putUng the Plaintiffs to strict proof thereof. PliilnUII In favour of the Commissioner for QJstoms and Exdse, which never reached the payee. As a· result of the complain~ a criminal Predictably, and despite all the energy put In by Klmaro J, (as case has been ~pened and Is now pending .at the Resident she then was) mediation between the. parties could not sua:eed. Magistrates Court at Kisutu. He tendered the cheque as Exh.PI. There has to be a bial, and a protracted one. The trlal attempted to .PW2 NELLA SHASHMWARI RAO Is the Branen Manager or EXIM answer the followtng Issues: - BANK, the 2nd PlalnUff.' He ·said that he recognized Exh.PI. 11 Is a . cheque for the sum of ·shs.175,809,754/m drawn by the 1st Plaintiff ·(1)· Whether the first Pla_lntlf! drew cheque No. 815213 on. · In favour of-the c:ommJssloner for Customs and Excise, and I~ Is dated the 2nd Plaintiff for an amount 'of slis.175,809,754/m 18/4/2005. It was presented by the Defendant, to EXIM through the In favour of the Commissioner for Customs and Excise? clearing process of the Bank of Tanzania on 16/5/2005. After cheddng on Its authenticity EXJM passed the cheque. This was (II) Who received the proceeds or the cheque? however, one of the 20 cheques presented by the Defendant on that day. He tendered the cheque Ust as Exh.P2. The essence of PW2's GABRIEL did deliver Exh.Pl to TRA, although on Inquiries he was evldente Is that the cheque has three Important lderittfication later shown the receipt from TI\A for the cheque, which was shown numbers, the cheque No; (815213 Is the cheque number) the _to_ TRA. pers6nnel ~ho visited him to follow up the payment. He number In .the middle Is the bank code Issued by the _Bank of. ··admitted that GABRIEL had since been suspended and charged with Tanzania to all EX!M Bank's cheques.· This Is No. 67130107, -This Is the offence of conspiracy to defraud, and that he Is the one who the security oode or MSR Code; fitted with a magnetic recognition Instll\rted those criminal proceedings. The charges facing

GABRIEL oode, which would detect any alterations If passed through a reader also include forgery of cheque No. A 815213 and TRA receipt No. or security machine, and thus reject the cheque. This Is therefore a 228968 dated 29/4/2005. PW3 was also led to produce the 1st technological clearance mechanism. SO no similar number can be Plaintiff's replies to TRA as Exh.01, and TRA's reaction thereto as used In two different cheques. It was PW2's evidence that this Exh,02 which denies receipt of the. cheque. PW3 also alluded In cheque passed all the security tests, and so they, as the 1st Plaintiff's cross examination that sometimes TRA officials would come to collect banker passed It. He said that they did not receive any other cheque cheques themselves but he was not sure whether the particular of the same number nor did they have a custom in the name of the cheque (Exh.P1) was collected from the office because all that he SKY OILS Umltd. The last number In the cheque Is the customer's knew was that after signing It, It was taken to the Clearance department. In this cheque It was No. 0300346014. department. In cross examination. PW2 clarified that he was not personally. The last witness for the Plaintiffs was BWENE UBERATUS Involved In the day to day clearance process, but he receives 'the MASHAURI GABRIEL IPW4). He said that he was working with cheque lists, and hands them over to the clearance department. On the 1st Plaintiff as Import and Export officer from 2001 to 2005, but a close look, PW2 admitted that although the cheque and leaf was subsequently suspended due to loss of money at NATOIL (I.e. appears to bear the Standard Chartered Bank's stamps the two do the 1st Plaintiff). Among his duties at NATOIL was to dispatch not appear to be the same. PW3 SAUM SADRUDIN HASHAM cheques to TRA. After explaining the procedure obtaining In paying said that between 2004 and 2006 he was the 1st Plaintiff's country various taxes to TRA, PW4 identified Exh.P1, and that he was the one manager with overall duty of overseeing the operations of the ~ took It to TRA and left It there, for the receipt to be collected the company. He recognized Exh.P1 as the cheque Issued by the Isl following day; one of the methods then. prevailing. He would not Plaintiff In favour of the commissioner for customs and Excise, In the remember whether there was a dispatch that had registered that sum of shs.175,809,754/s signed by the Ananoe Manager and cheque. himself. However, to his knowledge, the proceeds of the cheque were never received by the payee. They came to realize this when PW4 said that as far as he could recollect, he had returned to they received a letter of demand from the Customs and Excise the TRA offices the following day and collected, the particular SSE department. He tendered that letter as Exh,PJ. It Is dated (I.e. Single sum of Entry) and official receipt and returned It to the 11/7/2005. On checking with their bankers, EXIM BANK assured office and showed them to the finance boss, who filed them. Then him the cheque was cleared by the Defendant Bank, and even showed to them copies of the cleared cheque. On account of TAA In cross examination, PW4 said that he remembered to have not receiving the proceeds of the cheque, their claim Is for the refund sent the cheque In question (Exh.P1) and deposited It with counter of the money, Interests, and costs. In cross examination, PW number one at the TRA. payments office, but did not remember clarified that although the 1st Plaintiff had an account with the 2nd whom he met. However, on depositing the cheque, the TRA cashier Plaintiff and not with the Defendant they sought to recover the . gave him a single

bill of entry, and a receipt which is normally issued amount of the cheque because according to the clearance stamp, it by the cashier in the third counter, but in this case he obtained the was the STANDARD OIL COMPANY BANK which cleared this cheque, receipt from the first counter. However, after four to five months, but their money was with EXIM BANK, whose duty it is, to keep it TRA officials visited their office and claimed to have not received safe. On the company's payment procedures, PW3 admitted that he those payments. They also claimed that the receipt was forged. He was usually satisfied on seeing the signature of the Finance Manager, admitted that he was treated as a suspect in the scam, but he was and upon scrutinizing the payment voucher to ascertain the purpose also himself, wondering how the cheque was diverted. He admitted of the payment. To PW3 that was enough safeguard. The cheques that he was facing criminal charges at Kisumu RM's court, on account to TRA are then forwarded by way of dispatch by operations of the cheque (Exh.PI) and the receipt in question. In re- personnel. That person was UBERATUS MASHAURI GABRIEL. He examination, PW4 said that in presenting the cheque to TRA he had was the one who was assigned to delivering all the TRA cheques, and followed the procedures obtaining then. he was the one who sent this particular. cheque, Exh.PI. This was before the introduction of the Tanzania 'interbank Central' Bank System (TIS). However, he would not ascertain whether and when went on to distinguish the two receipts. He said that apart from the on the defence side. DW1 PMR MICHAEL JUMAMQSI address and general descriptions, the size of the prints, he testified that he was an Investigator with the police force. He and handwriting and signatures were different. By way of emphasis, others were assigned to investigate the case of theft of money as DW2 said that on 29/4/2005 he was on duty, and he never received complained by the 1st Plaintiff. As at the date of his testimony, the said cheque, and if it was received, a receipt would have investigation was still going on. In the course of the investigation, they have already collected several documents, including the receipt been issued on the same day. In cross examination, DW2 said that he did not know how soon should oil tax be paid, as he was not allegedly issued by TRA. He admitted a copy of that receipt as charged with following up payments but only receipt of revenue. He Exh.03. He also said they had by then arrested and charged was not aware whereby TRA officials would ring the tax payers to GABRIEL (PW4) with the offences of conspiracy to defraud; forgery, find out if cheques were ready for collection. and uttering false documents. DW2 SAID MWAMJUYA, is an official from TRA. Before moving to the Airport. he was stationed at, Before OW3. took to the witness stand DWI was recalled to longroom, Mapato House, between 1993 to 2006. His main duties to admit the Cheque Deposit Slip of 13/5/2005 for shs.175,809,754/a were to compile daily revenue collection reports and to receive as Exh.D5. pwl ALEYQ NGQYAJ LQWASSA testified that she cheques. According to the obtaining procedures, cheques would be was the Defendant's Manager, Support and Compliance, the position accompanied by single bills of entry and deposited at his counter. On she held in May 2005. Her main duty was to see that all the controls receipt of the cheque, the cheque is entered in a register together in the branches and operations were intact and impermeable. with the name of the payer, the date and the cheque number, the amount and the name of the person who presented the cheque, who she then took time

to explain the procedures obtaining in the would then be required to sign in the register. After which, the clearance of cheques: There was special clearance, which on presenter would take the cheque to the second counter where, applying with certain conditions cheques took only a day to pay. receipt would issue, Issued. Then he moves to the third counter, where on the other hand, the normal outward clearance process would take the payment is recorded and credited. Next day the cheque is taken more than one day, depending on the terms agreed by the members to the Bank of Tanzania where TRA keeps its account. They don't of the clearance house, the rules and regulations, Bankers, such as send cheques to any other bank. In the present case; DW2 said that the Standard Chartered were members of the clearance house, he knew PW4 as the person who used to bring cheques from NATOIL 1210 where the Bank of Tanzania and other commercial bankers are also (the 1st Plaintiff) for over 6 years and was well versed with the then members' prevailing procedures. He said that all companies had to follow only those procedures in paying their taxes. The only other way skipping the other details, DW3 identified Exh.05 as the now, was the Tanzania Interbank Central System (TIS). It was not cheque deposit slip which deposited with them a cheque for permissible for the presenter to just deposit the cheque and come for shs.175/a million in favour of Ms. MGS International, by SKY Oil the receipt the following day, because on presenting the cheque he INVESTMENT UNIT LTD. She was able to tell that clearance was by had to sign in their register. And besides, he knew of no case, where normal process, it was received by TELLER NO. 83 K, Stamp No. S. IRA officials had gone for cheques from the taxpayers. As far as he it was her opinion that this cheque was cleared through the could remember, at no time had PW4 ever left a cheque and come clearance house, and it was never returned by EXIM BANK unpaid for the receipt the following day. Refreshing his memory from his within the agreed period of time of 4 working days. When shown register, DW2 said that he could not see any entry of cheque No. Exh.PI, DW3 denied to have seen or received the cheque, because 815213 of 18/4/2005 for shs.175,809,754/= from the entries of they have no account with the commissioner for customs and Excise. 29/4/2005. Upon seeing Exh.PI, DW2 said he did not remember to according to her, the cheque never passed "through their bank have seen that cheque before. If they had received the cheque they although the stamps on the face of the cheque appear to be of the would have deposited it with the Bank of Tanzania. bank, but she was not sure whether the said stamps were genuine. The basis of her opinion was that not only did they not have an As to Exh.03, DW2 said that the receipt resembled ones issued account with the Commissioner of customs but also, that the "For by TRA. It is for shs.175,809,754/= and refers to the same cheque, and On behalf" stamp affixed at the reverse side of the cheque, was (Exh.PI). However, DW2 opined that the receipt was not signed by only applicable for special clearance, and not for normal clearance as was, of the IRA officials. Having lived there for 11 years, he was the case here. But what is even more perplexing, was that the familiar with all the signatures and handwritings of their cashier. cheque also carries an OUTWARD CLEARANCE stamp, normally used DW2 was then asked to compare this receipt (Exh.03) and another in normal clearance processes, but then the two stamps could not one number 228968 of 27/6/2005 also issued by TRA. He said that have been affixed in the same cheque.

Asked to examine Exh.05, the latter was a genuine receipt Issued by the Commissioner for Sales DW3 told the court that, whereas in Exh.03 the teller's Identification for SBES. He tendered a copy of that receipt as Exh.04. He then \ Il MULA. He Identified Exh.D5 as the relevant deposit slip. The cheque IS 83K, and not 83R, and the same teller could receive both the and the deposit slip passed an the bank's Internal control tests. It cheque and the pay In slip, it was different with the two documents was scrutinized by Teller 83 K, Initialed by the clearing manager, on shown to the witness. She also recognized Exh.P2 as the "electronic the right hand corner of the slip, and the proceeds of the cheque!" Journal. summarizing all the cheques liken to EXIM BANK, generated ;,,re audited II! the customer(s) CXDUnt. by their bank. Item 18 of the Journal Is cheque No. 81.5213, although It does not show the name of the payee, It was properly . On ~Mng the complaints he visited the customer who stamped by the clearance officer on 1~/5/2005 but the stamp also confirmed the transactions with SKY OIL INVESTMENTS. The appears In the cheque. The stamps In the two documents do not customer showed to them, a number of documents to evidence the however tally, which was another anomaly. transactions, with which his team was satisfied. In cross examination, DW3 said that Exh.P2, was not prepared DW4 also repeated the testimony of DW3 to the effect that by a teller but by a clearance officer. Asked about the MICR EXIM BANK did not appear within 4 days, but two months later In a (Magnetic Ink Character Recognition) process, DW3 said It was not letter dated 22/7/2005 although In the second week of July they had meant to check on the genuineness or otherwise of the cheques but also received a demand letter from Kesarla & Company, on behalf of only to sort them out according to their drawing banks and awaiting the 1st Plain Ur. Their response was to deny liability for payment of . electronic journals such as Exh.Pi.' She said microfilming was Just a the cheque for the reasons also advanced by DW3. He was of the process of keeping duplicates of vouchers used by banks, but It was view that the Problem originated with the drawer or the cheque, neither a step In the clearance process, nor a legal requirement. She noted, who for some reason did not deliver the cheque to where It said that she was not sure whether they had a microfilm or hard copy was intended, -and from thereon, a second similar cheque may have of the SKY Oil's cheque. She said that she became aware of EXIM's been made. complaints In August 2005, long after the cheque had been cleared. According to her, MGS International Ltd had been paid the cheque In cross examination, DW4 said that he did not have any for good value. It was not part of the clearance process to call on documentary proof of his visit to the customs department but he had the drawing bank to ascertain the authenticity of a cheque. She a written record of what he reported to the police. He did not know denied that the Defendant bank colluded with fraudsters to effect the 16 JAMES MOLO or where he was working, but he said that he saw his payment In question. Rather, the bank acted prudently In the name In the pay In slip In the archives and interviewed the teller (83 circumstances: K). It was also his evidence that the MICR process basically reads and recognizes the characterization of the Ink used to print the . In re - examination, OWJ said that microfilm was a separate cheque numbers and that the Defendant also uses the same method. unit In the bank, dealing with archiving. It Is Just a back up system If for some reason the figures cannot be printed, they

are punched and not mandatory process. As a collecting bank, all that STANDARD by a MICR model repair. CHARTERED BANK was concerned with, was to ensure that the Instruments presented to It were genuinely drawn and credited to the .He said further that according to the Dar es Salaam clearance customs account. In this case, their duty did not go beyond the rules of the receiving bank which verifies the genuineness of its incoming MGS International's account. The duty of seeing to the stamps; but according to the Defendant's standard procedures, the genuineness of the cheque was on the drawing bank as owners of Outward Clearance Stamp and the endorsement stamp cannot be the same used simultaneously. Although at the clearance house, there is not much time to check all the details of a cheque, the rules allow that . The next witness was GODFREY SIGALA (DW4), A holder of this account would be done within 4 days. C.P.A; DW4 was employed by the Defendant bank, from 2002 as an internal auditor, and in 2004 he was promoted to the position of Head of Internal Audit and Investigation. In the normal course of business, and the customer was paid the money for good value. In his evidence, which to a large extent was similar to that of DW3, DW4 drew a long check list of steps that the bank had set up in re-examination, DW4 said that as a receiving bank the to prevent and detect fraud, and to comply with Internal controls. Defendant had a duty to ascertain the identity of a depositor, or to know the nature of the transactions entered into by its customers. According to DW4 his investigation showed that on 13/5/2005 Their primary duty is to ensure that the name of the payee is there . their bank received a cheque from SKY OIL in favour of MGS in the amount of and the cheque has been endorsed all of which were complied with sum of over shs.175/= million. It was deposited by one JAMES . . . 19 17 endorsed it. If they did not receive it, they had paid it in good faith in the present case. He said that the MICR process is not used in the normal course of business. to detect the genuineness of a cheque. In further re examination PW2 said as a bank, their main purpose JDDRISA MOHAMED MJAMJKE is the sales and concern ; as with the genuineness of a cheque. This is done by the Managing Director of MGS International (T) Ltd, but before 2006 he was scanning the cheque with ultra violet light. The MICR process is an internal procedure of the Commercial Business Manager. He informed the Court, that an additional method of counterchecking the genuineness or otherwise sometime in January 2005 SKYOIL INVESTMENT LTD deposited of cheques. It is a mandatory process. So if the Defendant had money in their account with STANDARD CHARTERED BANK. They passed the cheque through the Ultra violet light and MICR process, representative of SKYOIL went by the name of DO_NALD and they would have discovered that the cheque had been tampered amount deposited was Tshs.175/ = million. He brought back the pay with. According to the requirements of banking procedures, every bank slip . He produced a copy of the pay in slip as Exh.06 . Issued by bank must keep copies of all the cheques it has processed. In this the Defendant bank. Having been satisfied that the cheque was . case, the Defendant never produced the cheque which they received. Indeed cleared, they opened an account for SKYOIL after obtaining . for MGS payment it was a prudent practice to keep copies either by such information as his TIN certificate. A receipt was issued to photocopies or microfilms of all inward and outward cheques. SKYOIL It was then that they proceeded to supply on worth the value of money

deposited. He finally said that this was not the first and with that, the defence closed its case. This was followed by a transaction with SKYOIL. In the past they had had a transaction by the final submissions of the learned Counsel which was done in worth 214/= million but this account was closed for being idle. Mr. Duncan, learned Counsel for the bank, neither had he seen the cheque in question. He said Defendant, submitted that although PW3 and PW4 identified Exh. P1 although he did not know where SKYOIL's offices were, he knew that 20% the evidence as to the drawing of the cheque was not clear. On the day they operate in Mbeya. He said DONALD did not produce any other hand, Mr. Lutema, learned Counsel for the Plaintiff, submitted identification papers or reveal his position in SKYOIL, although that all the Plaintiff's witnesses testified to the effect that the cheque ordinarily they would demand those particulars from their customers. was drawn in favour of the Commissioner for Customs. Therefore in He said that after this incident, all the details were given over to the his view, the answer to the first issue should be in the affirmative. Since he did not follow up with TRA he could not tell whether the TIN certificate for SKYOIL was genuine. The first issue relates to the identification of the cheque. The evidence of PW2, MR. NELI. A SHAHWARI RAO, Exh. P1, P2, and OS shown a letter dated 16/5/2006 from the Registrar of Companies in relation to this issue. According to PW2, a cheque has companies, DWS said that he knew that MGS International (T) Ltd is a three identification numbers. a real company, duly registered and operating in Tanzania, and is reportedly one of the largest tax payers in the country. He went "The first number from the left is cheque No. - 81S213. Next further and named some of its directors. number is the bank code given by the bank of Tanzania. He was then recalled for further cross examination. He said the bank code for Exim bank is 67130107. This code number also emphasized that they are demanding the money back because it appears in Exh. P2, Item No. 18. The third identification is the cheque paid to STANDARD CHARTERED was not that of their account number of the customer which is also shown in Exh. P2 and customer. Asked about the use of the "For and On Behalf" stamp in which also appears in Exh. P1 it is No. 0300346014. On the face of the cheque in question, PW2 said that although its presence is the cheque, it is clear that the cheque is drawn on EXIM BANK, for superfluous, it could sometimes be used in large sums cheques, as shs.175,809,754/- in favour of the Commissioner for Customs and an additional comfort, and a guarantee of its genuineness. In Exh. P1 Exdse, by NATIONAL OIL (T) LTD, the Plaintiff herein, Then, there is both OUTWARD stamp and the 'For and On Behalf' stamp are there the evidence of PWJ, SALIM SADRUDIN HASHAM, who identified the but the most important one is the OUTWARD CLEARANCE stamp. If signed in the cheque as those of a Finance Manager and .. only the "for and on behalf" stamp was sufficient, the cheque would have himself, on behalf of the first Plaintiff, been cleared without further endorsement. The Commissioner of customs stamp shows that they had received the cheque and .. 2J 21

amount payable, and the drawer, the cheque deposited to the aedlt From all this evidence, I am satisfied that cheque No. 81S213 or MGS INTERNATIONAL (T) LTO must be the same one as the one was drawn by the 1st Plaintiff on the 2nd Plaintiff, tn f""""!r of the drawn In favour or the Commissioner for eustoms. COmmJssloner for Customs and Excise, In the sum of shs.17S,809,754/=. The first Issue Is therefore answered In the ·My answer to ihls Issue cannot be different from those In the affirmative. first two Issues. · All the evidence, .Exh.PI, P2, PS points to the fact · that the partles were toying with the same cheque number and .'The second Issue, Is whO ,:eceiYect the Pfoceeds of the· therefore, with the same proceeds that were eventually credited In ~ M r . Duncan has submitted that the answer to that Issue . the aa:ount of MGS InternatiOnal. Whether or not SKY -OIL remains a puzzle In _view of the numerous disaepancles In :the INTESTMENT LTO exlsts, may be .relevan~ but I think the most evidence -on record. He submitted. that that mystery can only be · · auclal part of the evldenoe Is that. of PW2 who testified that EXIM · explained by the Plaintiffs, On the other hand; Mr.· Lutema, BANK had no account with SKY OIL So SKY OIL could not have submitted that from the evidence, It Is obvious that It was MGS drawn a cheque on EXIM. With greatest respect therefore, _I think INTERNATIONAL (T) LIMITED, who received the proceeds of the the answer to the third Issue must be In the affirmative. cheque. The fourth tssue ls whether the Defendant endorsed the I entirely agree with Mr. Lutema learned Counsel that the cheau~ aavable to the Commissioner" for Customs _and recipient of the. proceeds or cheque No. 815213 Is MGS ~ M r . ·Lutema, Counsel for the Plaintiffs began by first INTERNATIONAL (T) LTO. This Is because, ·first, I have·already_ suggesting that the Issue .be amended to read"whether the found In the first Issue that this cheque was cira;,, by the 1st Plaintiff Defendant namomt for deifilIDCI! the dleove oavable ta the on the 2nd Plaintiff In favour of the Commissioner for aistoms & Camm/ulonec for CuBPoll and Exdte· because in his view, the Excise for the sum of Tshs.175,809,784/=. This was the same duty of the bank Is not to endorse but to see that a cheque. Is cheque which was processed by the Defendant bank for clearance PIOPOrl\'. endorsed by the i:ustomer. It was then his view that the (Exh.P2) and It was the same cheque which was deposited with the stamping of the genuine cheque must have been done by or Defendant bank on 13/5/2005 per Exh.DS In favour of MGS facilitated by officials from the Defendant bank, notwithstanding the INTERNATIONAL (T) Ltd. And according to DW3 and DW4, this 22 " denial of the stamps appearing In Exh.PI by DW3 and OW4, as they amount was aedited In the ac:coun~ of. their customer, MGS · did not witness the process of stamping. Therefore, to him the INTERNATIONAL (T) LTD. Secondly, Mr. Duncan has tried to point answer to this Issue should be In the affirmative. out several Inconslstendes, but In my view, they're not materlal. It Is my considered opinion that the most audal piece or evidence· Is Mr. Duncan, on the other hand, submitted that the cheque that Of DW2, SAIDI MWAMT\JYA, who testified that the receipt collected by, tlie Defendant for MGS International (T) Ltd was the one (Exh.D3) brought back by PW4 Is not genuine. I' believe DW2 as a. drawn by SKY OIL INVESTMENT LTD and not the cheque drawn by witness or truth. The setlal number In the said receipt was that of the 1st Plalntlff In favour or the Commissioner for Customs. The rate Exh.04 Issued on 27/6/2005 for shs.14,000/=. DW2 further of the cheque (Exh.PI) Is unknown.

According to the learned established that that cheque never reached the Customs office: Counsel; witnesses from the Defendant disowned the endorsements at the back of Exh.PI, and It also materially differs from the Taking the totality of all the evidence on record, I am positive Information contained in Exh.DS. Similarly the stamps for outward that the proceeds of that cheque were received by MGS International clearance and that of "for and On behalf appearing in Exh.PI, (T) Ltd. The second Issue is thus answered. denoted different Instructions, and that was another anomaly, as the two stamps cannot be applied simultaneously. Besides, the stamps. The third issue is whether the account of MGS appearing on the cheque are different from those of the Defendant International Tanzania Limited was credited with the bank in terms of size. Therefore, according to the learned Counsel proceeds of the cheque? Mr. Duncan, learned counsel for the Defendant, submitted that the customer's account was credited with favour of the Commissioner for Customs and Excise (Exh.PI) was not the proceeds of the cheque drawn by SKY OIL INVESTMENTS endorsed by the Defendant. The answer to those Issues should be LIMITED. He relied on the evidence of DW3, DW4 and DWS together therefore be in the negative. With Exh.D4, D6. Mr. Duncan also referred to the articles marked for Identification as part of his submission. With respect. I think I agree with Mr. Lutema, learned Counsel that the fourth Issue documents marked for Identification had no evidential value and I was as presently worded is misleading. As is clear from the submissions not be swayed by them. Mr. Lutema, learned Counsel for the Plaintiff of both Counsel, at stake here, is whether the Defendant stamped submitted that in view of the similarity of the cheque number, the 27 in the event and for the foregoing reasons, I will answer the cheque in question for clearance. As both Counsel have the fourth Issue in the affirmative. substantively argued the Issue, in its amended form, I will also endorse the amendment to the fourth Issue, to read: whether the fourth Issue is whether the cheque by SKY OIL Defendant stamped for clearance the cheque payable to the INVESTMENT UMUED, exists? Mr. Duncan, learned Counsel, Commissioner for Customs, and Excise? _; suggested that the issue be also amended to read, "whether the cheque drawn by SKY OIL INVESTMENTS LTD OW" existed. I must admit that this was a rather complex Issue and has attracted the attention of the court. He then went on to submit that exercised my mind considerably. Eventually however I have to the particular cheque existed on the strength of the evidence of deduce the question on the basis of onus. DWJ, DW4 and exhibits DS and D6, and that after clearance with the Bank of Tanzania, the cheque was forwarded to the 2nd Plaintiff. It is the Plaintiffs' contention that the Defendant received and therefore it is the 2nd Plaintiff who knows where that cheque is, processed the payment in Exh.PI. The Defendant contends what it is because it is the paying bank which remains in possession of cleared received is not Exh.PI, but another one altogether. To prove this cheques. Mr. Lutema learned Counsel for the Plaintiffs submitted they produced and sought to rely on Exh.DS. However Exh.DS that since the 2nd Plaintiff did not have a customer by that name, reveals that the cheque deposited is No. 1513, for the amount of and has never issued a cheque to it, and since the particular cheque shs.175,809,754. Exh.P2 shows that this cheque bears the same was not depicted by the

Defendant either by photocopying, bank code and the account number of the customer. According to microfilming or other process, which was a prudent banking practice, the cheque deposit (Exh.DSJ the Defendant bank stamped on the. and since the burden of proof fell on the Defendant to prove that the face of the cheque (Exh.P1) with a teller's stamp (Teller 83R) on. 13 said cheque existed and has failed to prove so, the answer to this May, 2005, whereas Exh.DS carries the stamp of Teller NO. 83K. Issue must be that the said cheque never existed. In my view the fact that a different cheque, with the same In my view, whether the cheque drawn by SKY OIL "exists" or number was deposited With the Defendant bank is peculiarly within "existed" is of little consequence, to the resolution of the present issue. Its knowledge. Therefore in terms of s. 11s of the Evidence Act Issue, because it is just a matter of tautology. The amendment is not 1967, the burden of proof shifted to it to prove that fact. In this case therefore necessary for determining the matter in controversy case, the Defendant did not produce a copy of the cheque deposited between the parties. The real issue is whether SKY OIL by SKY OIL INTERNATIONAL (T) LTD. The Defendant does not INTERNATIONAL (T) LTD did really issue the cheque in controversy? dispute that the 1st Plaintiff drew the cheque (Exh.P1) which in my view was processed by normal clearance per Exh.P2 by the Mr. Duncan, learned Counsel for the Defendant has again Defendant. Yet, the Defendant has not satisfactorily explained away strenuously argued that on the strength of the evidence of DW3 and the coincidence in the similarity in the number of cheques in Exh.P1, DW4, and Exh.DS and D6, the cheque did exist. P2 and DS, notwithstanding some discrepancies in the stamps that DWJ and DW4 had tried to explain, I agree with Mr. Lutema that in my view, the present issue, is similar in content with the other evidence of those witnesses on those aspects was not primary issues above. I don't think therefore it can attract a different evidence. The testimony of the clearance Manager and the tellers answer would have gone a long way. On the basis of onus, I think the Plaintiffs have discharged their burden of proof and shown that most of it is not disputed that SKY OIL is not one of the customers of probably the Defendant must have dealt with the same cheque; while EXIM BANK. It could not therefore have obtained a cheque book that the Defendant has failed to prove that there is, as any other cheque from the 2nd Plaintiff. It is also not controverted that cheque No. other than Exh.P1, which was deposited through Exh.DS and which 815213 is a leaf from EXIM'S cheque book issued to NATIONAL OIL they dealt in favour of their customer, MGS International (T) Ltd. (T) LTD. There is also no dispute that this cheque with the same And since they were the last to handle the cheque deposited by SKY number was deposited by SKY OIL with the Defendant bank and OIL, they were in a better position to know where it is, but have failed at the Clearance House (Exh.P2). In my answer to the other failed to produce even a copy of the cheque. I would not agree with issues above, I have held that SKY OIL deposited the same cheque DWJ and DW4 that it was not necessary for them to keep copies of. through Exh.DS. With respect therefore, none of the exhibits referred their documentary transactions, but I endorse the opinion of PW2 to be by Mr. Duncan shows the existence of a separate cheque. that it was a matter of banking practice and prudence to do so. The Defendant's failure to keep a copy of the cheque deposited by SKY OIL or to produce it if they have, it works adversely against them.)I 29 The

burden of proof of the existence of the other cheque. On the other hand, Mr. Lutema, learned counsel for the Defendant, I have already held above that the Defendant has failed to discharge that burden. The learned Counsel discussed at length on the theory of the existence of the fraud of "chequesubstitution" between the 2nd Plaintiff and the Defendant. There is no doubt that the 2nd Plaintiff ought to have the true and the forged cheque. I think the theory is attractive, but remained with the paying cheque, but I think it is dear from the with respect. In the absence of the alleged "forged cheque" on the testimony of F'WZ, that as far as the 2nd Plaintiff was concerned they basket of evidence which is before me, I cannot make any further paid through Exh.P1 and kept it. They could not be expected to comment on this aspect. I would consign this theory to where it is in possession of a cheque drawn on it by SKY OIL, because it was not belongs, speculation and conjecture. What is before me is cheque their customer. It is not therefore fair on the part of Mr. Duncan Exh.P1, a cheque deposited Exh.D5, and Exh.P2, the cheque lists to learned counsel for the Defendant to submit that the 2nd Plaintiff which I intend to confine my analysis. ought to know the fate of the cheque. It was Mr. Lutema's submission that the Defendant facilitated the bottom line is that it is the Defendant who alleges the conversion of Exh.P1 in the clearance process. He said that existence of the cheque drawn by SKY OIL, which by a share dearance would not have been possible if the Defendant had passed coincidence is of the same amount and same number. It is the cheque through the MICR process, especially so, as the therefore their duty to prove its existence. I have found that the movement between the bank and the dearance house was too Defendant has failed to discharge that burden. Therefore, it must be seen. The learned counsel further submitted that the cheque was concluded that the cheque drawn by SKY OIL did not and does not paid fraudulently with the collusion of the Defendant bank staff and exist. MGS International (T) Ltd, who, as a corporate customer, never endorsed at the back of the cheque, but which however, was the sixth issue is whether the Defendant wrongfully nevertheless paid. Mr. Lutema wondered why an official of SKY OIL converted the proceeds of the cheque drawn in favour of the would take the trouble to take the cheque for deposit and then take Commissioner for Customs and Excise. Mr. Duncan, teamed the pay slip to MGS. He said this was nothing but a collusion counsel, submitted that by collecting the cheque drawn on behalf of 30 " between the Defendant bank, SKY OIL and MGS, to wrongfully its corporate customer, MGS International, the Defendant did not convert the funds, as demonstrated by other similar instances of deal with the cheque in a manner inconsistent with the right of fraudulent conversion involving MGS. And the Defendant bank persons entitled to them. According to the Defendant the person knows of this collusion, that is why it has never taken any step entitled to the cheque is MGS International (T) Ltd and no other.. against MGS, nor taken serious trouble to establish whether MGS was besides, none of the Plaintiffs had any actual or immediate right of a bona fide payee of the cheque. In support of this, Mr. Lutema also possession of the cheque, so as to entitle them to bring the present referred to several documents marked for identification, which I have action. Mr. Duncan relied on the principle at common law enunciated already ruled that they had little evidential value. Mr. Lutema further in COMMERCIAL BANKING

COMPANY OF SVDNEY LTD VS said that the existence of another case (Commercial. Case No .. MAFI.N [1960] All ER. 482, which he said had a very persuasive . 120/2005) In which MGS are also involved, is clear evidence that MGS . authority over this Court. on the other hand If Exh.Pl had reached . had a role to play In the said fraud, and that most likely SKY OIL was the Commissioner for Customs & Excise, It would eventually be its action, but by using the same Defendant bank, It is obvious that banked with the TRA account kept by the Bank of Tanzania, and It they are partners In the business of wrongful conversion of funds. It would never have come Into possession of the Defendant. In any was therefore his view that the Defendant wrongfully converted the case, Mr. Duncan, proceeded, the ownership of that cheque, would proceeds of the cheque drawn In favour of the Commissioner for lie In the Commissioner for Customs and Excise the payee therein, customs and Excise. So the answer to the 6th Issue should be In the and not any of the Plaintiffs therein. For this position of the law, Mr. affirmative. Duncan referred the Court to PENMOUNI ESTATES LTD vs. NAJJONAL . PROYINQAL ~BANK, STANLEY MOSS, AND In paragraph 15 of their plain- the Plaintiffs contend that the PITCHER (JHIRD PABIY} [THE LAW TIMES. vol, 173. of 24 Defendant wrongfully converted the proceeds of the cheque, issued November, 1945) as quoted In INTERCOM SERVICES LTD AND and payable to the Commissioner for Customs and Excise, thereby OTHERS VS. STANDARD CHARTERED BANK LTD [2002] 2 EA. depriving the Plaintiffs the amount of shs.175,809, 754/= causing loss 391 (HCK) .. On the other principle, the learned Counsel submitted and damage to the said Plaintiffs. In Its defence, In response to this that the Defendant had no duty In law towards the Plaintiffs. With paragraph, the Defendant denies to have converted those proceeds those, Mr. Duncan, submitted that the Defendant did not wrongfully /or three reasons. First the cheque collected by them was not the or otherwise convert the proceeds of the cheque ..)S 33 anti the customer has no title, or has a defective property of the 1st Plaintiff ~r ~nv party to the suit. Secondly title, to the Instruments, the banker should not incur although the Defendant admits having collected cheque no. 815213 any lawfully to. it is; true owner of the Instrument /by the cheque was drawn by SKY OIL INVESTMENTS and payable to reason of having received payment thereof. MGS INTERNATIONAL (T) LTD. Third the Defendant took and processed the cheque No. 815213 In good faith and for value; ..in INTERCOM SERVICES LTD AND OTHERS VS without notice of any defect or title, and without negligence. STANDARD CHARTERED BANK LTD (Supra) a case cited by Mr. Duncan learned counsel for the Defendant, It was observed per The tort of conversion has been defined to mean an act of Incuriam that: - willful interference without lawful Justification with any chattel In a ' manner inconsistent with the right of another, whereby that other is . "The true owner of a cheque is the person who would be kept deprived of its use and possession. In order to obtain damage,, the out of his money were the proceeds it be paid it the wrong plaintiff must allege and prove that at the time of the Defendant's person. Here the .cheque is not a to,ge,y, the true owner is .act, he had: - the intended payee or indorsee of the cheque or the bearer of it. If the cheque is forged, the true owner is the drawer (a) ownership and possession or the goods, or, thereof. (b) possession of them, or

- (c) an Immediate right to possess them, Again, C8AttSil!li (Supra) also defines what Is "good faith" and "negligence" at p. 286:- but without either ownership or actual possession (KJ. AIYAR - IUDIQAL DICUONARY 13th ed. p. 259). "Good faith ... means honesty In fact, whether or not negligent..... Negllgenre means falling /Jek>w the standarri of BLACK'S LAW DICUONAB'< 8th' ed. pp. 356 - 57, lists down reosona/Jle canr expected of a /Jank. several types of conve.:ston (1) c o n ~ conve;.lon, (11) cohverslon by detention, (111) conversion by estoppel, (Iv) conversion by taking,
- (v) conversion by wrongful delivery, (vi)' conversion by wrongful ,. 34 Although all the above quoted defnltlons and case law (excepting the destruction, (v0) conversion by wrongful dlspostlon, (viii) direct Bliis of Exchange Act) are only of persuasive value, I find them highly conversion, (Ix) fraudulent conversion and (x) Involuntary conversion. relevant In the present case. According to ROSS CRANSTON In his book PRiNCIPLES OF Applying the above principles o.n the facts In the present case, I, BANKING LAW IOXford, 1967) at common law, conve;.lon of the will first premise from my findings on the first five Issues. As seen cheque under which money Is collected and the value of the money above except for the fifth Issue my answers to an the other Issues received under It as a strict liablllty. To mitigate that liability s. 4 of were In the afflrmatlve. Which means that I satisfied that although the English Oleques Act 19S7, was enacted to give banks some form the Defendant claims to have processed a cheque deposited by or protection against the true owner of the cheques when they collect SKYOIL INVESTMENTS LTD the number or the cheque, the amount . for customers who have no or defective title. Under that law, the and the bank on which It Is drawn Is so similar to the one drawn by banks must show that they acted In good faith and without the 1st Plaintiff, that In the absence or a copy or the cheque said to negligence. have been deposited by SKYOJL and In the light of my finding on tiie flfth Issue above, It Is Irreslstble, In my view, that It must be found Locally, s, 85 (1) of the Bliis of Exchange Act (Ciip 215 - RE that the Defendant did In fact. process the same cheque. If the 2002) provides: - Defendant received It with different names of the drawer and the payee, those alterations must have been made on the same cheque. "8S (J) Where a /Janker. In good faith and without . Thls.ln.my view; constitutes fraudulent conversion of the cheque and negllgenre proceeds thereof. (a) receives. payment for a customer of an Instrument to which this section applies; or Mr. Duncan,. has strenuously argued that since none of the PlalnUffs owned the cheque In questlon, they could not maintain an (b) having credited a a,stomer's account with the actlon In conversion. Admittedly the definition of "owner" of the amount of.an Instrument ID which this section ~ue In a:mverslon dalms has been pro~ematic. ~owever, I am applies, receives payment thereof for himself. ~rsuaded by the definitions assigned to. that tenn by VISRAM i In 39 l7 and _DW4) and the disappearance or wtthholding of a copy of the INTERCOM SEBYJCES LTD AND OTHERS (Supra) that where a : cheque Itself the existence of bad faith is Implied, and as agents of cheque Is forged, the drawer remains the owner, but where It Is not the Defendant, the absence of good faith on the part of their staff Is forged, the payee becomes the awrier. In the.present case, there Is Imputed on !lie Defendant. no dispute that the 1st Plaintiff drew cheque No. 815213 on the 2nd

Plaintiff^o In favour of the commissioner (or customs and Excise. · Then there is the question of negligence, which is defined to . Unfortunately, on the facts, that cheque never reached the payee. Meanwhile, following the misconduct of the cashier, instead, as found above, it was fraudulently intercepted and diverted to the defendant. The standard of care expected of a bank, is through the defendant to pay a different person. It cannot be said explained in minute detail by DW4 GODFREY SIGAIA He gave 15 to have belonged to the Commissioner for Customs & Excise. On the steps which the bank would take in clearing cheques. The check list contrary, I think the cheque and its proceeds still belonged to the plaintiff. It appears to be very impressive and relevant to the witness, Plaintiffs, as persons immediately entitled to the reversal of the foolproof. But on all these checks and balances, the processing of the possession thereof. I am thus satisfied that the plaintiffs were the cheque in the MICR system is common to both the 2nd Plaintiff and the owners of the cheque and are entitled to maintain an action in the defendant as can be gathered from the testimony of PW2. conversion. It is also common ground that at that stage the MICR process. The next question is whether the defendant is entitled to capture all the magnetic ink details of the account number of the protection afforded under s. 85 or the Bills of Exchange Act? drawer, the cheque number and the amount, from which an (Supra), As demonstrated above, to qualify for the statutory journal is extracted for cheques drawn on each bank for clearance protection, the defendant must show that they acted in good faith purposes. It is altered this liability that the Clearance Manager and without negligence. Officer would assess check, and the Manager initials the deposit slip to confirm the accuracy or the details contained in the instrument. Interpreting s. 4 of the English Cheques Act 1957, which is in another requirement is for the teller to prepare a list or an deposit slip material with s. 85 of the Bills of Exchange Act of Tanzania, it slips of SO cheques (instruments) which he then hands them over to was held in *DfACKWEU vs BARCLAYS BANK plc* [1986] 1 All E.R. 676, that the onus of proof under that section is on the Service Delivery Manager who on receipt, sends off the summary collecting bank to establish that it had received payment of the sheet to the Clearance Manager who signs in the summary sheet. cheque in good faith and without negligence. The standard by which negligence on the part of the bank was to be determined was in the present case, although Exh.DS was not only influenced by whether the bank had taken reasonable care to satisfy itself that its persons who were not called to testify but also the summary sheet of customer's title to the cheque was not defective. the SO cheques received along with Exh.DS, was not produced in court nor its absence explained. The production of this sheet would "Good faith" is a question of fact and would depend on whether the court was satisfied that the cheque deposited via Exh.05, circumstances of each case. I have already held above that from. had the same details as those shown in Exh.P2 or not. If the evidence on record, a cheque has 3 identifying numbers, the summary sheet was prepared and the cheques passed through the cheque number, the paying bank code number, and the customer's MICR system, and really the defendant received a different cheque account number. All those numbers are clearly printed in the form SKYDII, the fraud would not have gone undetected. Here, the electronic journal (Exh.P2). The defendant does not deny, that this testimony of the Manager who

supervised the MICR process was the prevailing bank practice, and did not produce any other evidence. In the absence of such evidence the Court can only infer that exhibit to contradict the contents of Exh.P2. Exh.P2 identifies the cheque at all there was any deposited by SKYDIL did not pass cheque, Exh.P1 as the one drawn by the 1st Plaintiff (by its account through the MICR system. That constitutes negligence on the part of number) on the 2nd Plaintiff (by its bank code), and then the cheque the Defendant This is because none of DW3 or DW4 who testified number. Now if the Defendant had acted in good faith, it ought, in for the defence were themselves physically involved in the MICR my opinion, to have not only produced a copy of the cheque drawn process of this particular instrument by SKY Oil, but also produced another electronic journal to contradict Exh.P2. Exh.DS, which in fact refers to the same cheque. Then, one has to examine closely how the cheque was number, did not disclose the other details which went to disclose the cheque presented to the Defendant from the evidence on record, and from identity of the cheque deposited by SKYDIL. If anything, it only adds Exh.05 the cheque was deposited by, not a staff of the MGS to the suspicion that it must have been the same cheque. In the International (TJ) Ltd, but according to DWS by that or SKY OIL absence of the witnesses from among the Defendant's staff who 'There was no evidence that this cheque was first received by MGS. directly dealt with that particular cheque' (which did not include DW3. " negligence. If they kept a copy and later destroyed it, or made it International (T) Ltd which would have been indicated by its disappearance "this was evidence of want of good faith. endorsement at the back of the cheque, which according to the evidence was not so endorsed; and which DW4 admitted was not in the even, I would answer the 6th issue in the affirmative. normal for corporate customers. But without much ado the Defendant 'processed' the cheque. Although the absence of the The seventh issue is whether the 1st Plaintiff's endorsement would not in itself constitute negligence under s. 85 (3) 'drawn and signed' cheque No, 815213 neollacitly? of the Bills of Exchange Act, these circumstances in which the cheque had been presented for collection were in my view so unusual that the plea of negligence on the part of the Plaintiff is averred by of the ordinary course of business that the Defendant bank ought to the Defendant --, in paragraph 15 of the plaint, complete with the have been put on inquiry and so ought to have made further inquiries particulars, which in essence, is that the 1st Plaintiff or their of the customer and the Plaintiff, its failure to do so amounted to employees or agents failed to deliver the cheque through the negligence. CITIBANK, an agent of the Commissioner for Customs & Excise at the Long Room. -On the other hand, on the evidence on record, the Court is forced to believe that what passed through the process was Exh.P1, the Despite the phraseology of the pleading by the Defendant, the cheque drawn by the 1st Plaintiff because its details appear in issue as framed and the submissions of the Counsel, the question Exh.P2, the electronic journal no doubt. produced by the Defendant. was referred to whether the 1st Plaintiff bandied its cheque if the Defendant processed a different cheque, much as it may not obviously? Besides, suggestive, as the pleading might appear, have been necessary, as DW3 and DW4 claimed, I am of the firm there was no prayer from the Defendant for a finding of contributory negligence and in the light of the testimony of DW2 that it was prudent for negligence, -or what the plea was intended to achieve, but I will

the Defendant to have kept a copy- of the cheque for future . assume ihat this was the Intention of the Defendant as Is dear at the reference, If not physically, then electronically by microfilming. Even ·conclusion of his submission. If the Defendant did not feel the need to keep a copy or the particular (SKYOIL) cheque, It would at least, have led evidence that It was forwarded to the paying bank as she dalms. There Is no evidence. . " Be that as It may, Mr. Duncan submitted In amplification of the On the contrary, what was forwarded to the paying bank In this plea Iha, there was gross negligence on the part of the 1st Plaintiff particular transaction was an Instrument No. 815213 per Exh.P2. (through PW4) In handling their cheque. Apart from dellverlng the This as found above In my Judgment was a cheque (Exh.PI) drawn cheque without followng the laid down procedures It was the by the 1st PlalnUff, and no\ by SKYOIL .evidence :of PW1, that PW4 had been charged .;;,th the offences of forgery and uttetng false receipt No. 228568 (Exh.03) which SO, failure to produce, a copy· cir ·any-record of the cheque evidence was supported by that of PW2. The learned Counsel further deposited by SKYOIL, or the ·schedule of cheques apprwed _by the submitted by borrowing the thesis from OW4 as to how the fraud Oearance Manager o~e~ than Exh.P2, and th.e non production of _any .- could have been committed. So, It was the 1st PlalnUff (and Its staff) official of the oerendant Involved _In th_e. MIO\ __ pr0!>!SSlng · of the_ : who were to blame for facilltatng the fraud. Furthermore It took the alleged cheque In question as .witnesses and. the clrcu·mslances In 'Plaintiff almost three months_ to dlscover the fraud, which would not which the cheque was received and processed, very strongly have been so, had It exercised reasonable sklll and care. For thlS, suggests that, If there was any such cheque the Defendant dealt with Mr. Duncan concluded, the Plaintiffs are not entiUed to dalm because It negligently, and lost It or deliberately withheld Its production. In they ought not to be allowed to enjoy the fruits of their own my view, It Is Important for banks to keep copies of such negligence and wrongdoing. transactions. That thlS IS prudent for all the banlis to observe, Is lmpned In the policy (as testified upon by OW3 and DW4) _ror On the oier hand, Mr. Lutema, learned_ Counsel for the collecting banks to w_alt for 4 days so as to clear any doubts from the Plalnttff submitted that the 1st PlalnUff did not handle the cheque paying banks, because In the absence of Its owri records, It would be negngently, but with ordinary care and In the ordinary course of Impractical for the collecting banks to meaningfully deal with matterS .-business. It was the_breac:11 of trust by some officerS of the Tanzania that could arlse from the cheques they presented. Now, OW3 and Revenue Authority that led to the diversion of the cheque Into other OW4 have testified ·that_ they waited ror the 4 days before crediting _ hands. But In the altematlve, If there was any negligence, no loss · their customer's aa:nunt. _Ane, but they tlld not tell us, what they did would have been ocxaslo!K!d If the Defendant bank had acted with a copy of the cheque, (If they _ever kept one). My ~ew· I~ that If diligently, honestly and prudently. He then recaplWlated his they did not keep a copy of the SKY OIL cheque, It was sheer arguments as to why he thought they did not do .so diligently. And · " the Defendant was on the loo!< Olli, honest and prudent. In any so, condudcd the learned Counsel, the negligence or lndlsaeUOn on case, It was held In ourNN ys LEATHERM (1901] AC. 497, (1900 - the part of the Plalntlff was not the root cause of the loss.

- 3) All ER. 1 at p. 17, that at common law contributory negligence of a Plaintiff is no defence in the case of an intentional tort. From my On my part, I know that PW4 is now facing a criminal charge at findings above, the present case was no less than an intentional tort Klsutu Resident Magistrates' Court. It may therefore be ~ - by the Defendant, to comment on the credibility of this witness at this stage. But given that the cheque in question (ExhPI) was written on 18/4/2005, and for the above reasons, I would answer the 7th issue in the taken to TRA by PW4, the similarities and differences between the negative. two receipts. (Exh.D3 and 04) the testimony of DW2, together with . . . Exhibits P3, DI, and DZ, one cannot rule out 'the possibility of a The last issue is to what relief does the plaintiff entitle? conspiracy between the 1st Plaintiff's staff, TRA officials and some third parties, to defraud. However, as said above since there is a The Plaintiffs' claim against the Defendant is for the sum of pending criminal case on this matter and Since not all the material shs.175,809,754/- being an amount in cheque No. 815213 drawn on evidence is before me, I cannot say more than this. After all, neither 18/4/2005 in favour of the commissioner for Customs and Excise in PW4 SKYOIL officials or TRA officials are on trial here. discharge of some tax obligations, and which cheque and proceeds were taken wrongfully by the Defendant. However, I agree with the maxim of law quoted by Mr. Duncan that "tametsi non oportet suum in rebus habere, ut dicitur" Having carefully considered all the evidence on record, I have which means that no man can take advantage of his own wrong: *fo\nd* and hereby hold that the Plaintiffs have proved their case to But this maxim is sometimes qualified by another equally Important the requisite standard. Without much ado, I hereby enter Judgment maxim "Quod ab initio non valet la trahitur in terminum non pro Plaintiff and decree as follows: which means that which was originally void, does not by lapse of time become valid. So fraud renders any transaction
- (a) The Defendant is to refund the said Tshs.175,809,754/- voidable at the election of the party defrauded. Likewise the maxim to the Plaintiffs. does not apply where the right of a third party is to be affected . . (See BROOM'S LEGAL MAXIMS 10th ed. at pp. 113, 191, and 199). .
- (b) The Plaintiffs are awarded Tshs. 10,000,000/- as general In the present case, I have already found that fraud was/must have damages for conversion. been committed in relation to the 1st Plaintiff's cheque. So the maxim advocated by Mr. Duncan would not in my view, apply.
- (c) The sum of shs.175,809,754/= is to attract Interest of 21% per annum from 16th May 2005 to the date of Furthermore, as Mr. Lutema, has submitted even if there was

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negligence or conspiracy to defraud between the Plaintiff's staff and other persons It is not the proximate cause of the loss which is the

- (d) The decretal sum is to attract interest at the Court rate of subject matter of the present suit. As was held in JHACKWELL'S 7% from the date of judgment to that of payment in full. case (supra) where a defence of illegality of the Plaintiff's act is relied on, the Court has to look at the quality of the illegality and the
- (e) The Plaintiffs shall have their costs. proximity of the illegal conduct to the claim maintained by the Plaintiff and determine whether there had been an illegality of which Order accordingly. the Court should take notice of and whether by offering the Plaintiff SGD the relief sought it would not be contrary to public policy. In my view, in the present context, if there was any illegality on the part of JUDGE the Plaintiff, it was not proximate to the claim for the reasons set out 30/10/2007 above. Besides, I am of the further view, that in the circumstances, it would not be contrary to public policy to afford the reliefs sought by the Plaintiffs. As my analysis above has attempted to show the immediate cause of the loss of shs.175,809,754/- through cheque No. 815213, was the want of good faith, and negligence that led to the fraudulent conversion of the proceeds of the cheque by the Defendant. I find and hold that none of the commissions or omissions done by the 1st Plaintiff could have led to this situation, if.

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