

**Independent Commission Against Corruption v/s State Bank of Mauritius
Ltd**

2022 INT 67

CN: 111/2015 (FCD CN 121/2020)

IN THE INTERMEDIATE COURT OF MAURITIUS [FINANCIAL CRIMES

DIVISION]

In the matter of: -

Independent Commission Against Corruption

v/s

State Bank of Mauritius Ltd

JUDGMENT

Accused stands charged with the offence of wilfully, unlawfully and criminally accepting a payment in cash in excess of Rs 350,000 in breach of sections 5 (1) and 8 of the Financial Intelligence and Anti Money Laundering Act 2002 [FIAMLA]. Accused representative, Mr Mahmad Nawaz Khadaroo was assisted by counsel and pleaded not guilty to the charge

Mr Bussun produced a certified copy of the case bearing CN 237/2014. He was not cross-examined.

Statement of Accused company was read and produced in court by Mr Mahesh Kumar Purgaus. He stated that Mr Khadaroo was duly authorized by the bank in his capacity as manager to represent the bank and produced a letter to that effect. A cheque in the sum of 1 million rupees dated the 17th of July 2006 was produced in court. A deposit voucher was also produced. He further produced a statement of account for account 034097819. In cross-examination, he agreed that he recorded the statement of Mrs Chummun before recording Accused's version. He agreed that he did not record any statement from Barclays Bank Ltd in connection to the enquiry. He agreed that Accused representative gave him information concerning the clearing process of the cheque. Accused

representative did not agree that the transaction was a cash transaction. He agreed that Mrs Chummun also addressed the clearing process of cheque. He stated that the cheque was processed as a normal cheque since there was an internal procedure regarding the clearance of a cheque. He agreed that the cheque was a cash cheque, that it was not crossed and it was mentioned "paid cash" on the cheque. He stated that the persons who have made payment and accepted payment above the prescribed limit have been fined. He agreed that the cheque has been paid by Barclays bank Ltd and stated that the payment was accepted by the Accused bank before the cheque was cleared by Barclays bank. The payment was made by Barclays bank on the 18th of July 2006. He agreed that the Accused bank is not the beneficiary of the money. He stated that the transaction occurred on the day Mr Win Young Chin Tam Sen deposited the cash cheque over the counter. He then stated that the deposit was made on the 17th. He agreed that payment needed to come from Barclays bank. He finally stated that the offence is deemed to have been committed at the time cheque was deposited.

Mr N Treebohun identified a few documents including a Barclays cheque, a cheque deposit voucher and a bank statement. He stated that Mr Win Young Chin Tam Sen was working as mechanic at the time his bank account was opened. In cross-examination, he stated that the cheque is a Barclays cheque which was remitted to an account holder of SBM. It had to go through clearance and could not be encashed since the drawer's account is not held by SBM. The cheque had to be processed through the clearing channel. It had to be transferred to the drawee bank through the Bank of Mauritius. It is only when the cheque is cleared that the money can be credited into the account holder of SBM. He added that the handing over of a cash cheque at the bank to be deposited into Mr Win Young Chin Tam Sen's bank account is not tantamount to cash since it had to go through clearance process and it is an instrument of transfer until it is cleared. In re-examination, he agreed that a cheque which is neither crossed nor made payable to order amounts to cash.

The main features of Mr Win Young Chin Tam Sen's testimony are that in 2014, he was working as mechanic. He identified his signature on the cheque deposit voucher but was unable to identify the cheque. He however agreed that Mr Hassen Taher had given him a cheque in the sum of 1 million rupees before. He later agreed that the cheque was given to him by Mr Hassen Taher. He stated that the purpose of the cheque was for horse racing

betting. He added that he was requested by Mr Taher to cash the cheque. At the counter, he was told he could not cash same and that it had to be deposited. He denied that the money was an advanced payment for two cars. He agreed that he obtained the money from the bank afterwards. In cross-examination, he stated that he pleaded guilty to a charge of accepting payment in excess of Rs 350,000 and that it was a SBM cheque which had been presented to the bank. He denied that he was restaurant owner at the time. He repeated that it was not a Barclays cheque which he had presented. In re-examination, he stated he received one cheque in the sum of 1 million rupees from Mr Hassen Taher.

The gist of Mrs Ramjug-Chummun's testimony is that the procedure for a cheque deposit above Rs 100,000 is to enquire about the source of funds and check the authorized specimen signature. It is the procedure to inform the supervisor. It was Mr Win Young Chin Tam Sen who made the deposit of a cheque in the sum of 1 million rupees. The cheque was not crossed and it was a cash cheque. She added that it could not be encashed directly at the counter given the amount. She processed it as a cheque deposit because the person wanted the money to be credited into his account. She maintained that she could not encash it and that that she treated it as a crossed cheque. The purpose of the payment was a deposit for the purchase of two cars. She stated that she inserted the purpose of the payment on the cheque in the light of the information the client has provided her with. In cross-examination, she conceded having mentioned in her statement that the bank treated the cheque as a crossed cheque and hence the person would not have been able to obtain cash until the cheque is cleared. She denied that the bank has committed any offence.

In his unsworn statement, Accused representative who was working as manager in the branch where the alleged offence took place denied that charge. His version is that he is aware the cash cheque in the sum of 1 million rupees was processed at the bank by Mrs Chummun. His defence however is that the cheque was treated as a crossed cheque by the bank and had to go through the process of clearing. He denied that it was tantamount to a cash transaction.

Analysis and findings:

I have carefully considered the whole of the evidence on record.

The elements of the offence under section 5 (1) of the FIAMLA 2002 are (i) the making or accepting of any payment in cash and (ii) that the amount involved is beyond the prescribed limit.

It is not disputed that the sum involved is beyond the prescribed limit. The defence is that the acceptance of the cheque is not tantamount to acceptance of payment in excess of Rs 350,000 because the cheque had to go through a clearance process before the cheque could be encashed.

The question which has to be determined is whether the Accused bank did accept payment in cash within the meaning of section 5 (1) of the FIAMLA 2002 on the date when the cash cheque was deposited at the bank.

It is apposite to refer to section 2 of the FIAMLA 2002 which provides the legal definition of cash.

Cash is defined as

- (a) money in notes or coins whether in Mauritian currency or foreign currency;
- (b) includes any cheque which is neither crossed nor made payable to order whether in Mauritian currency or foreign currency

It is clear that the cheque which was produced in court falls within the purview of section 2 since it was neither crossed nor made payable to order. It was confirmed by Mrs Chummun that the cheque is indeed a cash cheque. Having found that the cheque which was deposited at Accused's bank is tantamount to cash, the next question is whether payment was indeed accepted on the date the said cheque was deposited.

The general rule is that payment by cheque is prima facie regarded as immediate payment subject to the condition that it is honoured upon presentation. When the cheque is so honoured, the date of payment of the debt is the date of giving of the cheque. **Holmes J A Eriksen Motors (Welkom) Ltd v/s Protea Motors & Anor [1973] (3) SA 685.** The fact that the funds had to be cleared or had to go through the clearing house is not of consequence so long as the cheque is honoured. There is no evidence in the present case

that the cheque has been dishonoured. On the contrary, Mr Tam Sen stated that he did eventually obtain the money.

At this juncture, it is appropriate to refer to the case of **ICAC v/s Aboo Saoud Saumtally [2016] SCJ 47** where the Appellate Court laid emphasis on the fact that the legal definition of payment cannot be narrowly construed. The Learned judges went on to observe that *“the legal meaning of the word payment must be determined in the context in which the word is used in section 5 (1) of the Act, which would include the policy and object of the legislation and more particularly the mischief which parliament intended to repress”*. Another pertinent case is that of **Briand G v/s ICAC & Anor** [2021] SCJ 336 where the decision of the Learned Magistrate was being challenged on the ground that she erred and wrongly interpreted the issue as to whether there had been payments in cash by the Appellant which would constitute an offence under section 5 (1) of the FIAMLA. The Appellate Court concluded, after seeking guidance from the definition of the term “deposit” in the Banking Act No 35 of 2004, that a sum of money deposited into the bank amounts to a payment and that when it is being withdrawn from the bank, it is being repaid by the bank.

Bearing in mind that a cheque is an unconditional order to pay and the above legal authorities, I find that the prosecution has proved beyond reasonable doubt that the deposit of the cash cheque is tantamount to payment in cash which Accused bank accepted on the date the cheque was deposited by Mr Win Young Chin Tam Sen.

The next question which arises is whether the transaction is an exempt one.

An “**exempt**” transaction is defined by section 2 of the FIAMLA 2002 as a transaction:

- a. *between the Bank of Mauritius and any other person*
- b. *between a bank and another bank*
- c. *between a bank and a financial institution*
- d. *between a bank and a customer where-*

(i) the customer is, at the time the transaction takes place, an established customer of the bank and (ii) the transaction consists of a deposit into an account maintained by the customer with the bank,

*where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer or
e. between such other persons as may be prescribed*

It is borne in mind that the ambit of section 2 is no longer restricted to lawful business activities and now encompasses lawful activities. In order for the transaction to be an exempt one under section 2 (d) , it is imperative that the transaction does not exceed an amount which is commensurate with the lawful business activities of the customer. Although there is evidence that Mr Win Young Chin Tam Sen was an established customer of the bank at the time to the transaction, it is very doubtful that the amount involved is commensurate with his lawful activities, let alone lawful business activities in view of the fact that he was working as mechanic at the material time as per the evidence. His testimony does not shed any light on how the sum of 1 million rupees is commensurate with his lawful activities. In fact, it is contradictory to the version of Mrs Chummun who gave evidence that the purpose of the cheque payment was a deposit for the purchase of 2 cars.

For the above reasons, I have no difficulty in concluding that the transaction cannot be construed as an exempt one.

The final issue to be dealt with is that of mens rea. Accused representative who was working as the manager at the branch where the alleged offence took place made it clear that he was aware of the cheque deposit in the sum of 1 million rupees and that same had been processed by Mrs Chummun. He however denied that the bank has committed an offence under section 5 of the FIAMLA to the extent that the cheque was treated by the bank as a crossed cheque and had to go through the clearing process. He added that the cashing of the cheque would depend on whether the drawer has money in his account. For the reasons enunciated above, I find that the fact that the cheque had to go through a clearing process cannot be relied upon as a defence. The fact remains that Mrs Chummun was well aware that the cash cheque was well above the prescribed limit but nevertheless wilfully and unlawfully accepted the cash cheque.

I have addressed my mind to the identification theory, attributing to a company the mind and will of senior members and managers, which has been developed to avoid injustice.

I find it apt to refer to the observation of Lord Reid in the case of **Tesco Supermarkets Ltd v/s Natrass** [1972] AC 153; *“it would indeed bring the law into disrepute if every act and state of mind of an individual employee was attributed to a company which was entirely blameless.”* It cannot be said that the company was entirely blameless in the present case. The policy of the bank as per the evidence of Mr Treebohun is to treat a cheque which has to be cleared at another bank as a crossed cheque since the cheque has to go through a clearing process. It is worthy to note that Mr Khadaroo who was at the time working as manager and operating at a senior level at no time reproached Mrs Chummun that she acted contrary to instructions or to the standard policy of the company. It is apparent from his statement that she acted as per the policy of the bank and normal procedures in line with the directing mind and will of the company. There is no evidence that Mr Chummun acted on her own frolic or contrary to instructions when she accepted the cheque deposit. Hence, I find that her act of unlawfully accepting the cash cheque can be attributed to the Accused bank and that the bank acted wilfully and criminally when the cheque was accepted at the counter of the Accused bank.

I have duly considered the submissions of Learned counsel for the Defence that Mr Tam Sen did not in fact identify the cheque as being the one he had remitted to the bank. This argument cannot be countenanced in view of the unshaken testimony of Mrs Chummun and the cheque deposit voucher which was signed by him and produced in court. I also find no merit in the submission of the defence that the enquiring officer has misconstrued the legal purview of section 5 of the FIAMLA and ought to have enquired further and questioned Barclays Bank. The issue regarding clearance and whether this transaction is tantamount to a cash transaction is a matter of law for this court to decide. It was thus not imperative on the enquiring officer to probe further on this score. I am also unable to agree with the submissions of defence Counsel that the intent of the legislator is to exclude banks from the legal provisions of section 5 of the FIAMLA. I find support from the case of **Beezadhur v/s ICAC & Anor** [2013] PRV 83_ where the Board made the following observation which was reproduced in the case of **R. K. N. Ltd v/s Maubank Ltd** [2020] SCJ 227 *“...the offence is committed by both the person who makes payment and the person who accepts. There is no exemption for banks as such in their dealings with their customers. Indeed, the shared responsibility of the bank and its customer for ensuring that a cash transaction is covered by the exemption appears to be an important aspect of the statutory scheme.”* As pointed out in the case of **R. K. N Ltd v/s Maubank Ltd [supra]**,

the bank was entitled to refuse to honour the cheque which exceeded the prescribed limit under section 5 of the FIAMLA.

For all the above reasons, I find that the prosecution has proved its case beyond reasonable doubt. I find Accused guilty as charged.

[Delivered by Nalini Senevrayar-Cunden, Magistrate of Intermediate Court]

[Delivered on the 14th of March 2022]