

**Farm AG International Trading  
(Pty) Ltd v Barclays Bank Plc & Other  
(2001) SLR 125**

Phillippe BOULLE for the plaintiff  
Kieran SHAH for the first defendant  
Ramniklal VALABHJI for the second defendant

**Judgment delivered on 5 November 2001 by:**

**PERERA J:** The plaintiff company, based in South Africa avers that goods to the value of R1,385,128 were supplied to the second defendant company (Bodco Ltd) during the period June 1997 to December 1998. They further aver that the amount was collected by the first defendant, Barclays Bank, on their behalf, and deposited in an interest bearing account for eventual transfer to South Africa in rands. On 27 August 1999 the plaintiff company obtained payment of the whole sum of R1,385,128. On their request, deposited in the client's account of their attorney (Boulle). The instant claim for R65,429.19 is the interest paid to Bodco Ltd while the claim against the bank is allegedly based on unlawful payment to a "third party" namely Bodco Ltd, while that against Bodco Ltd is based on unjust enrichment.

Barclays Bank avers that there was no privity of contract between them and the plaintiff and that the account holder being Bodco, interest was paid to them fully.

Bodco Ltd avers that the plaintiff being a non-resident company in Seychelles and that a condition of sale was the payment in South African rand as specified in the bills of exchange. They further aver that at the time the payment was made in Seychelles rupees on 27 August 1999 the amount due to the plaintiff was R1,249,048.90 according to the exchange rate of 0.8898 rands per rupee on that day. Accordingly a sum of Seychelles R136,079.10 is being counter-claimed as a set-off against the plaintiff's claim for interest payment.

The present dispute is as regards the entitlement of the interest on the deposits made to the bank in Seychelles rupees. Bodco Ltd avers that the plaintiff company on bills of exchange, negotiated through Barclays Bank, these bills were payable within 180 days. The currency of payment was to be in South African rands (exhibit 2D2). There was no stipulation as regards payment of interest.

Admittedly, the plaintiff company was aware that there was a foreign exchange shortage in Seychelles and that hence the importer, Bodco Ltd, was unable to remit payments in South African rands through the bank within the stipulated period due to the exchange shortage of Barclays Bank, a foreign currency on the island of Seychelles. Mr Michel Felix, a man of the plaintiff company testified that since 1996 the Bank had been unable to pay bills of exchange on the due dates. Therefore as the "collecting bank", they collected the bills from the drawee of the bills of exchange into an account entitled "bills paid awaiting exchange". This account was referred to as a "suspense account" which was in

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the name of Bodco Ltd.

According to exhibits 2D2 and P2, Bodco Ltd paid seven bills between the period 12 November 1997 to 23 June 1998 on the dates specified in such bills. I have prepared the following summary from particulars extracted from the documents produced in the case by all parties.

Bills paid awaiting exchange

<u>Date of Deposit</u>	<u>Bank Ref.</u>	<u>S.A.Rands Rate</u>	<u>Exchange Sey. Rs</u>	<u>Equ in Rs. Deposits</u>	<u>Interest Deposit</u>
12.11.97	ABC 105/97	253,725.00	1.054	266,513.00	R 18,210.51
26.12.97	ABC 157/97	171,887.20	1.0679	183,558.00	R 12,014.24
18. 3.98	ABC 244/97	199,505.00	1.0488	209,241.00	R 10,404.72
23. 4.98	ABC 31/98	203,280.00	1.0338	210,151.00	R 8,999.07
19. 5.98	ABC 32/98	208,521.00	1.0291	214,589.00	R 8,119.10
22. 7.98	ABC 283/97	265,136.73	0.8516	225,790.00	R 5,771.56
23. 7.98	ABC 42/98	<b>158,861.00</b>	0.8516	75,286.00	<b>R 1,909.99</b>
				(135,286 less	<b>R65,429.19</b>
	<b>S.A.R. 1,460,915.93</b>			<b>R60,000 paid to Plaintiff)</b>	

(Less SA Rands 57,174.20 equivalent of Seychelles R60,000 paid to a director of the plaintiff company at the rate of 1.0494) = **57,174.20**  
**SA Rands 1,403,741.73**

Mr Felix stated that this system was introduced to assist the rupee equivalent of the foreign currency due on the bill specified, was with the bank and not in the customer's account credited in the name of Bodco Ltd. However, the bank introduced Treasury Bills and earned interest, and consequently Bodco Ltd of the interest so earned. The total amount of interest paid which is the sum in dispute.

rs by ensuring that range, on the date The deposits were those amounts in those amounts in paid a percentage y was R65,429.19,

The agreement of both parties as to payment is evidenced between the bank and the plaintiff company each time a deposit Ltd in Seychelles rupees. The standard format of such communication (exhibit P2) -

the communications, as made by Bodco communication was as follows

The above-mentioned collection has been paid in Seychelles rupees on .....  
 In view of foreign exchange shortage prevailing in Seychelles we are unable to remit the proceeds in foreign currency now.

s rupees on  
 Seychelles we are

As we have several requests outstanding in our pipeline subject to a considerable delay.

remittance is

In as much as we would like to keep you informed of all the developments in the circumstances we are unable to speak of any definite date when payment may be expected. Upon realisation we will revert.

As the currency of the agreement and payment on the bills was to be in a SA rands, the usage of the word "paid" has to be qualified by the undertaking to make payment in foreign currency upon realisation.

In a fax message dated 17 April 1998, the bank informed the plaintiff company that the "waiting time" for remittance at that time was about 8-10 months from the date of payments effected in rupees. Prior to that on 28 March 1998 the plaintiff company in a fax message to Bodco Ltd stated –

Please ensure that payment is made in rupees to the bank on 1.4.98 as we still have to wait another 8 months for forex before bank transfer the funds to us.

This correspondence shows that although the agreed currency was SA rands, the plaintiff company had agreed to accept the rupee equivalent of payment in satisfaction of the debt, but as a means to satisfy the debt in a way that was the only way the bank could ensure that payment would be remitted to them in foreign currency. Section 11(1) of the Bills of Exchange Act (Cap 51) provides that

A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable:

- (a) At a fixed period after date or sight.
- (b) On or at a fixed period after the occurrence of a specified event the time of which is certain to happen, though the time of happening may be uncertain.

Although the bills in the instant case were payable at a fixed date as specified therein, the drawer had agreed that the bills were to be paid when foreign exchange was available. The bank by letter dated September 1999 maintained that "bills paid in local currency awaiting foreign exchange" for remittances to them according to the policy of the bank. The plaintiff was therefore advised that arrangements should be made direct with Bodco Ltd.

The basic dispute as to the ownership, or entitlement of the account interest has to be considered within the relationship of the parties inter se. The plaintiff company was the exporter, the drawer of the bill and the beneficiary thereon. Bodco Ltd was the importer, the drawee of the bill and the debtor thereof. The bank functioned in its capacity as a "collecting bank", and in a banker-customer, relationship with Bodco. The plaintiff company admittedly did not have an account with the bank hence was not a

"customer". As was stated by Lord Davey in *Great Western Railway Co v London and County Banking Co Ltd* [1901] AC 414 at 420-421, "there must be some sort of account, either a deposit or a current account or some similar relation to make a man a customer of a bank". In the same case, when before the Queen's Bench Division, it was held that if a person has no account with a bank and is not about to open an account, the fact that a bank renders some casual service to him will not make him a customer.

In the present case, when Bodco Ltd deposited the rupee equivalents on the dates fixed in the bills and informed the plaintiff company that payments had been made in local currency, the bills were not discharged, as the currency of payment still remained to be remitted. The payment in SA rand was beyond their control. Hence it was only a notice of remitting local currency to facilitate the payment of the currency of agreement when available.

Therefore as far as the first defendant bank was concerned, the banker-customer relationship existed only with Bodco Ltd, who had remitted money into an account in their own name awaiting the remitting of SA rands to the plaintiff. As Lord Cottenham LC stated in the case of *Foley v Hill and others* (1848) 2 HLC28:

the money placed in the custody of a banker is, to all intents and purposes, the money of the banker...He is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of banker in other places.

The bank in the present case had an obligation to pay interest to the account holder. They also had agreed to pay the principal sum to Bodco Ltd if some other arrangement had been made to satisfy the debt in local currency. Any dispute as regards the ownership of the interest in such circumstances had to be settled with the account holder and not with the bank. Hence the plaintiff company has no cause of action against the first defendant bank. Accordingly the case against the first defendant is dismissed with costs.

In the present transaction, between the plaintiff company and Bodco Ltd, the bills did not specify payment of interest on the sums claimed, which was in SA rands, nor was there any agreement as to the payment of interest in Seychelles rupees. They were term bills payable within 180 days from the dates thereon. Mr Boule, counsel for the plaintiff submitted that although no interest was claimed on the bills of exchange, interest is now being claimed on the proceeds of those bills. I have already held that the various deposits made by Bodco, in the "suspense account" in their own name, were payments made to obtain foreign exchange through the system operated by the bank. The obligation of Bodco Ltd to pay in the agreed currency was discharged only when the plaintiff company decided to accept the whole amount in Seychelles rupees which they wanted to be credited to the client's account of their attorney. Till then they were entitled only to the "sum certain" specified in the bill in SA rands. When they decided to

accept the equivalent in Seychelles rupees that position was a had been made not as a discharge of a debt owed to the plain plaintiff company is not entitled to the interest paid by the b second defendant company. Accordingly the case against the : dismissed with costs.

The counterclaim of the second defendant, Bodco Ltd, is k between R1,385,128 paid in full and final settlement of all the 1999 and R1,249,048.90, which is the rupee equivalent of averred to be the actual amount due to the plaintiff compa summary of invoices I have set out earlier in this judgment the SA rands is 1,460,915.93. The difference in the amount in SA r amounts is SA rands 57,174.70. This amount, at the exchange on 19 March 1998 - exhibit 2 D3) is equivalent to R60,000 v dated 16<sup>h</sup> July 1999 in the bundle of correspondence (exhibit I to Pierre Maingard (a director of the plaintiff company) on 19.3 P3a, interest has been calculated on R75,286 (that is, R135,28 1998 less R60,000 paid as aforesaid). The total of the rupee 1998 (less R60,000) was R1,345,128. The total SA rands was 1

Bodco however claims R136,079.10 as an overpayment. That : on the basis of the total value of the goods invoiced at SA applying the exchange rate of 0.8898 prevailing on 27 August R1,385,128 was paid to the plaintiff. This claim is also mad deposits continued to belong to the second defendant and Seychelles rupees was demanded, the total SA rands amount have been converted at the current rate of exchange. The po that those deposits had already been accepted by them for cc the rates prevailing on the dates of such deposits. However, o that those deposits belonged to the second defendant company bills, that is, SA rands1,403,741.20 became payable. The already deposited R1,385,128 at the rates current when the sev to cover the amount due in rands. By letter dated 15 August 1 plaintiff company informed the bank that his client wished to listed in the two schedules furnished and the accrued interest. E 1999 (exhibit 1D1), Bodco Ltd authorised the payment of R1,385,128 held in deposit to the order of Farm- Ag.

In the application form entitled "bills paid awaiting exchange" issued by the bank and used by Bodco, there is in small print, a note which states "once foreign exchange is available, I will pay any difference in exchange plus all your bank charges". Hence, the risk of the exchange rate increasing, and the consequent necessity for payment of additional Seychelles rupees was with Bodco. In addition when foreign exchange was finally available, the bank would apply the rate prevailing on that day and also levy the bank charges. If the rate was lower than on the day the deposit was made, Bodco Ltd would still have lost the difference in Seychelles rupees, as the bank was not obliged to

, as those deposits mpany. Hence the o its customer the d defendant is also

on the difference ices on 27 August ands 1,403.741.20, r that date. In the amount invoiced in between these two of 1.0494 (the rate according to letter as paid by cheque According to exhibit deposited on 23 June sits up to 23 June 741.20.

as been calculated : 1,403,741.20 and , the day a sum of the basis that the when payment in on that day should of the plaintiff was sion to SA rands at basis of my finding "sum certain" in the nd defendant had deposits were made, the attorney for the pt all the deposits er dated 26 August

make any refunds.

The second defendant claims the overpayment purely on the basis of the exchange rate prevailing on the date of payment in Seychelles rupees. They do not aver any ground to justify the claim for a refund of the overpayment, although obviously if SA rands 1,403,741.20 which was due on the bills was converted at the rate of 0.8898, the rupee equivalent payable to the plaintiff was R1,249,048.90 and not R 1,385,128.

In the case of *Kelly v Solari* (1841) 9 M & W 54 (cited in *Cheshire and Fifoot on Law of Contracts*), Parke B had this to say-

If, indeed, money is intentionally paid, without reference to the truth, or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. But, if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

In the present case, the seven deposits made in Seychelles rupees were known to both parties. The second defendant agreed to pay the total sum to the plaintiff when the request was made. In these circumstances payment was not made under a mistake of fact. Hence there is merit in the submission of Mr Boule that the counterclaim is based on an afterthought. In authorising payment, the second defendant impliedly waived the right to recalculation of the sum paid. Hence they cannot now claim any sum on the basis of an overpayment.

The counterclaim is accordingly dismissed with costs.

**Record: Civil Side No 36 of 2000**