**Nile Bank v Translink**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 22 June 2005

**Case Number:** 9/04

**Before:** Odoki CJ, Oder, Karokora, Mulenga and Kanyeihamba JJSC

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*[1] Contract – Indemnity – Breach of agreement – Interpretation of terms – Intention to be construed*

*from words used – Whether police report amounted to a conclusive finding – Whether Court of Appeal*

*erred in its interpretation of the agreement – Whether the conditions for the realisation of the indemnity*

*had been fulfilled.*

**JUDGMENT**

**Mulenga JSC:** Until 1996, Translink (U) Limited, the respondent in this appeal, maintained two current bank accounts in Uganda shillings and United States dollars respectively at a branch of Nile Bank Limited, the appellant in this appeal. In 1997 the respondent filed a suit in the High Court, alleging that the appellant, in breach of contract, refused it to operate the accounts and wrongfully closed them. It prayed for- (*a*) a declaration that it was entitled to operate the accounts and an order that the appellant credits the accounts with amounts wrongfully debited. (*b*) general damages for breach of contract; and (*c*) costs The appellant defended the suit and counterclaimed from the respondent UShs 11 472 682 due on an overdraft. The High Court dismissed the respondent’s suit and entered judgment for the appellant on the counterclaim with interest and costs. The respondent appealed to the Court of Appeal, which allowed the appeal and made orders to which I will revert in this judgment. Let me first summarise the background that led to this litigation. In April 1995, a dispute arose between the appellant and the respondent on what amount the latter deposited in its shilling account on 23 November 1994. While the respondent asserted that it deposited UShs 30 million, the appellant asserted that it received only UShs 10 million. In order to resolve the *impasse*, the appellant agreed to credit the respondent’s shilling account with the disputed sum of UShs 20 million upon the respondent undertaking to indemnify the appellant if the ongoing police investigation proved conclusively that the disputed sum was not deposited. It was agreed that in that eventuality, the sum so credited would be treated as an overdraft attracting no interest. The respondent executed a deed of indemnity dated 18 April 1995, exhibit P3, and the appellant credited the shilling account with the disputed amount. On 14 August 1996, the respondent, without reference to that outstanding agreement, notified the appellant by letter,exhibit P6, that it had decided to close its two bank accounts. It demanded for the closing balance to be remitted by drafts. The appellant refused to comply with the demand. First, in a letter dated 30 August 1996, the appellant pointed out that the immediate closure of the accounts would prejudice the appellant’s rights under the indemnity. It requested for time to ascertain if it should accede to the demand or should set off the balances against the overdraft deemed under the deed of the indemnity. Later, in a letter dated 19 September 1996, it advised the respondent: (*a*) that the police investigation (copy of whose report was forwarded) and its own internal investigation had arrived at the concurrent conclusion that the appellant did not receive the disputed sum of UShs 20 million; (*b*) that consequently, under the terms of the indemnity, the UShs 20 million credited on the respondent’s account, was to be treated as an overdraft; and (*c*) that the appellant would realise only UShs 8 527 319 from the balances on the respondent’s two bank accounts. The appellant concluded the letter thus: “By this letter you are hereby requested to make arrangements for the settlement of the outstanding balance of UShs 11 472 681. We look forward to your positive response and we hope that the whole exercise will be smoothly concluded with an option for you to maintain your account with us.” The copy report forwarded was a memo dated 5 September 1996 from the investigating officer to the ACP/Crime, exhibit P4, concerning the investigation. In a letter dated 24 September 1996, the respondent’s advocates protested the appellant’s stance. Without any reference to their client’s previous decision to close its accounts, the advocates asserted: (*a*) that the police report in exhibit P4 was inconclusive; (*b*) that the respondent strongly objected to the consolidation of its accounts and to not being permitted to operate its accounts; (*c*) that the appellant was in breach of the banker/customer relationship; and (*d*) that the indemnity was binding and enforceable, but could only be invoked upon conclusive proof that the UShs 20 million was not deposited. They also wrote to the police protesting that the report in exhibit P4 was not objective but was tailored to favour the appellant. About two months later, the respondent filed the suit in the High Court pleading that the appellant was in breach of the terms of the deed of indemnity because its decision to appropriate the said balances was not based on a conclusive police report envisaged in the deed of indemnity, but on a mere progress report. The respondent, further, pleaded that following the police investigations, employees of both the appellant and the respondent were charged with theft, but that the respondent had failed to find out the results of their trial in court. I am constrained to observe that although clearly the substantive core issue between the parties was “whether the respondent deposited the disputed amount on its bank account, ” it was sidelined in the courts below. This is apparent from the parties’ respective pleadings and presentations of their cases, as well as from the framing and resolution of the issues by the courts below, where focus was directed more on construction of the deed of indemnity, exhibit P3, and description of the police report, exhibit P4, than on the said core issue. The respondent’s suit was virtually based on the said deed of indemnity and no averment was made in the plaint that that disputed sum was deposited on the account. Hence, the issues framed at the trial were in brief: 1. w hether exhibit P4, amounted to the conclusive investigation (report) in writing; 2. w hether the defendant was entitled to invoke the deed of indemnity; 3. w hether the plaintiff is entitled to the relief sought in the plaint; 4. w hether the defendant is entitled to the prayers in the counterclaim The learned trial Judge found for the appellant on the two main issues principally because he held that exhibit P4 contained a conclusive police report. In the Court of Appeal, Twinomujuni JA, who wrote the lead judgment, found that the first three grounds of appeal raised a single issue, namely: “Whether the decision of the respondent to confiscate moneys on the appellant’s accounts in the respondent’s bank was in accordance with clause 2 of the deed of indemnity. . .” In brief, his answer to that issue was to the effect that the police report on which the appellant relied to “confiscate” the consolidated balance on the respondent’s accounts was not a conclusive report within the meaning of the deed of indemnity, and that consequently, the confiscation was premature. The fourth ground of appeal raised the issue whether the respondent was entitled to operate its bank accounts. His answer to this was indirect. He held that the respondent’s attempt to close the accounts was strange and highly suspicious and that the appellant, as a prudent banker, was entitled to resist the attempt, but was not entitled to pay itself from the respondent’s accounts on strength of the inconclusive report in exhibit P4. Lastly, the court held that the fifth ground concerning the counterclaim, did not arise and had to fail because: “The event which could have allowed the (bank) to make the counterclaim, ie the conclusive report from the police, has not yet occurred.” The final orders of the court were framed in the lead judgment thus: “In light of the above findings and in order to do justice to both parties I would order a return to the *status quo* that existed on 13 August 1996, a day before the appellant applied to close the accounts with the respondent. *I think, however, that the respondent is entitled to prevent the operation of the accounts until the police issues a conclusive report*. The account will be deemed to have remained open with the balances that were on them on 19 September 1996. Any interest that was due will be deemed to have continued to accrue till this matter is concluded in accordance with the deed of indemnity. Because of the holding that it was the ill timed demand of the appellant to close his accounts that triggered confiscation of his accounts and therefore this suit, I would order that each party bears its own costs here and in the High Court.” (Emphasis mine.) The two grounds of appeal to this Court (excluding argumentative phrases) are that: 1. T he learned Justices of Appeal erred in fact and law when they held that a police report dated 5 September 1996 did not amount to a conclusive finding as envisaged by a deed of indemnity between the parties … 2. T he learned Justices of Appeal failed to properly evaluate the evidence on record which established that the prosecution of suspects in relation to the matter in dispute between the parties had been concluded … Mr *Byenkya*, learned Counsel for the appellant, argued the two grounds separately. The essence of his submission on the first ground of appeal was that, pursuant to the deed of indemnity, the parties bound themselves to wait for the police investigation to establish conclusively if the disputed amount was not deposited, whereupon the sum of UShs 20 million credited on the respondent’s account was to be treated as an overdraft. For the purposes of the deed, the investigation was to establish only one fact, namely whether the respondent’s servants banked the disputed amount or not. The parties did not concern themselves with results of any prosecution that might arise from the police investigation. According to learned Counsel, the contents of the report in exhibit P4 showed conclusively that the disputed amount was not banked as alleged by the respondent’s servants. He criticised the Court of Appeal for concerning itself with the nature or form of exhibit P4 rather than the substance of its content. Instead of considering if the report proved that the disputed amount was banked or not, it relied on extrinsic matters to hold that it was not a “conclusive” but only a “progress” report. On the second ground of appeal, Mr *Byenkya* submitted that, contrary to the holding by the Court of Appeal, the evidence on record showed that the prosecution in the Magistrate’s Court was complete. He argued that this misconception of the evidence led the court to conclude, wrongly, that the parties ought to await completion of a prosecution that is no longer pending. For the respondent, Messrs *Lwere, Lwanyaga and Company Advocates* lodged written submissions under rule 93 of the rules of this Court. On the first ground of appeal, they supported the findings by the Court of Appeal that the police had not issued a report that was “conclusive” within the dictionary meaning of that word. In their view, exhibit P4, was an internal police communication on progress of an investigation. The fact that it was not copied to the respondent, as the complainant who instigated the police investigation, or to the appellant, leads to the inference that the police did not intend to treat that internal communication as a final report, to be relied upon by either party to the deed of indemnity. Although exhibit P4 referred to a handwriting expert report that exonerated the appellant, that alleged report was never produced in evidence. Besides, following the respondent’s protest against exhibit P4, the police issued another inconclusive report showing that the appellant’s servants who were allegedly exonerated were subsequently charged and prosecuted together with the respondent’s servants. A conclusive report would have included the result of the prosecution as the final finding of the investigation. On the second ground of appeal, the learned advocates submitted that the Court of Appeal was correct to hold that the prosecution which ensued from the police investigation, had not been concluded because some of the suspects had absconded before being tried. They stressed that no evidence was adduced to substantiate the appellant’s claim through counsel that its servants had been acquitted in the Magistrates’ Court. According to available evidence, four suspects were prosecuted and only one was discharged. The Court of Appeal found that the prosecution of the others was incomplete or outstanding. The learned advocates stressed that this Court, as a second appellate court, must not interfere with findings of fact by the first appellate court unless the latter came to a wrong conclusion due to misapprehension of the evidence. They submitted that the Court of Appeal considered the issues and evidence properly and came to the correct conclusion, and they urged this Court not to interfere with its findings. As I indicated earlier in this judgment, the decision of the Court of Appeal is based on that court’s finding that exhibit P4 was a progress report and not the “conclusive police report” supposedly envisaged under the deed of indemnity. This is evident in the lead judgment where after noting the dictionary definitions of the word “conclusive” and asking himself if any of the definitions fitted the memo in exhibit P4, Twinomujuni JA wrote: “In holding that the memo was conclusive report of the police, the learned trial Judge stated: ‘The indemnity bond must be interpreted strictly in accordance with the golden rule of interpretation. The provision in the bond about the Police Fraud Squad is not ambiguous or vague so that we go behind to find out whether by ‘*the conclusive report*’ meant the final finding of the court. In my opinion, after the handwriting expert had given his report, the Police Fraud Squad was within its powers to issue its conclusive report pursuant to the deed of indemnity.’ My finding on the first issue is in the affirmative ;exhibit P5 was the police squad conclusive report envisaged in the indemnity deed.’ With the greatest respect, I am unable to agree that . . . exhibit P5. . . was a conclusive report. The Director of CID called it a progress report. Even D/AIP Begumisa himself did not believe that he had made a conclusive report. He recommended that it be forwarded to the respondent merely ‘for information and update’. In fact, on 9 January 1997 he wrote another internal memo on the same matter to his boss. It is entitled ‘Theft and Related Offences: A Progress Report’. The contents of this memo have already been reproduced above. It is significant to note that in this report he stated: ‘I wish to inform you that four people, that is to say two bankers of Nile Bank and two employees of Translink were charged, later one of the bankers (Mwine Enock) jumped bail, and this created a delay in proceedings with the rest.’ Though the first memo claimed that the handwriting expert had exonerated Nile Bank, the latter memo reveals that further investigations had taken place which led into two employees of Nile Bank to be charged with subject matter of the investigation. I have already remarked that although this case was reported to the police by Translink (U) Limited, the police have never sent to him any report “conclusive, progress” or otherwise. There is another disturbing aspect of the deed of indemnity. I do not think it would have been possible for the police to issue a “conclusive” report on the case unless there was no evidence to prosecute anyone. Once they took a decision to prosecute two employees of Nile Bank and two of Translink, it was impossible for the police to issue a conclusive report unless the prosecution was concluded in court.” For clarity I would summarise the reasons given for the finding that exhibit P4 was a progress and not a conclusive report, as follows: (*a*) In the letter dated 13 September 1996, forwarding exhibit P4 to the appellant, the Director of CID described exhibit P4 as “a progress report”; (*b*) The officer who authored exhibit P4 described a subsequent memo which he wrote on the same subject on 9 September 1997 as “a progress report”; (*c*) Although exhibit P4 claimed that the appellant had been exonerated, other investigations led to the appellant’s two employees being charged; and (*d*) After the decision to charge servants of both the appellant and the respondent, it was impossible for the police to issue a conclusive report until the prosecution in court was concluded. It is apparent from the foregoing that in the view of the Court of Appeal the parties’ intention was to resolve their dispute on the basis of a final report to be compiled by the police after conclusion of their investigation and any resultant prosecution in court. Does that view conform to what the parties expressed in the deed? It is a trite rule of interpretation, that in construing the intention of the parties to it, the court must discern the intention from the words in the document. It ascertains the intention of the parties as expressed in the document. The pertinent portion of the deed reads thus: “Now we, Translink (U) Limited: 1 Do hereby apply that you immediately credit our account with the disputed amount of UShs 20 million. 2 Do hereby covenant that *in the event of the investigations currently being conducted by the Police Fraud Squad prove conclusively in writing that the said amount of UShs 20 million was never deposited* by Messrs Translink (U) with Nile Bank Limited then the said amount shall be treated as an overdraft granted by the Nile Bank Limited to Messrs Translink (U) Limited attracting no interest.” (Emphasis mine.) With the greatest respect to the learned Justices of Appeal, I find that their view of the intention of the parties is not in consonance with the parties’ intention as expressed in the deed. The parties did not, expressly or by implication, refer to a final or concluding police report as the basis on which their dispute would be resolved. My reading of the deed is that the stipulated eventuality, upon which the parties agreed the dispute would be resolved, was not a final police report, but rather conclusive proof from the police investigation, that the respondent never deposited the disputed sum on its account. It is upon such proof that the sum of UShs 20 million was to be treated as an overdraft, attracting no interest. To illustrate this point, I think it helps to paraphrase the pertinent sentence in issue thus: “*in the event* (*that*) *the investigations … prove conclusively in writing* that the said amount of UShs 20 million was never deposited …” (Emphasis mine.) It appears to me that the use of the expression “in the event the investigations prove conclusively in writing” the parties plainly meant that the sum of UShs 20 million credited on the respondent’s account would be treated as an overdraft if the investigations established that the respondent had not deposited the said sum on its account. Even the respondent’s managing director appears to have understood the provision in that way, for in his evidence in chief he described it albeit in converse form, as follows- “The (indemnity) document provided that if the police investigation found that the sum of UShs 20 million was actually taken and received by the bank, then it would be my money.” Much as it is a common expectation for police criminal investigations to lead to prosecutions in court, I see nothing in the deed that would compel me to infer that the parties’ intention, as expressed in the deed, was to await conclusion of the court prosecution resulting from the police investigation. Admittedly, the deed does not stipulate the mode of determining the conclusive proof. Nor does the deed make it clear in whose writing the conclusive proof was to be. In my view, however, that is not a bar to either party asserting as a fact, at any stage even prior to that fact being proved in court, that the police investigation has proved conclusively that the sum in question, was or was not deposited. What was envisaged in the deed was not a final report after conclusion of the case, but conclusive proof of the fact that the money was or was not deposited. In my opinion, it is immaterial that exhibit P4 was described as a progress report. Clearly, the first, second and fourth reasons relied on by the Court of Appeal were misconstrued. What matters is whether the report constituted conclusive proof in writing that the disputed sum was never deposited on the respondent’s account. It is in that context that I proceed to examine the report in contention. In exhibit P4 dated 5 September 1996, the investigating officer wrote: “*Re: Theft and Related Offences* Reference is made to the above subject matter. This case was reported here on 17 March 1995 by the managing director of Translink (U) Limited. Inquiries commenced and suspects appeared in Court on 2 May 1995.

*Brief Facts*- It is alleged that 30 million shillings were taken to Nile Bank on 23 November 1994 by three workers of Translink to be deposited on the account of Company. A deposit slip reading 30 million duly stamped and signed by purportedly the bank and was taken back to the company by the workers confirming the deposit on reconciling the bank statement by the managing director (Translink). It was found that instead of 30 million, 10 million was credited on the account. *Findings* - The deposit slip (exhibit) from Translink (U) Limited, the specimen of the suspected bank official purported to have signed the deposit slip and the stamp sample from the bank were taken to the handwriting expert for comparison to establish the author of the signature. The handwriting expert report was secured, exonerating the bank, that is to say the stamp impression on the deposit slip (exhibit) was different from the genuine stamp impression of Nile Bank and the author of the signature on the deposit slip was not the same author of the specimen signature of the suspected bank official. *These findings indicate that the Translink workers banked only 10 million and forged the stamp, signatures of the bank officials, to purport that they banked 30 million*; and this forms the basis for charging them.” (Emphasis mine.) According to this report, the police investigation found proof that the respondent’s workers had not banked UShs 30 million, as they claimed, but had banked only UShs 10 million. Basically, the proof so found is the finding by the handwriting expert that the bank pay-in slip which was purported evidence of depositing the larger amount, was forged. In my view, in absence of any contradiction, that would be conclusive proof, albeit circumstantial, that the disputed amount of UShs 20 million was never deposited on the respondent’s bank account. The Court of Appeal appears to have taken a different view because of surmising that subsequent to the handwriting expert report there was further investigation that led to employees of the appellant being charged. In the excerpt from the lead judgment reproduced earlier in this judgment, Twinomujuni JA said: “Though the first memo claimed that the handwriting expert had exonerated Nile Bank, *the latter memo reveals that further investigation had taken place which led into two employees of Nile Bank to be charged* with the subject matter of the investigation.” .” (Emphasis mine.) With due respect, I think this is another incidence of misconstruing evidence. The first memo alluded to is exhibit P4, dated 5 September 1996, and the latter memo is exhibit P5, dated 9 January 1997. The learned Justice of Appeal construed the two memos as if they were consecutive reports on progress of investigation as at the two dates, meaning that the charging of the appellant’s employees alluded to in exhibit P5 was subsequent to the handwriting expert report, and resulted from further investigations carried out between the two dates. The record makes it quite clear that from the beginning of the dispute the employees of both parties were suspected and charged. It is because of that fact that the respondent, through his advocates protested in exhibit P15 dated 24 September 1996, against the content of exhibit P4, as tailored, to favour the appellant. They wrote, *inter alia*: “Employees of both Translink (U) Limited and Nile Bank Limited were charged in court and the matter is still subjudice. In fact, one of the employees of Nile Bank Limited jumped bail and there is an arrest warrant for him … There is no mention of these facts in the report which renders it inconclusive.” It seems to me that the memo in exhibit P4 was not intended to be a comprehensive report of all that had transpired in the course of the investigation. It was written at the prompting of the appellant as is evident from exhibit P8 dated 19 September 1996, in which the appellant informed the respondent: “Upon your instructions to close your accounts, the bank rekindled its internal investigation and established that it never received the said amount. *We went further to request the CID Fraud Squad to give us their report touching upon the same matter. The said report was in conformity with the bank’s findings. A copy of the said report is attached hereto … for your reference*.” (Emphasis mine) Similarly, the later memo in exhibit P5 dated 9 January 1997 was not written as a comprehensive report of the investigation progress as at that date. It was written in response to the respondent’s protest at the omission of details from exhibit P4. In his evidence at the trial, the respondent’s managing director said: “On receipt of the police report (copy tendered as exhibit P4) I did not agree with its contents and wrote to my lawyers complaining. I instructed the lawyers to write to CID highlighting the various omissions. They did write to CID subsequently we were given another report by the police. It was sent to me by the police directly to our office . . . It is dated 9 January 1997. (Tendered in as exhibit P5).” Incidentally, the learned Justice of Appeal overlooked this evidence, as well as an endorsement on exhibit P5 suggesting that both parties be given copy thereof, when he observed, in his judgment, that the police never sent to the respondent any report “conclusive, progress or otherwise”. Be that as it may, there was no basis for the holding that investigations subsequent to the handwriting expert report led to employees of the appellant being charged. It is obvious to me the sequence was that subsequent to the four suspects being charged, the handwriting expert report “was secured exonerating the bank”. Lastly, on this ground, I have to comment briefly on the submission by the respondent’s advocates that no reliance should be put on the handwriting expert report because it was not produced in evidence. I am unable to accept that submission. The available evidence about the expert report is secondary, in that only a summary of its substance was inserted in the investigating officer’s memo, exhibit P4. Significantly, however, it was the respondent who tendered that memo in evidence with the consent of the appellant. If the respondent disputed its accuracy or credibility, the onus was on the respondent to adduce cogent evidence to discredit the expert report. No such evidence was adduced. The respondent cannot now turn round and shift the burden onto the appellant, as it were, that it should have adduced better or further evidence of the expert finding. With the greatest respect I would hold: 1. t hat it was a misdirection on evidence, on the part of the Court of Appeal, to hold that the indemnity deed could be invoked only after the magistrate’s court had given a verdict in the criminal case that resulted from the police investigation; and 2. t hat the said court erred on evidence to the extent it implicitly held that the police investigation did not conclusively prove that the respondent never deposited the disputed amount on its bank account. In my opinion therefore, the first ground of appeal ought to succeed. In view of my holding on the first ground, I find it unnecessary to discuss the merits of the second ground in any detail. Whether or not the prosecution of the suspects in court was concluded would not affect the results of this appeal. I should observe, however, that there is, on record, evidence of Natwaluma Mubezi Samuel, DW2, to the effect that two bank employees (including himself) and two employees of the respondent were charged and that:

1. he was prosecuted and discharged in 1997 upon the court finding that he had no case to answer, but his co-employee jumped bail before trial;

2. one of the respondent’s employees was tried and acquitted and the second also jumped bail. It is also on record that the efforts made by the respondent and its advocates to obtain the results of the prosecution directly from the police and the Magistrate’s Court were fruitless. Even orders made by the High Court on application of the respondent during the trial of this case, first for the Director of CID to produce the police file, and later for Senior Principal State Attorney, Byabakama Mugenyi, of the Directorate of Public Prosecutions, to produce both the police and the Magistrate’s Court files, did not produce the desired results. The latter appeared before the court twice to say he could not trace the files. I am unable to understand why in apparent disregard of all that evidence and record, the Court of Appeal held that there was “*a prosecution which from the evidence on record, is not yet concluded*” and ordered that it was in the interest of justice, to both parties, to return to the status before the respondent attempted to close its accounts. With due respect, this is tantamount to failing to resolve the dispute that the parties looked to the court to determine. In result, I would allow this appeal and set aside the judgment and orders of the Court of Appeal. I would substitute a judgment dismissing the respondent’s suit and upholding the appellant’s counterclaim for UShs 11 472 681, with interest at the court rate from the date of this judgment till payment in full. I would award costs of this appeal and in the courts below to the appellant. Odoki CJ, Oder, Karokora and Kanyeihamba JJSC concurred in the judgment of Mulenga JSC

For the appellant:

*Mr Byenkya*

For the respondent:

*Messrs Lwere,*