

CASE DIGEST

**BANKING; INDEMNITY CONTRACT:
LIABILITY ON INDEMNITY:
WHAT MUST A BANK PROVE TO
SUCCEED IN AN ACTION FOR
LIABILITY ON INDEMNITY?**

**MACT SECURITIES LTD. & ANOR. v.
GUARANTY TRUST BANK PLC.**

BANKING; INDEMNITY CONTRACT: LIABILITY ON INDEMNITY: WHAT MUST A BANK PROVE TO SUCCEED IN AN ACTION FOR LIABILITY ON INDEMNITY?

(MACT SECURITIES LTD. & ANOR. v. GUARANTY TRUST BANK PLC.)

COURT OF APPEAL (LAGOS DIVISION, NIGERIA)

Background Facts

The case of Guaranty Trust Bank (Respondent) at the High Court of Lagos State (trial court) that resulted in this appeal was that by an executed indemnity contract, the 1st Appellant undertook to indemnify the Respondent against all actions, claims or proceedings which may be brought or made against the Respondent by reason of clearing the third party cheques through the 1st Appellant's account with the Respondent and also to pay the Respondent on demand, all payments, losses and expenses suffered by the Respondent arising therefrom. Upon the strength of the said indemnity, the Respondent cleared two bank drafts, upon presentation by the Appellants, in the value of ₦70,000,000.00 and ₦50,000,000.00 respectively, made in favour of Oyo state Government to be cleared through the 1st Appellant's account domiciled with it. Sometimes in November 2013, the Respondent received a complaint from the Economic and Financial Crimes Commission (EFCC) that the aforementioned cheques were cleared without the authorization of Oyo State Government and requested that the Respondent furnish the commission with the instruction from Oyo State Government to clear the cheques. In response, the Respondent stated that the cheques were cleared based on the indemnity executed by the Appellants in favour of the Respondent.



The EFCC on this note demanded the Respondent to re-issue the sum of ₦70,000,000.00 and ₦50,000,000.00 respectively to the Oyo State Government, which was unilaterally re-issued in favour of Oyo State Government. After the re-issuance of the draft, the Respondent debited the 1st Appellant's account for the total sum of ₦120,000,000 and the 1st Appellant started the repayment of the indemnified sum by issuing cheques wherein the total amount of ₦15,000,000.00 (Fifteen Million Naira) was recovered, and which necessitated the institution of an action to recover the outstanding sum of ₦105,000,000.00 with interest.

Mact Securities Ltd & Anor. (Appellants) contended the Respondent's claim and stated that pursuant to an offer for the sale of shares by the Oyo State Government, it made a down payment of the sum of ₦1,100,000,000.00 (One Billion, One Hundred Million Naira Only), but due to certain circumstances, the Deputy Governor of Oyo State had to involve the EFCC (Economic and Financial Crimes Commission) to stalemate the transaction and this led to the arrest of the 2nd Appellant. To secure his release from the EFCC, the 2nd Appellant was made to pay the sum of ₦120,000,000.00 to the Oyo State Government by issuing 2 (two) bank drafts in favour of Oyo State Government, which led the Appellants to institute an action against the Oyo State Government. Subsequently, the parties settled, and the terms of settlement was adopted as judgment of the lower court. Part of the judgment of the lower court was that Oyo State Government was not entitled to any refund by the 1st Appellant. Upon the amicable settlement between Oyo State Government and the Appellants, the Appellants discovered that Oyo State Government had not realized the bank draft of ₦120,000,000.00. Thus, the 2nd Appellant had to repurchase the bank drafts from the issuing bank, AfriBank and paid it into the 1st Appellant account with the Respondent. The Appellants further alleged that the Respondent unscrupulously debited its account in the sum of ₦120,000,000.00 without its approval and allegedly paid same to Oyo State Government. Also, the Respondent after the said debit, used the instrumentality of EFCC to unlawfully arrest the 2nd Appellant in a bid to recover the said sum upon which the Appellants had to pay the sum of ₦15,000,000.00.

Upon the conclusion of trial, the trial court, held that the Appellants are liable for the indemnity executed and gave judgment in favour of the Respondent. Dissatisfied by the decision of the trial court, the Appellant appealed to the Court of Appeal.

One of the issues raised for determination is: *Whether the lower Court was right in its finding that the 1st Appellant was liable to the Respondents on the sum of ₦105,000,000.00 by virtue of the Deed of Indemnity 1st Appellant executed in favour of the Respondent.*

Arguments

On this issue, the Appellants' Counsel argued that for the Appellants to be liable on the indemnity they must owe primary liability to the creditor (in this case the Oyo State Government), and that the Court must ascertain what the mutual or even the presumed intentions of the parties are as to the legal obligations owed to each other, and that the lower court failed to do this but simply held that the 1st Appellant was liable on the indemnity based on the fact that the Respondent alleged that the EFCC demanded to know under what authority the Appellant cleared the bank drafts (erroneously referred to as 3rd party cheques). Counsel further asserted that the court did not ascertain the intentions of the parties when they entered into the indemnity contract. It was Counsel's submission that the lower court not only failed to make a finding on this issue but did not even avert its mind to it at all in finding the 1st Appellant liable on the indemnity. It was further submitted that no evidence whatsoever was tendered, or testimony given of any action or claim brought against the Respondent for which it suffered loss that can be claimed on the indemnity. The Appellants' Counsel prayed the court to resolve this issue in their favour.

The Respondent Counsel, on the other hand, contended that the Appellants jointly executed an indemnity in favour of the Respondent, being a financial institution so as to be able to clear third-party cheques; which ordinarily the Respondent ought not to clear but save for the indemnity given by the Appellants which in turn precludes the Respondent from any liability that may inure thereon, and that apart from the fact that the agreement is binding on the Appellants, the terms of the indemnity executed by the Appellants shows that it does not limit itself to proceedings but also to claims being made by a third party.

Counsel submitted that the Respondent is a law-abiding financial institution and will not venture into the melee relating to investigations by the EFCC, and that the Respondent was left with no other option but to inform the 1st Appellant of its intention to activate the indemnity as a result of the inaction of the Appellants towards the travails of the Respondent occasioned by the act of the 1st Appellant. According to Counsel, the liability incurred by the Appellants with respect to the instant suit was caused by the inaction of the Appellants when they were prompted by the Respondent to care of the investigations carried out by EFCC on the Respondent as a result of their actions.

Decision of the Court

In resolving this issue, the Court of Appeal held that:

An indemnity contract arises where the indemnifier promises to meet any legal liability which the indemnified is held to be under. **To be liable on the indemnity, the Respondent must show that an action, claim or proceeding, had been brought or made against the Respondent by reason of clearing the alleged 3rd party cheque and as a result, the Respondent suffered loss and damage.** There is no evidence or claim from Oyo State Government that its money was missing or any evidence that any money was paid to Oyo State, the supposed beneficiary of the 3rd party cheque. The appellate court further held that best evidence of proving payment into a bank account is by production of a bank teller or an acknowledgement showing on the face of it that the bank has received payment, and that in the instant appeal, there is no evidence of any acknowledgement or receipt from Oyo State Government that they were paid any money.

Issue resolved in favour of the Appellant.

John Duru Esq., for the Appellants

Adetunji Adedoyin, Patrick Mgbeoma, and Ayobami Folarinde for the Respondent

This summary is fully reported at (2023) 3 CLRN.

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info@clrndirect.com