

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 35 OF 1995

BETWEEN

NBC HOLDING CORPORATION. APPELLANT

AND

HAMSON ERASTO MKECHA. RESPONDENT

(Appeal from the order of the High
Court of Tanzania at Dodoma)

(Mwalusanya, J.)

dated the 12th day of December, 1994

in

Civil Case No. 10 of 1994

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

By an agreement dated 7/1/94 the respondent obtained an overdraft facility of 5,000,000/= from the then National Bank of Commerce expressed to expire on 10/12/94 and subject to various conditions. Clause (2) of these conditions stated:

Although the overdraft is sanctioned to expire on 10/12/94 the Bank retains the right of varying it at any time without prior notice.

Indeed on 31/1/94 the respondent was required to sign a new agreement granting a reduced overdraft of 2,000,000/= and on 1/2/94 he was informed that that sum represented the approved overdraft which had previously been erroneously indicated as 5,000,000/=. The respondent protested to the Bank's branch manager at Singida and at the Bank's headquarters in Dar es Salaam and this resulted in the 5,000,000/=

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overdraft being restored on 22/2/94. However, the respondent then commenced proceedings in the High Court at Dodoma alleging that the variation constituted a breach of contract and that he had suffered damage between 1st and 22nd February when the variation was in operation. He claimed what he termed general damages amounting to 19,577,510/=-, interest at the Bank rate and costs. The trial judge held that there was a breach but awarded the respondent 3,669,500/=- in special and general damages, plus costs and interest. The Bank, whose liabilities have since vested in the NBC Holding Corporation, appealed against the decision through learned counsel Mr. Richard Rweyongeza. The respondent was represented by Mr. George Mbezi.

In deciding that the Bank had breached the contract, the trial judge held that Clause (2) cited above, which he termed an exemption clause, did not empower the Bank to vary the overdraft amount but its expiration date. He said:

It is my view that the amount of the overdraft was the essence of the contract in this case, and the reduction of the same deprived the agreement of all the contractual force. I take it that the exemption clause entitled the defendant bank to vary only the date of expiry, the interest rate, etc., but not the amount of the overdraft facility which was the core of the contract.

In arriving at that view he held that Clause (2) was ambiguous, that it had to be construed restrictively against the Bank because it appeared on a standard form, and that, in accordance with the ejusdem generis rule, the words "the bank retains the right of varying it at any time" were to be read as limited to the expiry date rather

than the overdraft facility. The third ground of appeal which Mr. Rweyongeza first argued was that the learned judge erred in his construction of the Clause and that variation had reference to the overdraft. Mr. Mbezi supported the judge's interpretation.

We think, with respect, there is no ambiguity in Clause (2). In our appreciation of it, the pronoun "it" refers to "overdraft" and the phrase "at any time" refers to the date of expiry, thereby meaning that the overdraft could be varied at any time before 10/12/94. The trial judge found as a fact that the agreement were explained to the respondent and held that the respondent understood the document. The respondent therefore understood the variation to refer to the overdraft and that is why his counsel at the trial did not argue that Clause (2) was ambiguous but merely that it was "very unconscionable", meaning oppressive. We do not think the argument of conscionability could avail the respondent, either, because parties to an executory contract are at liberty to vary its terms at any time, either partially or wholly, if the necessity for doing so arises. Besides, variation of overdraft terms is a recognised banking practice. We only need refer to a passage brought^{to} our attention by Mr. Rweyongeza in SHELDON'S PRACTICE AND LAW OF BANKING 13th ed. p. 310, which states:

When a banker agrees to allow the customer on advance, the document of charge usually consists a provision making the loan repayable on demand. He also takes power as a rule to cancel the specified limit, if and when he deems it advisable to do so.

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In this case, too, it is apparent that the respondent's basic complaint was not against the variation as such but, according to para 6 of the plaint, was on the fact that the variation was done "without giving sufficient notice" and that this was "to the detriment and loss in business on the part of the plaintiff". It is indeed apparent that notice is necessary in banking practice, for SHELDON's book further states (ibid.):

But he (the banker) must give reasonable notice to his customer before acting upon his decision to cancel the limit, and must pay all cheques within the limit originally agreed upon, drawn and put into circulation before the customer has received notice. How much notice is required will depend upon circumstances.

In the light of the foregoing, and now with reference to the first, second and fourth grounds of appeal, we are satisfied that there was no breach of contract on account of the variation as such. Moreover, it is not easy to see in what sense Clause (2) became an exemption clause in relation to variation as such; it was in that context merely an enabling clause to vary the limit of the overdraft. However, the Clause constituted an exemption in another context - the context of notice: it exempted the Bank from the necessity of giving prior notice ~~Bank retained the right to vary the overdraft without prior notice but~~ when exercising the right to vary the overdraft. It is ~~noteworthy,~~ ^{noteworthy,} though, that it did not say that the Bank was exempt from liability for damages arising from the absence of notice. If such an exemption was intended, it had to be expressed in clear words: Allison (F. Gordon) Ltd. v. Wallsend

Shipway and Engineering Co., Ltd. /1927/, 43 T.L.R. 323, 324. As the clause stands, there is no mention of exemption from liability for varying the overdraft without giving notice. We think that is precisely why in the letter addressed to the respondent on 1/2/94, the Bank hastened to apologise for the inconvenience arising from its act: "Tunakuomba msamaa (sic) kwa usumbufu utakaokupata haikuwa nia yetu kukupa matumaini ya aina hiyo." Since notice is necessary in banking practice, a banker who seeks to exempt himself from it does so at his own risk if, as in this case, the exemption does not extend to liability for injury to the customer. Therefore, while holding that the variation of the overdraft in this case was not a breach of contract, we believe the Bank exposed itself to damages for exercising its right to vary the overdraft without notice in the absence of an exemption from liability.

The various heads of damages awarded by the trial judge are challenged in the fifth, sixth and seventh grounds of appeal. The fifth ground, relates to the award of 1,610,000/= for cotton cake which went bad on account of the delay in dispatching it from Shinyanga to Arusha. The trial judge held that if the overdraft had not been reduced, the respondent would have dispatched the cake earlier, but he was from 31 January to 21 February busy trying to establish why the overdraft was reduced. We have held that variation of the overdraft as such did not amount to a breach, but even if the matter were looked at from the absence of notice, we think the claim was remote and untenable. In the evidence of the respondent, the overdraft was extended for the business of supplying beer to Shinyanga and Singida. There is no connection between this activity and the supply of cotton cake and the latter was therefore not contemplated in the contract.

We sustain the fifth ground and set aside the award of 1,610,000/=.

In the sixth ground it is contended that the trial judge erred in awarding 59,510/= as travel, board and lodging expenses incurred by the respondent when he travelled to Dar es Salaam to press for the restoration of the original overdraft, and 1m/= as lost profits when the variation was in operation. The judge made the first award merely for being "reasonable" in the light of the 10 days the respondent spent at Dar es Salaam. We think reasonableness cannot be the basis for awarding what amounted to special damages, but strict proof thereof. The respondent tendered no receipts to establish the claim but conceded that he had none. On the award of 1m/= the judge himself said:

I agree with the defendant's counsel that this claim being of special damages ought to be strictly proved. The plaintiff did not bring any documentary evidence to establish how much profit he had been making in the past. What we have is mere speculation and conjecture ...

The respondent had claimed a total of 14,630,000/= as lost profits, but the judge observed that the respondent could not have made that much profit in 21 days were 3m/= not removed from the overdraft. However, he observed that if the appellant had bought beer of 3m/= he would have realised some profit. He therefore assessed loss of profits at 1m/=. Once again, we have held that there was no

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breach, so that amount was not available even as nominal damages. Further, there was no evidence of any loss, so the sum cannot be awarded even for the absence of notice. Moreover, as Mr. Rweyongeza pointed out, it does not appear that the respondent was engaged in the business for which the overdraft was extended. He did not say for what purpose he issued the cheques Exhs. P2, P3, P4 and P5 to Philemon Olutu of Arusha, Malisa of Moshi, Joel Brothers Ltd. of Singida and Star Petrol Station of Singida respectively. He could not possibly have purchased beer from a petrol station for distribution to Shinyanga and Singida. What is more, he did not say that the cheques were presented to the Bank and dishonoured. In short, the award had no basis whatsoever.

Finally, the seventh ground challenges the award of 1m/= as general damages. As pointed out by Mr. Rweyongeza, the respondent did not pray for general damages but special damages which he erroneously titled "General Damages". The learned trial judge realised this but made the award on the ground that "our financial institutions do not strictly abide by their working ethics" and that the breach "must have caused a lot of anxiety and inconvenience to the plaintiff as a businessman." Since we have held that there was no breach we can see no basis for punishing the appellant Bank for the so-called breach of ethics; and since the respondent appears to have been engaged in businesses other than the business for which the overdraft was extended, he cannot be compensated for anxiety and inconvenience even for the absence of notice.

We have in sum come to the view that this appeal ought to succeed and it is allowed in its entirety, the judgment and decree of the High Court being set aside. The appellant will have its

costs here and below.

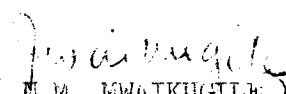
DATED at DODOMA this 27th day of June, 2000.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINCIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(N.M. MWAIKUGILE)
SENIOR DEPUTY REGISTRAR