IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 5 OF 2006

[From original Civil Case No. 8 of 2004
In the District Court of Iringa]

CRDB BANK LTD. .....APPELLANT

VS

CASPAR MLOWE & OTHERS ..... RESPONDENTS

JUDGMENT

Werema, J.

The Respondents who are trading under the name and style of Sokoni Partnership (IRA) were the plaintiffs in the District Court of Iringa District at Iringa. The appellant Bank was the defendant at the lower court. The facts upon which the case arose are that on 5th day of January, 2004, the respondents issued a cheque in the sum of shillings 300,000/- (say three hundred thousand shillings) against their account No. 01J1070087901 maintained by the appellant Bank at Lumumba Branch in

Dar es Salaam. The Cheque was drawn in favour of Ilala District of the city of Dar es Salaam.

The drawee, the holder of the bill, through her Banker, NMB Ltd, presented the cheque for payment on 14th day of January, 2004. It was not honoured and was returned with endorsement "effects not cleared". These words have been consistently at the trial court taken to connote that the account had no sufficient funds to honour the Bill (cheque). The drawee informed the drawer, the respondent herein, that the Bill was not honoured. The respondents are reported to have paid the like sum in cash to the drawee. The respondents upbeat that their account had sufficient funds to offset the demands of the sum in the cheque complained to the appellant. This latter complaint was acted upon by the appellant, so it seems, by sending a letter of apology dated 9th March, 2004 to Ilala Municipal Council. A copy of the letter was sent to the respondents. Inspite of the apology, the respondent sued the appellant Bank for negligence and breach of duty to them and for tarnishing their reputation. The particulars of negligence are stated in the plaint as

date of judgment, and thereafter at the court rate until full payment of the decretal amount; and costs of the suit.

The appellant/ defendant resisted the claim. But in their written submissions dated on 8th February, 2006 admitted that the cheque that was drawn by the respondents/plaintiffs in favour of Ilala Municipal Council was indeed dishonoured by the Bank. Further, that at the time when the cheque was dishonoured the accounts of the respondents/plaintiffs had sufficient funds to offset the amount that was in the cheque. At the proceedings in the lower court, the appellant admitted this fact but argued that the omission was a slip which is excusable and was a result of pressure of work caused by influx of clients that the Bank has to attend daily. Further, that the confusion was caused by a number appearing on the cheque which referred to the respondent's account number with the Iringa Branch of the Appellant Bank. The appellant bank appears not to have explained sufficiently and seriously on the confusion made by this number. I do not think it was serious and well thought of line of their defence.

In the judgment of the lower court, the Learned presiding magistrate found that there was gross negligence on the part of the Bank in dishonouring the cheque drawn by the respondents/plaintiffs. The Appellant Bank did not bother to investigate whether or not their account had no effects on the relevant day. The Court was satisfied and there was no dispute that on that date and time that account had sufficient effects to meet the obligations that the Bank was directed to do.

The Court entered judgment for the Plaintiffs/Respondents herein as follows:

(a) general damages to the tune of shillings 8,0000/-

(b) interest at commercial rate from the date of the dishonoured cheque to the date of judgment and thereafter at court rate from the date of judgment till full payment;

(c) penalty of Shillings 30,000/-

(d) Costs of the suit.

The appellant has raised four substantive grounds of appeal against the decision of the District Court. I will reproduce them in seriatim:

(1) that the learned trial magistrate erred in law and fact when she held that the respondents had suffered in their business with Ilala Municipal Council and that their reputation was lowered in the estimation of the Ilala Municipal Council Councillors as a result of their cheque being dishonoured in the absence of any proof to that effect;

(2) that the learned trial magistrate erred in law when she awarded general damages in the sum of shillings 8,000,000/- without stating the principle on which she relied upon in assessing the same;

(3) that the learned trial magistrate erred in law and fact when she awarded a sum of shillings 30,000/- to the respondents as a penalty while there was no evidence adduced in Court in

support of that claim and that there was no drawn up issue regarding such a claim; and

(4) that the order awarding interest at commercial rate from the date of the dishonoured cheque to the date of judgment and thereafter at Court rate from the date of judgment till full payment is ambiguous in that it does not state which amount between the decretal sum of shillings 8,030,000/- and the amount contained in the dishonoured cheque of shillings 300,000/- should carry awarded interest and the rate itself said to be commercial one is not disclosed.

On the basis of these challenges, the Court is being asked to allow this appeal, quash and set aside the decision of the lower court. The Respondents through their Advocate, Mr. Mwakingwe, Esq. are resisting this appeal and are upbeat that the decision of the learned trial magistrate is well founded in law and are of the view that this Court be pleased to dismiss this appeal with costs.

I have read the record of this appeal, the written submissions of both Counsel and the record of the proceedings at the lower Court and the judgment issued thereof. The subject at issue is one of great public interest. It is a subject relating to a Banker-Customer relationship and generally sound banking principles governing them. It is a relationship that creates duties to the Banker and the Customer. The Banking industry has over time developed principles and customs which are now universal. One can safely say that these principles are not localised but international. According to usage and customs over time, Banker-Customer relationship is both fiduciary and contractual. It is fiduciary because it is governed to certain extent by principles of equity and contractual because it is based on an agreement of two parties and conditions set out thereof which are essentially contractual. This appeal must be looked into with hindsight of these principles. In order to do so, I have not only looked at the decision of the lower court but re-evaluated evidence and considered the applicable law as I deemed fit to meet the ends of justice in the matter.

I had in mind that this matter was not exhaustively dealt with at the lower court.

The subject of this case was a dishonourement of a cheque. The applicable law to the subject is the Laws of United Republic of Tanzania. A cheque is a bill of exchange and is therefore governed by the Bill of Exchange Act, [Cap 215 R.E 2002]. Under section 3 of the Act, a bill of exchange is defined as **an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determined future time, a sum certain in money to or to the order of a specified person, or to bearer.**

Litigants and the Court assumed that the bill or cheque as it has been called all the time was an instrument which complied with this definition. I do not see on record of the proceedings whether this was an issue that was considered. It was assumed. I hold upfront that the instrument was a bill of exchange as

defined above and that it is subject to the law cited herein.

The Lower Court found as a fact that the instrument was drawn by the Respondents herein and that it was in favour of Ilala Municipal Council, one of Councils of the City of Dar es Salaam. That when it was presented by beneficiary's Banker (NMB Ltd) to the drawer's Banker it was returned endorsed with words "**Effects not cleared".** These words have been interpreted wholesale to mean that the drawer's accounts had no funds. Unfortunately, the Drawer's Banker, the respondents herein, testified to the effect that this is what they meant. I have no intention to change their testimony. However, I feel obliged to note in passing that in banking practices those words could mean a lot of things in connection with contractual duty of the Bank to its customer. They are safety valves where the Bank is in doubt of or is of the opinion that the purported drawer is a fictitious person or uncertain as to the authenticity of the cheque. It is more so where the cheque was not personally presented by the respondents. I need not go into this because the Bank

spoke of its mind as what those words meant. I do not and I am not impressed that the words meant what has been ascribed to it. But this is obiter and my decision will not be based on what I know about that term. I will go along, in the circumstances of this case, with the testimony and opinion of the appellant bank.

It is a fact therefore that the Bank dishonoured, without reasonable cause, a cheque drawn by the Respondents while at the time of presentment there were in their account sufficient effects or funds. As I have indicated above, the law of banking proper is the law of relationship between the banker and its customer. It is a contractual relationship. The two, the Bank and the customer are also in a fiduciary relationship. The Respondents and the appellant were in this kind of relationship. This relationship embraces mutual duties, obligations and privileges to both parties. Some of the duties and obligations are stated in the Bills Exchange Act.

Lord Atkin, L.J in **Joachimson v Swiss Bank Corp [1921] 3 K.B 110** at p.117 put these duties in a proper perspective when he said:

"The bank undertakes to receive money and collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the Bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written order so as not to mislead the bank or facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of the balance until he demands

payment from the bank at the branch at which the current account is kept".

The Bank has a duty of care to the customer and is enjoined to act in good faith. This is based in equity and contract. On one hand, it is a relationship that can also be regulated, as far as the contract is concerned, with the **Law of Contract Act, [Cap 345 R.E 2002]**. My view is that there is an overlap of the law on the dishonouring of a cheque. The two statutes are, as far as the rights of parties herein are concerned, complementary.

It is apparent from the record of the proceeding at the lower court, that the Appellant Bank did not exercise its duty of care as is prudently required. The issue here is what remedy is available to the respondents or what is the extent of liability of the Bank? It seems to me that the learned magistrate and the learned advocates, who are senior members of the Bar, proceeded on the understanding that this was a matter governed by common law principles as established and expanded by

the doctrine of stare decisis[1] under the law of tort principles. There was, in my view, an innocent attempt to introduce comparative negligence into an area which is statutory regulated. Common Law principles such as those based on negligence can only apply to supplement or in interpreting the two statutes that I have referred here. Dishonouring of a cheque is a matter which is regulated by a specific statute. The common law principles can play a vital role in filling the gaps in the law but should not precede a statute.

The measure of damages, when a cheque is dishonoured wrongly or negligently, according to the law should be deemed to be liquidated damages. These are itemized under section 57 of the **Bills of Exchange Act.** What this serves in the industry is maintenance of certainty and predictability in commercial transactions. By prospectively establishing the rules of liability that are generally based not on actual fault but on allocating

[1] A group of cases developing principles of negligence includes Winterbottom v Wright[1842]10 M&W 109;
Longmeid v Holiday (1851) 6EX 760; George and Wife v Skivington (1869) L.R. EX.1; Heaven v Pender (1883)11QBD 503; Derry and ORS v Peek HL 1889 14 App. Case ,337; Le Lievre and Dennes v Gould (1883) 1QB 491;M'Alister(Donoghue) (pauper) v Stevenson HL [1932] AC 562; to HADLEY BYRNE & CO LTD V HELLER & PARTNERS LTD [1964] AC 480-540

responsibility to the party best able to prevent the loss by the exercise of care, the law not only guides commercial behaviour but also increases certainty in the marketplace and efficiency in dispute resolution. These ends would not, in my considered view, be furthered by the introduction of the sort of fact inquiries necessitated by comparative negligence. I think this is the furthest I can go. In an appropriate case this would have been the point of determination in this appeal.

Section 57 of the Bills of Exchange Act provides as follows:

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows-

(a) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from prior indorser-

(i) The amount of the bill;

(ii) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

(iii) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of the protest;

(b).....

(c) where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest as damages may or may not be given at the same rate as interest proper.

A person who was to recover, according to these provisions, was the holder. He could recover from any party liable on the bill. The Holder in this case was the Ilala Municipal Council. A party who was liable on the bill

was the drawer and the appellant bank, the parties herein. Indeed, on receipt of notice of dishonouring, the respondents paid their debt to the holder in cash. There is no evidence to show that there were expenses of protest incurred by the holder or the drawer, the respondents herein. Associated with this, I do not see evidence that the Holder, the said Council, has claimed from the drawer who is the respondent herein, interest on the delayed payments of the principal debt or protest expenses to warrant a the court to determine ex gratia payments in form of liquidated damages. It is therefore apparent, in interpreting these provisions as I have done, and I so hold that the respondent cannot and are not entitled to recover under section 57 of the **Bills of Exchange Act.**

The reason for the law is its beauty of predictability and consistence. The beauty of reasoning is its perfection of prediction to the meaning of the law. On this, we are indebted to jurists and eminent judges who, through their love for the law and predictability have in their legal texts or judgments reduced into print and other literature, their

well thought out decisions and opinions. We are thus not walking in virgin lands or potholed paths. The area of contract is one of immense ***stare decisis***. This appeal presents such an opportunity. The relationship of the parties here is equally governed by the Law of Contract. The Appellant as a Bank has a duty of care in dealing with instructions of the respondents. If the bank acts negligently, it is a breach of duty and such a breach attracts consequences. If a customer spends time in the bank more than is necessary, either because tellers are slow or thin to handle an influx of customers for example, such a customer may be entitled for compensation if he can show that the Bank has breached its duty of care towards him or her and that such a customer has suffered loss or damage for the time he has spent in the bank. Such compensation shall not, however, be given for any remote and indirect loss or damage sustained by reason of the breach. Of recent, bank customers have complained about the time they spend in banks processing the withdrawal of funds. It appears to me that bankers are taking their customers for granted. It may be

of interest to the bankers that this may in certain circumstances attract liability. Such a liability cannot be farfetched.

Let me return to the subject of this appeal now. The issue for my consideration is the quantum of measure of damages. Section 73 (1) of the Law of Contract Act is relevant in this case. It provides:

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

The respondent must therefore show that they suffered loss or damage from the dishonourement of the cheque by the appellant. In addition, show that the loss or damage naturally arose in the usual course of things from the breach or that the appellant knew that dishonouring of the cheque will likely result in such loss or

damage. The agreement on the current account that the respondent operated at the appellant's bank was not tendered in evidence to enable the court to appreciate the conditions under which that account was operated. Such agreement would have enabled the court to see whether there was a stipulation in its terms in regards to compensation for breach by a party of its terms. Section 74 of the Law of Contract Act anticipates that parties may stipulate in such a contract a sum to be paid in case of such a breach or as a penalty. It is also possible to stipulate in such a contract an indemnity clause, on the basis of section 77 of the Law of Contract, where parties agree to indemnify the other from any loss caused by him. I cannot on the basis of the record at the lower court ascertain why this was not tendered by either party in evidence. Nevertheless, it is not the duty of the Court to decide which evidence should be brought to court to help a party claiming a relief. That is for the parties themselves to decide. Under section 77, the rights of indemnity holder are stated to be all damages which he may be compelled to pay in any legal proceedings in

respect of any matter to which the promise to indemnify applies; all costs which he may be compelled to pay in any such proceedings if, in bringing or defending them, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the proceedings; and finally all sums which he may have paid under the terms of any compromise of any such proceedings, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the proceedings. Applying section 77 of the Law of Contract Act, the respondent will be entitled for his costs of the suit at the lower court and to this court. These are remedies that the Law of Contract Act stipulates. The Act does not stipulate the quantum of damages. That is left for the parties to do and where they fail to do, the court may determine that quantum. As I have stated the measure of damages in favour of a holder

of a cheque that is dishonoured is deemed to be liquidated damages. The term liquidated damages is not defined under the Bill of Exchange Act or the Law of Contract Act, [Cap 345 R.E 2002]. I have already decided that the Bill of Exchange Act does not apply in resolving the respondent's claim but the principle of liquidated damages is severed and may guide this court in assessing the quantum of damages. It is not a term of art. In a normal parlance, liquidated damages are a sum of money fixed in advance by the parties to a contract as the amount to be paid in the event of a breach. They are recoverable provided that the sum fixed was a fair pre-estimate of the likely consequences of the breach, but not if they were imposed as a penalty. In this case, no sum was fixed.

Having reviewed the law on this matter, I think the provisions of the Law of Contract Act may be sufficient for this Court to determine this appeal.

The lower Court found and held that as a result of the dishonoured cheque, the respondents must have suffered in their business with Ilala Municipal Council to some extent. I am unable to appreciate how the

respondent suffered in their business. The suffering in business means that the respondents suffered a financial loss because of dishonouring of that cheque. Damages for breach of contract are designated to compensate for damage, loss or injury that the respondents had suffered through the breach. If a person has not in fact, suffered any loss by reason of the breach, is nevertheless in law, entitled to a verdict but the damages recoverable in that case will be purely nominal. In United Kingdom, it used to be £2[2]. That is less that shillings 5,000/-. The case for the respondent was that he suffered loss of business. Proof of such loss ought to have been given and should have been quantified in monetary terms. To succeed the respondents ought to have submitted annual business returns for two or three consecutive preceding years to allow a correct assessment of this quantum. It is more a question of evidence rather than, if I may add, off the cuff statement. I see no evidence that the respondents suffered any loss in business with Ilala Municipal Council. If there were any

[2] See Anson's Law of Contract, (J.BEATSON, 27th Edition, 1998, Oxford, at page 560. The reasoning behind being that damages are not a way punishment for wrong inflicted. It is not punitive.

of such loss it was not sufficiently pleaded and this court cannot substitute reason for a conjecture.

Along with the loss of business claim, there was a claim and finding by the Court that the respondent's reputation was lowered in the estimation of the Councillors of Ilala Municipal Council on the basis that the respondent's issued a cheque that was dishonoured by his banker. I think all assumptions in judicial thinking must be reasonable and grounds of such assumptions must be cogently and firmly established. In an issue that need evidence to support it, assumptions cannot be allowed to stand. Evidence ought to have been led to the effect that Councillors in fact regarded the respondents in lower esteem. This could have succeeded if evidence was led to that effect either by calling as witnesses any of the Councillors or if any of them had inquired from the respondents and expressed regrets or sympathy. Evidence of such contact lacking, there is also no evidence to show that the Councillors discussed or were even aware that a cheque originating from the respondents was dishonoured because their accounts had no effects. It will

be injudicious and a conjecture for me to infer failure by the Council to acknowledge a letter of apology as evidence that they were still aggrieved with the respondents and the Appellant Bank. The inference does not show that beauty of legal reasoning. There is no proof whatsoever to warrant such a finding. The learned Magistrate misdirected himself and I would therefore allow this ground of appeal.

The Lower Court judged that the respondents were entitled to general damages on the basis that the Court found that they had suffered loss. The Court quoted a passage of Lord Donedis in ADMIRALTY COMMISSIONERS V SUSQUEHANN (1926) A.C at page 661 and guided by that decision awarded a sum of shillings 8,000,000/- as general damages to the plaintiff, the respondents herein. General damages are damages that are presumed as a resultant of defamation complained of and need not be specifically proved[3]. They are to be determined reasonably and not by a stroke of the pen. On the same footing nominal damages which can be given for breach of

[3] See Leonard Sawe v L. D. S Nyakyi [1976]LRT 21, per Hon Justice Lugakingira

contract or trespass in which no damage has been caused need not also be proved. They are awarded in order to vindicate the plaintiff's rights. In my considered view, such amount should be proportionate to the quantum of the principal amount in the bill or the amount of the total effect unless there are aggravated circumstances to warrant a sum such as was awarded here under the heading of general damages. I think this is the essence of the proper pleadings. I have in mind, what I have stated above that the respondents did not show the extent of their future loss of earnings[4] if indeed they lost any business with Ilala Municipal Council. I have already determined that there is no proof of that even in the respondents' pleadings except for the general assertion.

The object of an award of damages for breach of contract is to restore the plaintiff, as far as money can do, in the situation he would have been without the breach. In this case, assuming that the cheque was not dishonoured where the respondents would have been? It

[4] Further reading of this subject on proper pleadings in the area of damages see Perestrello Ltda V United Paint Co. Ltd.[1969]1WLR 570,579,per Lord Donavan; Shearman V Folland [1950] 2 K.B 43 51 per Asquith L.J; British Transport Commission v Gourley[1956]A.C. 185, 206 per Lord Goddard

is my opinion that the situation of the respondent, both in terms of financial standing and reputation, has not been affected by the dishonour of the bill.

I have taken this long in order to unbundle the technicalities that appeared to elude parties and the learned magistrate on this subject. I think it is a common ground both at this Court and the Lower Court that the bank failed to exercise a duty of care. Breach of Contract attracts some damages. Contractual damages of which the relationship of the parties were in, may be recovered for substantial physical inconveniences or discomfort arising from the breach. It is now accepted under common law principles of tort that damages for distress can be given on the basis of ADDIS V GRAMOPHONE CO. LTD. [1909] A.C 488[5]. There is no doubt in my mind that the respondents suffered anxiety and distress when he was informed that the bill that he had drawn in favour of the Council was dishonoured. The respondents are entitled to damages arising therefrom. Respondents need

[5] See also Co-operative Insurance Society Ltd V Argyll Stores(Holding) Ltd[1997]2WLR898 at page 906 (H.L)

not prove them. Proof of anxiety, frustration and distress will be enough and had demonstrated them enough at the trial Court. Such damages, as a principle, are nevertheless compensatory in nature and are not designated to inflict retribution on the appellant for inflicting or causing anxiety, frustration and distress to the respondents. These are based on a contractual relation as well on fiduciary relationship, on the basis of equity. I have considered for guidance, section 76 of the Law of Contract, section 57 of the Bill of Exchange Act and the established principles under the common law as received by the Tanganyika Order in Council, 1920 [22 July, 1920] and I am settled that the appellant bank cannot negative liability. The respondents are entitled to general damages not as retribution against them but in order to enforce a duty of care they owe in law to the respondents.

I found the amount claimed as well as that which was awarded by the lower court to be on the high side on the basis of the principles that I have stated above. I take into account the apology letter by the respondent's banker to the holder of the bill as a mitigating factor in vitiating

the quantum of damages substantially. I consider a sum of 1,000,000/- (One million shillings only) to be sufficient as general damages. I also note that as successful party respondents will be entitled to costs of the suit. There are no aggravated circumstances warranting the court not award them. In the circumstances, therefore, I find it proper and appropriate to set aside the judgment of the lower court dated 28th April, 2006 and substitute the orders thereof with the following orders:

(i) General damages of shs 8,000,000 awarded to the Respondent is set aside. The sum is substituted with a sum of shillings 1,000,000/-(say shillings One million only) to the respondents.

(ii) that the appellant bank shall meet the costs of this suit for respondents at the lower court and on this appeal,

(iii) award of penalty imposed against the appellant is set aside instead the appellant shall credit to the respondents account, if this has not

been done, with shillings 30,000/- (say shillings thirty thousand only) which they wronged debited at a penality for dishonourement of the bill;

(iv) The decretal amount of shillings 1,000,000/- (say shillings One Million Only) shall attract an interest at court rate from the date of this judgment to the date of full payment.

Frederick M. Werema

JUDGE

7/5/2007

Date: 7.5.2007

Coram: F. M. Werema, J.

For Appeallant: Mr. Mkwata, Advocate.

For Respondents: Absent

C/C: Sifa.

This Judgment is read in Court in the presence of the parties and the Court Clerk.

Frederick M. Werema

JUDGE

7/5/2007