IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO. 12 OF 2014

LUSEKELO SAMSON MWANDENGA ..... PLAINTIFF

VERSUS

EXIM BANK (T) LTD ..... DEFENDANT

17th & 20th February, 2015

JUDGMENT

MWAMBEGELE, J.:

The plaintiff Lusekelo Samson Mwandenga; a natural person living and working for gain in the city of Arusha instituted the present suit against the defendant Exim Bank (T) Ltd; a limited liability company carrying on the business of banking with a branch at Arusha. The plaintiff's claim against the defendant, as can be gleaned from the plaint, is for the following orders:

i) An order commanding the defendant to credit the Plaintiff's Account No. 5787197774 with a total sum of Tanzanian Shillings One Hundred and Nine Million (Tshs. 109,000,000/=)

being a total amount withdrawn from that account without his authority;

ii) An order commanding the defendant to pay the Plaintiff special damages as pleaded in para 12 of the plaint;

iii) An order commanding the defendant to pay the plaintiff general damages as will be assessed by the honorable court;

iv) An order commanding the defendant to pay the plaintiff interest on item (i) at the prevailing commercial rate from the date of filing this suit till the date of judgment;

v) An order commanding the defendant to pay the plaintiff interest at court rate from the date of judgment till full payment;

vi) Costs of this suit; and

vii) Any other relief this honorable court may deem fit to grant.

Briefly stated, the background facts giving rise to the present suit are as follows: the plaintiff is a customer of the defendant who maintains a savings Account No. 5787197774 at her Arusha Branch. On diverse dates; that is, 2nd, 11th and 15th March, 2013, the plaintiff's account was debited with the sums of Tanzanian Shillings Fourteen Million (Tshs. 14,000,000/=), Fifty Million (Tshs. 50,000,000/=) and Forty-five Million (Tshs. 45,000,000/=) respectively. The plaintiff claims the withdrawals were done without his authority. It is stated that, as a result, the plaintiff suffered special damages of Tshs. 19,075,000/= being bank interest of 2.5% per month as well as general damages. It is also

asserted that the plaintiff wrote the defendant to have the anomalies rectified in his account but that the efforts went unrewarded.

The defendant, as can be gleaned from the written statement of defence, denies all allegations putting that it did not debit the account of the plaintiff, that the liability of its employees has not been established, that the defendant has not breached any duty and that the plaintiff has neither suffered special nor general damages as alleged in the plaint.

On 17.02.2015 when this matter was called on for hearing, the defendant, without assigning any reason, did not enter appearance. The advocates for both parties were present on 10.12.2014 when the hearing date was fixed. Thus, Mr. Ruwaichi who represented the plaintiff snatched the opportunity to make a prayer under Rule 46 (2) (d) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 to proceed with the hearing *ex parte* predicating on the fact that the defendant had notice of the hearing date. He was right. Upon scanning the entire record and being satisfied that indeed the defendant was aware of the hearing date, I granted the prayer made by Mr. Ruwaichi, learned counsel for the plaintiff. Consequently, this case proceeded *ex parte* and this is the judgment thereof.

I must point out from the outset that, out of inadvertency, the plaintiff was allowed to prove its case *ex parte* without the court recording the

issues as proposed by the parties. However, on 25.11.2014 the parties were ordered to file the issues they agreed on before the trial commences. Indeed, a perusal on the court record shows that the parties filed a document comprising three agreed issues on 30.01.2015. This document, however, bears the signature of only the plaintiff's counsel. The place where counsel for the defendant was supposed to sign is left blank. Be that as it may, the document shows the following agreed issues:

i) Whether there was authorization of the amounts debited;
ii) Whether the plaintiff was negligent in conducting the affairs of his account; and
iii) To what reliefs are the parties entitled?

Before I continue with this judgment, let me, firstly, underscore the position of the law as regards failure to frame issues before the hearing of a suit. Failure to frame issues before hearing commences is an ailment. It may or may not be fatal depending on the circumstance of each particular case. In the circumstances of this case, the ailment is curable in that the parties seem to have agreed on the above filed issues. And as good luck would have it, the facts of this case, generally, and the entire pleadings show in no uncertain terms that indeed the dispute between the parties revolves around the above issues. The parties were aware of what was at stake between them. Admittedly, there are situations where failure to frame issues before hearing

becomes a fatal ailment - see ***Janmohamed Umerdin Vs Hussein Amarshi & Three Others*** (1953) 20 EACA 41 cited with the Court of Appeal Tanzania in ***Edson Mwakanyamale Vs NBC (1997) Ltd***, Civil Appeal No. 63 of 2003 (unreported) and ***Abdallah Hassani Vs Juma Hamis Sekiboko*** Civil Appeal No. 22 of 2007 (unreported). However, in situations where the parties are aware of the actual controversy between them, the omission by the trial court to frame issues before hearing commences is not fatal. The omission becomes fatal only when it (the omission) results in failure of justice - see ***Tanzania Sand and Stone Quarries Vs Omoni Ebi*** [1972] HCD n. 219; the decision of this court and ***The Honourable Attorney General Vs Reverend Christopher Mtikila*** Civil Appeal No. 45 of 2009 (unreported); the decision of the Court of Appeal. In the ***Reverend Christopher Mtikila*** case (supra), for instance, the Court of Appeal observed:

> "The mere omission, on the part of the trial court, to frame an issue in a matter of controversy between the parties, cannot be regarded as fatal unless, upon examination of the record, it is found that the failure to frame the issue had resulted in the parties (i) having gone to the trial without knowing that the said question was in issue between them, and (ii) having therefore failed to adduce evidence on the point".

In the case at hand, as already alluded to above, I am of the considered view that the dispute between the parties is well understood as deciphered from the proposed agreed issues and as can deciphered from the pleadings. From the pleadings, the parties to this suit know for certain what the bone of contention between them is. This case, therefore, falls within the ambit of the ***Tanzania Sand and Stone Quarries*** and ***Reverend Christopher Mtikila*** cases (supra). In the premises, proceeding to hear the case without framing issues in the present case, did not offend any ends of justice.

The foregoing notwithstanding, it is desirable that issues are framed prior to commencement of hearing of any suit. Failure to frame issues before hearing, as happened in this case, is an unfortunate occurrence which should not be encouraged to recur.

The above said, let me now revert to the present case. The plaintiff had only one witness to field in support of his case; the plaintiff himself – Lusekelo Samson Mwandenga. He testified as PW1 and his statement was admitted in lieu of his testimony in chief in terms of sub-rule (1) of Rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 and marked as PWS1. Therein, PW1 states that the defendant had on the 3rd, 11th and 15th dates of March, 2015 withdrew his monies at the tune of Tanzanian Shillings Fourteen Million (Tshs. 14,000,000/=), Fifty Million (Tshs. 50,000,000/=) and Forty-five

Million (Tshs. 45,000,000/=) respectively without his authorization. To reinforce his testimony, PW1 tendered a Bank Statement which was issued by the defendant on the 08.12.2014. The same was admitted in evidence and marked Exh. P1. PW1 went on to state that as a result the employees of the defendant were arraigned and charged in a criminal court as per the charged sheet which was also tendered and admitted in evidence and marked Exh. P2. It was his further testimony that as a result, he has suffered general and special damages and that he wrote to the defendant demanding it to rectify the anomalies in his account but the defendant did not do so. PW1 finally prayed that the defendant should be ordered to pay back his monies that were withdrawn without his authorization together with all the prayers as prayed for in the plaint.

Having gone through the entire record of this case generally and pleadings in particular, I entirely agree that the issues proposed and filed by the parties in this court on 30.01.2015 show what is at stake between the parties and are, therefore, the only ones that call for determination in this judgment. I choose to deal with them in the order they appear.

I start with the first one which is whether there was authorization of the plaintiff on the amounts debited. The plaintiff stated that the amounts of Tshs. 14 million, 45 Million and 50 Million were debited by the defendant from his account without his authorization. A scrutiny of Exh.

P1; the Bank Statement, unveils entries of the said amount as withdrawals made on the said dates of 3rd, 11th and 15th March, 2013. Apart from that, there is nothing else which suggests that the defendant either withdrew or authorized the said withdrawals from the said account without the permission of the plaintiff. Neither is there anything to indicate that there was no withdrawals of the said monies as alleged in the written statement of defence by the defendant. It is a word from the plaintiff which has not been controverted by the defendant for the obvious reason that the suit proceeded in the absence of the defendant.

In the circumstances, the question here pertaining to the said withdrawals becomes: who authorized or caused the withdrawals as between the account holder (the plaintiff) and its custodian (the defendant)? The plaintiff alleges that it was the defendant who, without express authorization, withdrew the said monies. He tendered Exh. P1 to prove that there were such withdrawals. At this juncture, the burden of proof shifted onto the defendant to show how the withdrawals were made and or on whose authority. As intimated earlier, the defendant did not appear to defend the claim and no account was either made in the Written Statement of Defence as to how the withdrawals were made or authorized by the plaintiff. It is for this reason I find and hold that the plaintiff did not authorize the withdrawals made on the 3rd, 11th and 15th March, 2013 on Account No. 5787197774; the plaintiff's savings account.

As to the second issue; whether there was negligence on the part of the plaintiff, so far I have not landed on anything concrete be it from pleadings or testimony to infer negligence on the part of the plaintiff. It is my well considered opinion that it was the duty of defendant to make sure that the monies of all her customers, including the plaintiff, were safe and secure. That was not done and blame cannot be shifted on the plaintiff. I therefore find in the negative in respect of the second issue; the plaintiff was not negligent in any way in maintaining his account.

The third issue is in respect of reliefs to which the parties are entitled. The plaintiff has put up a total of seven prayers. I will look into each of them in turn and in the order they appear in the plaint.

The first prayer for payment of principal amount withdrawn from his account without authorization is granted as prayed. However, the second prayer must fail in its entirety. It is trite law that special damages, being exceptional in their character, must be pleaded specifically and strictly proved – see ***Zuberi Augustino Vs Anicet Mugabe*** [992] TLR 137, **Maritim & Another Vs Anjere** [1990-1994] 1 EA 312 and ***Stanbic Bank Tanzania Limited Vs Abercrombie & Kent (T) Limited***, Civil Appeal No. 21 of 2001 (unreported), to mention but a few. I think it was Lord Macnaghten who laid down the

principle in ***Stroms Bruks Aktie Bolag Vs John Peter Hutchinson*** [1905] AC 515 at page 525 in the following terms:

> "Special damages on the other hand are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, **they must be claimed specifically and proved strictly**."
> [Emphasis supplied]

The above principle, which is oft quoted in many common law jurisdictions including Tanzania, was followed by the Court of Appeal of Tanzania as a correct statement of the law in the ***Stanbic Bank*** case (supra) in which, reiterating its earlier position in the ***Zuberi Augustino*** case (supra) in which it held that special damages must be specifically pleaded and proved, the Court had this to say:

> "Although not as comprehensively expressed, this Court in one of its decisions - **Zuberi Augustino Vs Anicet Mugabe**, [1992] TLR 137, at page 139 said:- It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

In the case at hand, the plaintiff pleaded special damages in the Plaint. However little or no attempt was made in evidence to justify the claim. Apart from a mere statement that he suffered loss of bank interest of 2.5% monthly, he has not tendered anything concrete to substantiate his claim. Neither was an agreement indicating such amount as interest to which he is entitled nor any amounts already accrued and collected as a result of such interest have been led in evidence to establish his claim. The balance of probabilities on this issue tilts against the plaintiff. I therefore refuse this prayer.

As to the prayer for general damages, these are discretional. However, this court is enjoined to exercise its discretion judiciously in awarding such damages and accordingly, in order to do so, it must be guided by the party making such prayer – see ***M/S Tanzania - China Friendship Textile Co. Ltd. Vs Our Lady Of The Usambara Sisters*** [2006] TLR 70. In my considered opinion, since the plaintiff has succeeded to prove on the preponderance of probabilities that indeed he was kept out of reach of his monies by the defendant, it is an opportune circumstance towards general damages. This is logically and legally desirable because loss or possible hardship which results from being denied use of money is quite obvious. I deem an award of Tanzania shillings seven million (Tshs. 7,000,000/=) as general damages to be capable of dressing the scars. I will therefore grant this amount in response to the third prayer.

The fourth and fifth prayers are equally granted. The plaintiff is awarded interests at commercial rate of 19% from the date of filing the suit to the date of this judgment and interest at court rate of 7% from the date of this judgment to the date of full and final satisfaction. However, the latter interest (at court rate) shall be charged on the decretal sum only whereas the former shall be charged on the principal sum only. The sixth prayer is granted in that the defendant is condemned to pay costs of this suit. In the circumstance, I deem to be no other relief fit and grantable by this court.

In fine therefore I enter judgment for the plaintiff and proceed to pronounce as follows:

i) The defendant shall pay the plaintiff a total of Tshs.109,000,000 being the total principal amount withdrawn from the plaintiff's account number 5787197774 without his authority;
ii) The defendant shall pay the plaintiff Tanzania shillings seven million (Tshs. 7,000,000/=) being general damages;
iii) The defendant shall pay the plaintiff interest at commercial rate of 19% on the principal amount from the date of filing this suit till full and final satisfaction;

iv) The defendant shall pay the plaintiff further interest at Court rate of 7% on the decretal sum from the date of this judgment till full and final satisfaction; and

v) The defendant shall pay the plaintiff costs of this suit.

It is so ordered.

DATED at ARUSHA this 20th day of February, 2015.

J. C. M. MWAMBEGELE
JUDGE