Civ. App 31/2015

IN THE COURT OF APPEAL - SIERRA LEONE

First International Bank SL. Ltd

vs.

Tarrick Jaward

Coram:

Hon. Justice Desmond Babatude Edwards CJ
Hon. Justice Allan Bhammie Halloway JSC
Hon. Justice Reginald Sydney Fynn JA

Counsel:
Editayo Pabs Garnon Esq for the Appellant
Sulaiman Banja Tejan Sie for the Respondent

JUDGMENT DATED …….. November 2020

Fynn JA

Background

1. The brief facts of this case are that on 4th April 2014, Mr. Tarrick Jaward a business man who also operates an account at the First International Bank had issued a cheque for the sum of Le 44, 410,000. The cheque was made in favour of Messers B M Kadami Enterprises who were Mr Jaward's suppliers and with whom he was also involved in a Joint Venture. When Kadami presented the cheque to the First International Bank on 7th April 2014 the bank did not honour the cheque instead marked it *"returned to drawer".* This meant that Mr. Jaward had insufficient funds in his account to enable the bank honour the cheque and pay his debts to Messers Kadami
2. Messers Kadami soon afterwards terminated their relationship with Mr Jaward. Mr Jaward alleges he has consequently suffered significant loss which he claims is due to the bank's negligence. Mr Jaward insists that he had sufficient funds in his account or ought to have had such funds as he had made deposits into his accounts in anticipation of this cheque which should have accrued a sufficient balance in his account. He argues further that had it not been that the Bank had negligently double debited his account on 4th April 2014 in the sum of Le 2,160,000 in respect of another cheque his account would have been healthy enough to accommodate the cheque which had been returned.
3. The Bank denied any negligence and would not give the apology requested arguing that if there was an error it was due to a technical failure and that in any event Mr.

Jaward had insufficient funds in his account on the day he had issued the cheque which was returned and that he (Mr. Jaward) had ignited a race against time to augment his account before the cheque was presented. The bank argues further that technical difficulties with the central clearing system which are completely beyond the control of the bank had impacted Mr Jaward's transactions.

4. Mr Jaward therefore sued the bank for I) Damages for Negligent Misrepresentation II) Special Damages and III) Costs. He was successful, the court below found in his favour and ordered the Bank to pay Le 35,000,000 bi-monthly until final payment, damages for negligent misrepresentation assessed at Le 50,000,000 and costs. It is against this judgment that the Bank has appealed on the following grounds:

    a. That the learned Trial Judge erred in law and in fact when he held that the defendant negligently misrepresented that the plaintiff's account was in shortfall at the material time when the request for payment was made by the plaintiff.

    b. That the learned Trial Judge failed to advert his mind to the facts deposed in the affidavit-in-opposition relating to the issue of the short fall created in the defendant's account as at the material time when the request for payment was made by the plaintiff as caused by the double debit entries due to a technical problem from the automated clearing house operated by the central bank and therefore did not properly evaluate the evidence/exhibits adduced in respect thereof attached to the said affidavit in opposition.

    c. That the learned Judge erred in law when he held that the plaintiff had suffered as a result of the alleged negligent misrepresentation by the defendant and therefore is entitled to damages assessed at Le 50,000,000

    d. that the learned trial Judge erred in law and in fact when he held that the plaintiff is entitled to special damages assessed at Le 35,000,000 bi monthly as a result of the termination of the plaintiffs joint venture with B. M Kadami Enterprises based on the projected profit and loss statement adduced by the plaintiff as the only evidence of the said loss without more

    e. that the judgment is against the weight of the evidence

<u>The Submissions</u>

5. The parties respectively filed written synopsis of their submissions. They also both addressed us orally.

6. The appellant's thrust is that though the matter is between these two parties there were in fact a lot more players (ie other banks and the central bank) whose actions impacted these transactions. The appellant submits that to truly understand and adjure the issues one should have a clear understanding of the rules that govern banking hours and the Central clearing house system. Appellant's counsel referred the court to and relied on passages found in *Law relating to Financial Services*,

Graham Roberts 4th Edition as well as to *Paggett's Law of Banking,* 12th Edition. In brief and read together those passages set out that though a bank may receive amounts outside the stated business hours it gives no guarantee that the amounts so received would be duly processed on the day that they had been so received as business properly so called had come to an end for that day. He submitted that the error if any was due to Mr. Jaward issuing a cheque at a time his account lacked funds to satisfy it whilst he raced to beat the clock to augment the account.

7. The appellant argues further that the Learned Trial Judge was wrong to have found that there was a breach in the duty of care owed to the respondent and even if there was such a breach there was in fact no evidence to support the damages that had been granted to the respondent.

8. The respondent's counsel on their part argue that the defence put up in the High Court was a sham and the LTJ was correct to have found it to be so. It attempted wrongly to deny the appellants negligence. The respondent insists that the double debit was the centre of the wrong done to the respondent and that the appellant was solely to be blamed for it. The respondent places heavy reliance on the neighbor principle and the duty of care set out in the celebrated case of *Donoughue v. Stevenson.* The respondent submits that there has been a negligent misstatement for which the appellant must be liable insisting that the LTJ had ruled rightly and assessed the damages accurately.

Deliberations

9. Grounds One and two relate much more to the issues around whether the cheque was wrongly dishonoured and who should take responsibility for the return of the cheque. In other words was it correct for the Bank to have dishonoured the cheque? This court has the obligation to "rehear" the case and the appellant has indeed urged us to do so, and we shall do so by carefully considering and weighing the key factual issues that have been raised.

10. The subject of this case is in truth the return of the cheque for Le 44, 410,000 and any other transactions that occurred between the parties have no significance except in so far as they may have impacted the return of that cheque. In that regard I would agree with the LTJ that the claim that the respondent had in the past submitted cheques which resulted in an overdrawn account are truly of no consequence. What is crucial is whether this particular cheque was submitted and dishonoured at a time when the respondent had enough funds in his account to accommodate it.

11. A passage from the appellant's synopsis has struck me as a synthesis of the main issue in dispute and it may also hold the key to the resolution of this point , I shall reproduce it verbatim:

> *"So it is counsel's submission that at 1.30pm on 7th April 2014 the respondent account balance was Le 44,053,608/67 and so could not*

accommodate a cheque for Le 44,410,000/00. The respondent has a shortfall of Le 356,391/67 so the bank was totally within its rights to reject the cheque for insufficient fund"

12. This is all well and good save that on 4th April 2014 the respondents account had been double debited in the sum of Le 2.16M. If the Appellants concede that on the 7th April the account had in it Le 44,053,608/67 the true picture is that but for the double debit the account would have had more in it. The account would in fact should have had in it on 7th April but for the double debit the sum of Le 44, 053, 608/67 (which is conceded was available) PLUS Le 2.16M this total (Le 46+M) would certainly have satisfied the cheque in the sum Le 44, 410,000/00.

13. It appears to me that it is abundantly clear that but for the double debit the account would have been healthy enough to service the cheque which now had to be returned. The next immediate question would be "who should take responsibility for the double debit?" The appellants argue that the bank was careful and did everything according to the procedures and that this was but a technical computer error. This may be so but if it has caused some loss; who should bear that loss?

14. The old doctrine of *res ipsa locquitor* comes to mind. Machines are usually controlled by human beings. When they malfunction usually it is due to some human error or failing. I do not think that the bank's computers of their own will made a double debit. It is possible but highly unlikely. The facts which have been presented suggest the clearing system was down. Whilst the system was down the transaction clearing the cheque for Le 2.16M was manually entered, but when later the entry did not show on the record when the system came back on, the transaction was again entered. It later became clear that the second entry was unnecessary as the first which had not immediately appeared had in fact been captured by the computer and was later reported and now one of the entries had to be reversed. However before that reversal was made a cheque (which would otherwise have been honoured but for the double debit) had been presented and dishonoured. It seems to me that the thing speaks for itself.

15. The Appellant has brilliantly articulated that there has been no misfeasance on the part of the bank but I am unable to accept those submissions. It cannot be denied that banks continue to have a duty to produce the clients' money on demand within the limits pre-agreed. The customer should be able to confidently expect this and any departure will be in breach of the banks contractual duty. It surely will be unfair for the bank to be able to insist that it cannot honour a cheque because the account is in shortfall of Le 356,391 but the customer cannot in the reverse claim damages when the bank refuses to honour a cheque of Le 44, 410, 000 when the customer has amounts in excess of that amount with the bank.

16. A dishonoured cheque can have serious implications for the drawer. In some instances the drawer may become liable under the criminal law especially where the dishonoured cheque was used to settle an obligation owed to the government (see Financial Management Regulations 2007). It would be grossly uneven for the

dishonoured cheque to have such grave consequences on the drawer when it turns out he is at fault but none on the bank who wrongfully dishonours a cheque thereby putting the drawer at such risk or at a loss as is alleged in this case.

17. When the cheque was dishonoured the bank had thereby represented falsely to the drawee that the respondent did not have sufficient money with the bank to satisfy the cheque. This was certainly not true. The balance showing in the respondent's account which the bank was relying on was an erroneous record. The respondent did not make the error and had no way of preventing it as he had not withdrawn Le 2.16M twice from his account. He only withdrew it once and was completely oblivious of the fact that the bank had recorded it twice. The money (double debit) was still with the bank, the records were with the bank and the error was the banks. The bank surely misrepresented itself when it told the drawee (by dishonouring the cheque) that on 7th April the bank was not holding enough money on the respondent's behalf to satisfy that cheque.

18. "In *White v Jones* [1995] 2 AC 207 at 274 F Lord Browne-Wilkinson said;

> *"The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice."*

19. In my opinion this passage is a true reflection of the position of the law in Sierra Leone and I will adopt and apply it. It cannot be denied that a fiduciary relationship exists between a bank and its customers thereby invoking a liability for any negligent misrepresentation. The bank in the instant case must therefore be liable for its negligent misrepresentation. I will dismiss grounds one and two of this appeal.

20. **Grounds three and four** challenge the damages the court below awarded the respondents. I have already held that without a doubt if anyone should bear the effect of the loss and or damage caused by the wrongful dishonour of the cheque it must be the bank. The next question we are presented with would be; to what measure?

21. The learned Trial Judge had awarded Le 50,000,000 as general damages and Le 35,000,000 bi-monthly as special damages. The appellant submits that these awards were given in error and we now have to review how damages are assessed and what their purpose is, in circumstances such as these.

22. Generally the award of damages for breach of contract is to put the party in the position he would have been but for the breach of the contract. It is not to be seen as a lottery where the winnings may result in immediate arrival at wealth. It has been put this way by one jurist *"the party is liable to pay for restitution not for destitution"* (see *Kamara vs Okekey Fishing Company Ltd*). Regarding special damages Justice N D Alhadi JA makes the point in *Seboard West Africa vs. Eric James,* there, he quoted Bowen LJ in *Ratcliffe v Evans* (1892) 2QB with much approval as follows;

> *"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves ....and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage ought to be stated and proved. As much certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry".*

23. Regarding the general damages of Le 50,000,000 I have not seen the degree of certainty in the evidence that would lead to and justify that the damage reached such severity. In my opinion these damages were not meant to be punitive. Considering, especially that though the special fiduciary relationship between bank and customer does raise the issue of misrepresentation and make the bank liable for the misrepresentation; it certainly cannot be denied that the work environment and circumstances of a bank does lead to double debits of this kind often.

24. It certainly can be argued that it is foreseeable that some loss would occur if a cheque were dishonoured wrongly but can it be foreseen that the loss will be such as might lead to the termination of a business relationship of this particular kind? I think not. This becomes highly speculative and in my opinion smirks of pure economic loss. Whilst the bank must take responsibility for the misrepresentation (and it is a shame it did not do so earlier with an apology), this does not in my opinion warrant damages such as would open floodgates that will make the business of banking untenable. If nothing else public policy would demand that that those floodgates remain shut.

25. In the USA case of *Loucks v Albuquequ*e the Appellate Court in New Mexico, faced with a request for compensation on a wrongfully dishonoured cheque, took the view that it would be sufficient for the bank to refund the charges and fully reimburse the customer for any costs incurred in the processing of the dishonoured cheque. I am persuaded by this approach. I note that the award of the High Court is equal to the total balance in the customer's account on the day of the misrepresentation, or put differently, the award granted is some 20 times more than the amount which was erroneously double debited; this appears to me, to be excessive. I would allow only a modest amount under this head.

26. Similarly the award in respect of special damages does not appear to be in tandem with the evidence before the court to wit:

    a. the declared profits of the respondents business in tax clearance for 2014 fixes his chargeable income at no more than Le 26,000,000 (page 41 of the records). This is chargeable income for a year.

    b. Goods and services returns dated 31st March 2014 fixes his total sales at Le 35,000,000 (page 44 of the records).This represents declared sales for a year.

    c. Projected monthly Income and Expenditure Accounts fixes his **projected monthly** profits at Le 35,000,000 (see page 30 of the records). This would mean that his annual projected profits would be in the region of Le 420,000,000.

27. Whilst it is not expected that these three would ordinarily be exactly the same, one would hope that they remain in the same region. I have noticed that the first two which are mandatory documents filed by the respondent before the events leading up to this action are in fact in the same region. I note also the amounts in those two, attempts to capture the state of the whole of the respondent's business. The third document however which appears to have been developed specifically for this action and which only deals with a subset of the respondent's business sets forth an amount of Le 35,000,000 as the monthly projected profits. I note that this amount is equal to the amount of profits declared for the whole of the previous year and surpasses the amount declared as total sales in 2014. As a more reliable guide to the award of special damages, I am inclined to rely on the figures provided by the respondent himself and at a time long before this action was begun or even contemplated.

28. Additionally I have also considered that whilst the evidence does suggest that the dishonoured cheque contributed significantly to Kadami terminating the joint venture agreement with the respondent there may have been other contributing factors. Kadami's terminating letter to the respondent states *"it is to be noted that this decision was taken in light of undue procrastination of some of our business transactions with other people at that material time which was precipitated by the issuance of a dishonoured cheque to us"*(see page 46 of the records).

29. In my opinion whilst, the dishonoured cheque may well have been the last straw that broke the camel's back it seems to me that this camel's back had long been in the breaking. It would be unjust therefore for the court to ignore the existence of other factors contributing to the demise of Kadami's business relationship and proceed to make an award which lays the blame solely at the feet of the bank.

30. The consequence of the forgoing considerations would be that the appeal will succeed in part on grounds 3 and 4 but this being limited only to the quantum of the damages awarded. The LTJ was right to have imposed the damages but in my opinion a lesser amount under each head would have been more appropriate.

Conclusion

31. Having found that the appellant bank despite its fiduciary relationship had wrongly dishonoured the respondent's cheque and that the bank thereby misrepresented the respondent's financial circumstances to a business partner resulting in loss, I will dismiss the appeal entirely save as far as it relates to the assessment of damages. I find that the respondent is entitled to damages but I will make awards as follows:

    i. General damages: Le 10,000,000 and interests thereon at 10% per annum from the date of the wrongful dishonour of the cheque to the date of this judgment,

    ii. Special Damages: Le 30,000,000 only

    iii. The Appellant bank will refund all charges related to the reversed transaction

    iv. The respondents will have the costs below and that of the appeal to be taxed if not agreed.

    It is accordingly ordered.

Hon. Justice Reginald Sydney Fynn JA*……..*

Hon. Justice Desmond Babatunde Edwards CJ……..