IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MSOFFE, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 21 OF 2001

STANBIC BANK TANZANIA LIMITED..... APPELLANT
VERSUS
ABERCROMBIE & KENT (T) LIMITED ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania – Commercial Division at Dar es Salaam)

(Kalegeya, J.)

dated the 15th day of January, 2001
in
Commercial Case No. 21 of 2000

JUDGMENT OF THE COURT

14 July & 3 August 2006

MROSO, J.A.:

The appellants who are represented by Mr. Mujulizi, learned advocate, were the losing party in a suit which was filed in the Commercial Division of the High Court at Dar es Salaam. They were aggrieved and appealed to this Court. The respondents before us who are represented by Mr. C. Ngalo and Mr. M. Ngalo, learned advocates, were also dissatisfied with certain parts of the High Court judgment and cross-appealed. For reasons which were given in an order of this Court on 29th November, 2005, and we need not repeat

them here, the appellants' appeal was dismissed and the cross-appeal was adjourned for hearing on a later date. Brief facts of the case which led to the cross-appeal will be helpful.

The respondents were, and may still be, a tour company which appears to operate from Arusha. They operated a US Dollar Account with the appellants' branch at Arusha. In that connection they used cheque books from the appellants and all the cheque leaves were marked "Account Payee Only". Between April, 1999 and November, 1999 the respondents drew 124 cheques with a total value of USD 56,065, some payable to the Tanganyika National parks (TANAPA) and some payable to the Ngorongoro Conservation Authority (NCA). The proceeds of those cheques were never paid to either of those bodies. Instead they were fraudulently paid into the account of a customer of the appellants, one Frank Godfrey Mwoga. Mwoga then withdrew the money from the account and shared it with his conspirators in the fraud. One such conspirator was Caroline Maeda, a bank supervisor, who at the time worked with the appellants.

When later the respondents discovered that the cheques they had drawn in favour of TANAPA and NCA had not been paid to those clients they confronted the appellants demanding that the amounts of the cheques which had been debited from their account be re-credited, the latter disputed liability. In the meantime, according to the respondents, they (the respondents) had to use money obtained as a loan from the International Finance Company (IFC) for other purposes to pay TANAPA and NCA the respective amounts which were due to them in lieu of the money which had been fraudulently diverted to Mwoga's bank account. The respondents also sued the appellants for the USD 56,065.00 and for USD 3,360.00 being interest at 12% from 1st December, 1999 to 31st May, 2000 and also interest at 12% p.a. from 1st of June, 2000 till full and final payment.

The appellants argued that the respondents themselves were negligent and contributed to the loss of the money. They further argued that there was no proof that the respondents had used the loan money from IFC to make a "second payment" to TANAPA and NCA. There was no basis for the claim of USD 3,360.00 as 12%

interest on USD 56,065.00. There was no breach of contract by the appellants and, consequently, no justification for general damages.

The trial High Court (Kalegeya, J.) found that the appellants had been grossly negligent in the manner respondents' cheques were handled by their banker. The respondents were entitled to a refund of the stolen money and they were not guilty of contributory negligence as there was no evidence to establish it. The trial court finally considered "whether the Plaintiff is entitled to damages and interest" and whether "charging just 12% as general damages (sic)" was reasonable. Consequently, it ordered that the respondents should be paid "the interest rate payable by Defendant on Current Account of the type and not Us Dollars 3,360 claimed". It also allowed a 12% interest on the decretal amount.

In considering this cross-appeal we have to take judicial notice of the fact that the appellants' appeal had been dismissed and, therefore, the High Court findings of fact, which might have been challenged had the appeal been heard, remain intact. Only the

findings of fact by the High Court to the extent that they are relevant to the cross-appeal can now be considered. We think it is now appropriate to discuss the grounds in the cross-appeal.

The grounds read as under:-

1. The Hon. Trial Court erred in law and in fact in rejecting the special damages claimed by way of interest as per paragraph 14 of the plaint.

2. The Hon. Trial Court erred in law and in fact in accepting the uncorroborated evidence of the Appellants witness regarding the interest rate payable on commercial lending.

3. The Hon. Trial Court erred in law and in fact in rejecting the Respondents' claim for general damages for breach of contract.

To begin with, we wish to make a general observation on what appears to be a confusion in the lower court judgment where special

and general damages were treated as if they meant one and the same thing. In paragraph 14 of the plaint as filed by the respondents who were the plaintiffs before the trial court there was a specific claim of USD 3,360 as "interest at 12% p.a. from 1st December, 1999 to 31st May, 2000 as per mercantile practice obtaining in Tanzania or by way of special damages". The trial judge, however treated that claim as one for general damages as well. The confusion is manifested by the following words which were used. The judge said –

> "next is whether the Plaintiff is entitled to damages and interest".

No distinction was being made here between special damages and general damages. A little later in the judgment, the learned judge in considering the respondents' advocate's arguments for special damages based on the rate of interest charged on the I.F.C. loan said:-

> "He argues that as the IFC loan attracted 12.38 % interest charging just 12% as general damages is reasonable".

Arising from such confusion the High Court disallowed the claim of USD 3,360 which was special damages. We now ask ourselves whether the respondents were entitled to the claim in paragraph 14 of the plaint on the basis that either the mercantile practice obtaining in Tanzania allows an interest of 12% or that the claim was special damages.

Looking at the evidence adduced by the respondents through Rajendra Modha (PW1) we can find no evidence of the alleged mercantile practice. So, clearly the claim was not proved on the basis of a mercantile practice which provided for a 12% interest on a loan.

There was the alternative basis for the claim that it was special damages. The law is that special damages must be proved specifically and strictly. Lord Macnaghten in **Bolag v Hutchson**

[1950] A.C. 515 at page 525 – laid down what we accept as the correct statement of the law that special damages 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 specially and proved strictly.

Although not as comprehensively expressed, this Court in one of its decisions – **Zuberi Augustino v 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.

The question then is whether the special damages of USD 3,360.00 were specifically pleaded and proved.

Paragraph 14 of the plaint made the claim for the special damages but strictly speaking the particulars were not given. But

even if it is accepted that the way those damages were pleaded met the requirements of pleading, were they special strictly proved?

Again, the only witness for the respondents who was supposed to provide the strict proof did not satisfy the requirement. All he said in this connection was –

> We borrowed 300,000 US Dollars. We were not able to service the loan agreement as per terms because we fell short of cash for having paid for Camp Sites ---
>
> It carries interest of 12.38% as per s. 3.02 of the Loan Agreement (Exh.P1).
>
> We claim US Dollars 59, 425 and 12% interest.

With due respect, that cannot be strict proof of the special damages of USD 3,360.00, let alone proof that it was money from that loan which was used to pay for the camp sites.

The trial judge in apparent reference to the special damages (although he did not use those words) said:-

> Here, the plaintiff is clamouring (sic) for damages allegedly because the Defendant's action disturbed its cash flow as it was forced to effect another payment to TANAPA and NCA for the tourists' safari; that even then it took that money from funds for construction project which was funded by International Finance Corporation, which act allegedly brought to a standstill the said project. He argues that as the IFC loan attracted 12.38% interest charging 12% as general damages is reasonable.
>
> On this argument I am on all fours with Defendant that the alleged loan and the issue at hand are not connected in any way. Money could have been taken from any other source including its reserve fund. That apart, no evidence was led to show that the money paid if any, came from the IFC funds ---.

The High Court then granted an interest of 2% "on a current account rate".

The 2% interest rate on a current account was testified to by DW1 – Mr. Fidelis Malembeka, the Branch Manager of the appellant Stanbic Bank at Arusha. He said:-

> On a current Account we pay a maximum of 2% interest – that is the rate payable. If the Court was to find us liable this would be the rate of interest.

So, apparently the court was minded to find the Bank liable to pay an interest on the 56,065 USD as (special) damages, and hence the 2% interest rate on that amount. Mr. C. Ngalo, could not see the reason for the trial court to accept the 2% interest rate rather than the 12% which was proposed by them. The reason is not far to seek. In the case of the 2% interest rate, as already mentioned, there was the evidence of the banker and in the absence of contrary evidence from a professional banker, the court was entitled to accept that evidence

as reliable and dependable compared to the reliance on the IFC loan interest rate. The latter has no relevance to a current account interest rate. The respondents' money in issue was kept in a current account with the respondents. Although it could be asked if the special damage had been strictly proved, since at this stage there is no appeal against that finding, we dismiss the first and second grounds of the cross appeal.

Mr. C. Ngalo submitted forcefully that in view of the finding of the trial court that there was gross negligence and considering that 124 cheques were destroyed within a span of six months, the destruction of each cheque being a separate fraud and a serious betrayal of trust to their customer, this Court should step into the shoes of the trial High Court and award substantial damages. He referred the Court to several decisions of this Court, the High Court and of foreign courts. Among the cited cases were **Grace Ndeana and NBC Holding Corporation,** (CAT) Civil Appeal No. 76 of 1999 (unreported), **The Trustees of the Tanganyika National Parks t/a Tanzania National Parks versus The National Bank of**

Commerce and International Forex Bureau Ltd, (HC – Arusha) Civil Case No. 33 of 1995 (unreported); **Cooper Motors Ltd. versus Moshi/Arusha Occupational Health Services** [1990] TLR 96; **Tournier v National Provincial and Union Bank of England** [1924] 1 K.B 461 and **Canara Bank versus Canara Sales Corporation and Others** [1988] LRC 5. He submitted that although the award and quantum of general damages are in the discretion of the Court, he nevertheless suggested that they could be in the region of USD 100,000.

Mr. Mujulizi submitted that there was no breach of contract and the decision of the trial judge regarding the general damages as canvassed in the cross-appeal could not be faulted. Since general damages are awarded at the discretion of the court an appellate Court should not interfere, even if there was an error. But if this Court found that the trial court was in error regarding general damages, then it should remit the record to the trial court with a direction that it should consider the issue.

According to Mr. Mujulizi, the **Grace Ndeana** case was not relevant in the case under cross-appeal. There was no evidence that respondents' reputation had been tarnished. No person from either TANAPA or NCA gave evidence at the trial to say that as a result of the 124 cheques not being paid to them they held the respondent in less esteem. The other cases cited by the advocate for the respondent were equally irrelevant, according to Mr. Mujulizi. The case which was before the trial court was one of clear theft, which was a criminal matter, and the Bank would not be penalized by condemning them in damages for crimes committed by their employees. On the other hand, since the conduct of the respondents' employee, Mr. Mkali, who handled the cheques before they landed into wrong hands raised many unanswered questions, the respondents cannot be said to have come to court with clean hands and equity would not help them. The 2% interest which the trial court thought fit to grant the respondents was sufficient compensation to them. He asked the Court to dismiss the appeal on general damages.

Although as mentioned earlier in this judgment the trial judge appeared to have failed to distinguish in his judgment special damages from general damages it is clear, however, that he did not reject general damages. He found that the appellants were grossly negligent and were in breach of their contractual obligation to the respondents. The following reasoning from the High Court judgment gives indication of breach of the contractual obligation:-

> A banker who encashes a forged cheque by a customer's employee is liable to the customer for having paid without authority or instruction, and, in the same way the banker becomes liable where, though the signatures are proper, a person other than the payee is paid instead.

Again quoting from Lord Macnaghten in the **Balog** case mentioned earlier, general damages are:-

> ... such as the law will presume to be the direct, natural or probable consequence of the action complained of.

Damages, generally, are:-

> That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. See Lord Blackbum in **Livingstone v Rawyards Coal Co.** (1850) 5 App. Cas. 25 at page 39.

Asquith, C.J. in **Victoria Laundry v Newman** [1949] 2 K.B. 528 at p. 539 said damages are intended to put the plaintiff "... in the same position, as far as money can do so, as if his rights had been observed."

If the appellants' rights as a customer of the bank had been observed the cheques would not have been paid to a person other than TANAPA and NCA. To redress the failure the trial court ordered that the money – USD 56,065.00 – that was debited from respondents' bank account be refunded. But before the court order was made there was evidence from PW1 – Modha – that the

respondents had to make another payment to their clients – TANAPA and NCA. So, they were put into the inconvenience of having to find money, from whatever source, to make a second payment. We think the respondents therefore should be recompensed for it.

But although the trial court did not find the respondents guilty of contributory negligence it was not disputed that their employee – Mkali – was the one who was given the cheques to take to both TANAPA and NCA. He was not called to court by the appellants to explain what he did with those cheques. All we know is that he was able to bring to the respondents vouchers from TANAPA and NCA suggesting, as Modha put it, that "... the cheques were received by TANAPA and NCA ..." One would be forgiven if one believed that the respondents' employee participated in the conspiracy to divert the payment of the cheques into Mwoga's account which means really that both the appellants and the respondents had dishonest people among their respective staff. We are of the considered opinion, therefore, that while the respondents are entitled to some general

damages, they certainly do not deserve substantial damages as canvassed by Ngalo Advocates.

The cases which were cited by the learned advocates for the respondents are not in our view authority for granting substantial damages in the circumstances of the case before us. We will make brief reference to only some of them.

The **Grace Ndeana** case is in fact authority for grounds for reducing an award of damages which the trial court had fixed too high. In the **TANAPA v NBC** case no general damages were awarded. In the **Cooper Motor Corporation Ltd** case this Court restated the principles on which an appellate court can interfere with the quantum of general damages fixed by the trial court. It reduced the quantum of general damages which were inordinately high, from Tshs. 600,000/= to Tshs. 150,000/=.

Since under section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 this Court has "the power,

authority and jurisdiction vested in the court from which the appeal is brought" we think we should step into the shoes of the trial High Court to assess the general damages instead of remitting the case to it. In all the circumstances as we have tried to consider we think an award of USD 10,000 as general damages would meet the justice of the case. The cross-appeal is allowed on the third ground to the extent as explained. The respondents are to get a third of the costs and as both Mr. C. Ngalo and Mr. M. Ngalo are advocates of the same firm, we refuse a certificate for two counsel as prayed and certify for one counsel only.

DATED at DAR ES SALAAM this 3rd day of August, 2006.

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL