REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERICIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 101 OF 2010

SUNIL CHANDULAL SHAH...1ST PLAINTIFF

HASMUKHLAL VIRCHAND SHAH.......................................2ND PLAINTIFF

ATUL CHANDULAL SHAH ....3RD PLAINTIFF

CHANDULAL VIRCHAND SHAH...4TH PLAINTIFF

VERSUS

I & M BANK..DEFENDANT

JUDGEMENT

1. A discussion that arises herein is what is, either as a general proposition or specific to the relationship of the Parties herein, the right time for a Lender to sell Shares or Stocks where a Margin has been breached in a Share and Margin Facility.

2. Since the year 2004, there existed a Banker/Customer relationship between I & M Bank Limited (I & M Bank or The Defendant) on the one part and Sunil Chandulal Shah (Sunil or the 1st Plaintiff), Hasmukhlal Virchand Shah (Hasmukhlal or the 2nd Plaintiff), Atul Chandulal Shah (Atul or the 3rd Plaintiff) and Chandulal Virchand Shah (Chandulal or the 4th Plaintiff) on the second part. In fact Sunil had been a customer of I & M Bank since the late 1980s and is known to the major Shareholders of the Bank.

3. At least from sometime in the year 2006, Sunil was trading in Shares at the Nairobi Stock Exchange (NSE). Requiring the help of I & M Bank to finance the trade, Sunil made a request to the Bank for some facilities through a letter of 16th January 2006(which though not shown to the Court was acknowledged as existing by Sunil). On 6th February 2006, I & M Bank offered Sunil an overdraft facility for the sum of Khs.23,701,000/=. This offer was duly accepted by the Sunil. That facility was subsequently enhanced on 4th April 2006, to Khs.38,501,000/=.

4. The Facility around which the controversy herein exists is that made through a Credit Facility letter dated 13th December 2007(P Exhibit pages 15-27). The Facility was in the nature of an overdraft with a limit of Kshs.73,501,000/-. It was to be guaranteed by Atul, Chandulal and Hasmukhlal. The purpose of the overdraft was solely for trading in Shares to be held in I & M Nominees Limited (CDS Account, Sunil Chandulal Shah).

5. A feature of this Facility is that it would be subject to the aggregate value of Shares held in the names of the Plaintiffs covering at all times 70% of the aggregate exposure of the four subject to a maximum of Kshs.317,500,000/=. It would be for this reason that the covenants in clauses 9 (c), (d) and (e), (f) and (g) of the Facility letter are central to this matter. They are set out below:-

> (c) If any time the prevailing market value of Pledged Securities does not exceed by at least 70% per cent the amount of the moneys and liabilities under the Facility the Borrower hereby undertakes to pay to the Bank such sum of money as shall be required to make up the required margin or undertakes on demand and at the option of the Bank either to deposit with or transfer to the Bank or to trustees for or nominees of the Bank (as the Bank may require) additional securities approved by the Bank to make up the required margin.
>
> (d) The Borrower hereby agree and authorize the Bank to sell all or part of the Pledged Securities through Forced Sale or otherwise, at the Bank's discretion, in order to regularize the Facility upon failure, after due notice to by the Bank to the Borrower, to regularize the Facility. Such proceeds arising from such sales shall be net of all charges and commissions as specified under the existing regulatory guidelines, rules and procedures.

(e) The Borrower further agrees not to dispute or question the Bank's mode of Selection, amount and choice of securities (shares) among the Pledged Securities or the price at which such shares are sold as long as such transactions are carried out in accordance with the regulator's guidelines, rules and procedures.

(f) The Borrower further agrees to pay to the Bank any resulting shortfall after such sales, as specified above, of all the Pledged Securities and all amounts due and owing to the Bank under the Letter of Offer.

(g) In the event of Forced Sale or any such sales as permissible under the existing law to clear the Facility with a resultant credit in favour of the Borrower, such amount in excess of the Facility.

6. It is common ground that a Letter of Guarantee and Indemnity for the Guarantee contemplated by the Facility letter was duly executed by Atul, Chandulal and Hasmukhlal on 15th December 2007 (D Exhibit pages 24 – 31). It is also common ground that the Facilitiy was granted. All was well for sometime.

7. It was the evidence of Sunil that sometime on 31st August 2008, the Margin was breached but the Bank only raised the issue in a letter of 9th December 2008 (P Exhibit 31). In that letter I & M advises that as at 8th December 2008, the Margin had been breached with the consequence that there was an excess of Khs.25,4451,034. Sunil was required to regularize the situation by either making payment to reduce the outstanding balance or by pleading additional security that would be acceptable to the Bank within 14 days of the letter.

8. The mainstay of the Plaintiffs case is that, in view of clause 9 of the letter of offer, in the event of breach of the Margin, I & M Bank was obliged to immediately enforce the securities by disposing off the Shares pledged as security. In this manner he would not suffer a loss. In additional to asserting that such prompt action was obligated by Contract, Sunil argues that it is a conventional exercise of prudent banking. He adds that it would be even more critical in his circumstances given the global economic meltdown and trends at the Nairobi Stock Exchange at the material time.

9. It was not until on or about 10th June 2009 that I & M Bank started to sell the pledged Shares. While the Bank has proffered an explanation for the apparent delay, Sunil holds it as unacceptable and lack of exercise of a reasonable degree of care. Sunil asserts that as a result of that delay he has been occasioned loss and damage of Khs.26,337,200.56 being the amount in respect to Margin loss between the periods of 31st August 2008 to 23rd February 2010 when the suit was filed.

10. In addition to that Claim, Sunil, Hasmukhlal, Atul and Chandulal as guarantors seek to be discharged from their obligations on the basis that the delay in enforcing the security constituted a clear variation of the terms of Contract between the Principal Debtor and the Bank for which the Guarantors cannot be held liable.

11. Ultimately the Plaintiffs seek the following Prayers in their Plaint of 23rd February 2010 :-

a. An Order of permanent Injunction to restrain the Defendant, either through itself, servants or agents from further selling, disposing of, or alienating the 1st Plaintiff's shares pledged as security or any of the Plaintiff's shares whatsoever or otherwise enforcing the personal guarantees executed by the 2nd to 4th Plaintiffs for the overdraft.

b. A Declaration that all interest, penalties and other charges levied on the 1st Plaintiff's account is illegal, unlawful and irrecoverable and that the Plaintiffs are not indebted to the Defendant over the overdraft facility.

c. Special damages for Kshs.26,337,200.56 together with interest rates.

d. Cost of the suit and interest.

Although the Plaintiffs had taken issue with the interest charged as being usurious and unagreed, this aspect of the Claim was not prosecuted at all and must have been abandoned.

12. The Bank's position is that in the event the exposure to Share Margin was breached then upon demand by itself, Sunil would pay such money as would be required to make up or restore the agreed Margin and/or at the option of the Bank deposit with or transfer to the Bank acceptable additional securities sufficient to restore the agreed Margin. In addition the Bank would be entitled, at its option and at any time after the breach, to sell all or any part of the pledged shares through forced sale or otherwise.

13. While explaining the seeming delay in selling the Shares, the Bank is confident that the option to sell and the timing of the sale was at its own discretion. The Bank explains that it was Sunil who requested it to hold off the Sale until the first quarter of the year 2009 because of the prevailing market situation in December 2008.

14. The Bank understood its duty as only to act in good faith and to sell the pledged Shares for the best price reasonably available. The Bank argues that it has discharged this duty.

15. Three witnesses testified. These are Sunil (PW1) and Wilfred Abincha Onono (PW2) for the Plaintiff and L.A Sivaramakrishnan (D.W.1) for the Defence. This Court will discuss and analyze their evidence as is necessary to resolve this Dispute. The rival sides proposed different sets of issues which this Court has considered in the context of the Pleadings. This Court sees the following as worthy for determination:-

a) When was the 70% Margin breached?

b) Did the Bank have a contractual obligation to sell the pledged Shares immediately upon the Breaches?

c) If the answer to (b) above is in the affirmative then what loss, if any, did the Plaintiffs suffer owing to the delayed sell?

d) What is an appropriate order on costs?

When was the 70% Margin breached?

16. There is consensus that sometime in the course of 2008, the 70% Net Margin was breached. There is also agreement that the very first time that the Bank requested Sunil to regularize the account because of breach of the Margin was through a Letter of 9th December 2008 (P Exhibit page 31). It is however the position of Sunil that the Margin was irredeemably breached from 31st August 2008.

17. That alleged date of breach is attributed to the analysis carried out by PW2. PW2 is a Certified Public Accountant and the Managing Consultant of Interest Rates Advisory Centre Ltd (IRAC) which boosts as specialists in Financial Consultancy and undertakes Audit of Borrowing Contracts and Interest Recalculations. He explains in his evidence that using Share prices from the Nairobi Stock Exchange (NSE) for the period September 2006 to May 2009, he prepared a valuation for all Shares placed under the Management of I & M Bank by Sunil. On that basis he was able to generate a Table (P Exhibit page 37 to 51) which shows the value of the Shares on different dates against Sunil's indebtedness on those dates. Although the Report by the witness does not include the Document setting out the prices of various Shares from NSE over the material period, he maintained that to be public information.

18. In the course of cross-examination, the witness was vigorously examined on his understanding of the terms of the Credit Facility Letter and letters exchanged between the Bank and Sunil. Yet, on the other hand, the Court did not sense an equal or any serious effort to discredit the tabulation worked out by the witness. This Court would have no difficulty accepting it as credible. If there was need for some comfort, then it can be drawn from the position taken by the Bank as to the state of affairs on 8th December 2008. Compare the information set out in the Banks letter and that of IRAC's Table.

	Outstanding Balance	Value of Pledged Shares
Bank	61,002,380/=	50,787,924/=
IRAC	58,569,365.84/=	49,384,063/=

The difference may not be substantial!

19. In addition, the assertion by Sunil's side that the breach was from 31st August 2008 finds some corroboration from the Banks own letter of 9th December 2008 in which the Bank talks about decline in Market prices of Shares "over the past few months". This Court is willing to accept the evidence by PW2 that Sunil's account went into a state of permanent breach from 31st August 2008.

On when to sell the pledged Shares.

20. This really is the crux of the matter. So as to unravel this question, regard must be given to the Contract entered between the Parties. The Contract, and there is no disagreement about this, is the Credit Facility letter dated 13th December 2007. In construing the terms of this Contract, this Court accepts the proposition by Counsel for the Plaintiffs that it should apply the general Rule that the intention of Parties to an agreement should be ascertained from the contract as it is deemed that what the Parties intended is what was stated in the Agreement. This passage from Chitty on Contracts, 28th Edition volume 1 is not without value:-

> "Intention of the parties. *The task of ascertaining the intention of the parties must be approached objectively. The question is not what one or other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the Contract". The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself. "One must consider the meaning of the words used, not what one may guess to be the intention of the parties". However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man*".

21. The Contract between the Parties contemplated that there could be breach of the Margin and set out what should happen in that event. That is, the respective obligations of the contracting Parties in that event. Clauses 9 (c)(d)(e)(f) and (g) are key in this regard and provide:-

> (c) If any time the prevailing market value of Pledged Securities does not exceed by at least 70% per cent the amount of the moneys and liabilities under the Facility the Borrower hereby undertakes to pay to the Bank such sum of money as shall be required to make up the required margin or undertakes on demand and at the option of the Bank either to deposit with or transfer to the Bank or to trustees for or nominees of the Bank (as the Bank may require) additional securities approved by the Bank to make up the required margin.
>
> (d) The Borrower hereby agree and authorize the Bank to sell all or part of the Pledged Securities through Forced Sale or otherwise,

at the Bank's discretion, in order to regularize the Facility upon failure, after due notice to by the Bank to the Borrower, to regularize the Facility. Such proceeds arising from such sales shall be net of all charges and commissions as specified under the existing regulatory guidelines, rules and procedures.

(e) The Borrower further agrees not to dispute or question the Bank's mode of Selection, amount and choice of securities (shares) among the Pledged Securities or the price at which such shares are sold as long as such transactions are carried out in accordance with the regulator's guidelines, rules and procedures.

(f) The Borrower further agrees to pay to the Bank any resulting shortfall after such sales, as specified above, of all the Pledged Securities and all amounts due and owing to the Bank under the Letter of Offer.

(g) In the event of Forced Sale or any such sales as permissible under the existing law to clear the Facility with a resultant credit in favour of the Borrower, such amount in excess of the Facility.

22. Mr. Odera for the Plaintiffs submits that upon the breach and in the event of Sunil not taking corrective measures (to pay money to make up the required margin or to provide acceptable additional securities) then the Bank was obliged to sell the pledged Shares within a reasonable time. Counsel argues that although time is not fixed in the Contract, the law implies that the sell should happen within reasonable time. The Plaintiffs place reliance on the decision of Lord Watson in Pantland Hick vs. Raymond & Reld [1893] A.C. 22 at page 32 where he said,

"*When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time*".

23. This Court is asked to find that a delay of 7 months is unreasonable.

24.In support of this line of argument this Court is referred to an Article by Ope Banwo under the title, "***Share/Margin Loans and the Investor; The Legal Dimensions of the Debacle".*** In this undoubtedly interesting read, the Author postulates as follows:-

"*Now having raised their own level of duty of care, skill and diligence the bank can be held to the reasonable man standard of care and legitimate issue will be: Did the bank exercise the proper duty of diligence and care in approving SPECIFIC STOCKS for the customer? Did the bank exert proper diligence in deciding the RIGHT TIME TO SELL OR NOT SELL when the stock fell below a certain level or was the bank only driven by its own interest? Did the Bank exercise proper diligence in apprising the customer of the current market situation and trend? Did it raise the PROPER ALERT AND CAUTION for the customer to revise its position when the stocks nosedived below the 130% safety net the both parties agreed should activate sell-off by the bank? Finally, did the totality of actions by the bank actually CAUSE THE CUSTOMER TO MAKE HUGE LOSSES? These are issues the bank could have avoided by not including those stringent conditions that basically left the banks at the mercy of the customer*".

25. On the other end of the pendulum, the Bank does not read clause 9(d) as imposing a duty/obligation on the Bank to sell the pledged Shares at any particular time or immediately the 70% Margin was breached. For this argument the Court was referred to various authorities. This Court is content to rehash a few.

26. It was proposed that given the volatile nature of the Stock Market it would be absurd and punitive to the Plaintiffs for the Bank to sell the Shares immediately the Margin was affronted. Cited in support was the Decision in Federal Deposit Insurance Corporation vs. Air Altantic & another 452 N.E at 1147:-

"Given the volatility of the stock market, a requirement that a secured party sell shares in mutual funds, held as collateral, at a particular time, would be to shift the investment risk from the borrower to the lender. But "[i]t is the borrower who makes the investment decision to purchase stock. A lender in these situations merely accepts the stock as collateral, and does not thereby itself invest in the issuing frim. Nor, unless otherwise agree, does the lender undertake to act as an investment adviser, although imposing a duty on the lender to sell the stock at the 'reasonable' time would foist that role upon it" Capos v. Mid-America Nat'I Bank, supra at 680".

27. It was suggested by Mr. Karori Kamau for the Bank that the accepted practice and usage in this type of arrangement is that stated in the Decision of Charles E. Johnson Jr., vs. Bank one Securities Corporation Layre [2005] Us CA 6 11 as follows:-

"*We agree with the reasoning of these courts and believe that the Kentucky Supreme Court would adopt a similar approach with regards to Ky.Rev.Stat.Ann. 355.9-207. Specifically, we conclude that under Kentucky law a lender has no obligation to sell pledged stock held as collateral merely because of a market decline. If the borrower is concerned with the decline in the share value, it is his responsibility, rather than that of the lender, to take appropriate remedial steps, such as paying off the loan in return for the collateral, substituting the pledged stock with other equally valued assets, or selling the pledged stock himself and paying off the loan*".

28. This Court was also urged to find that the law on the timing for enforcement of Securities is that there is no obligation to enforce at any particular time and the Lender has an unfettered discretion on when to act.

(a) In ACC Bank PLC vs. MCEllin & others [2013] IEHC 454, the Irish Court held,

"32. More fundamentally, this argument ignores the fact that there is no obligation to enforce rights at any particular time. It is for the bank to choose the time to act. That appears very clearly from the decision of the Court of Appeal in Silven Properties Limited v. Royal Bank of

Scotland plc [2004] 1 WLR 997. In that case, Lightman J. at para. 14, delivering the judgment of the court commented as follows:-

> "*14. A Mortgagee 'is not a trustee of the power of sale for the mortgagor'. This time-honoured expression can be traced back at least as far as Sir George Jessel M.R in Nash v. Eads (1880) 25 SJ 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which is owed; See Cuckmere Brick Co. v. Mutual Finance Limited [1971] Ch 949, 969g. A mortgage is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in Raja v. Austin Gray [2002] 1 EGLR 91, 96 para.29 per Peter Gibson L. J. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the Power will occasion loss or damage to the mortgagor; (See China and South Sea Bank Limited v. Tan Soon Gin (alias George Tan) [1990] 1 AC 536). It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price; see Tse Kwong Lam v. Wong Chit Sen[1983] 1 WLR 1349 at 135b*."
>
> In China and South Sea Bank Limited vs. Tan Soon Gin [1990] I AC 536 Lord Templemon held,
>
> "*If the Creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The Creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the Creditor*".

29. The starting point to resolving these two contrasting positions is by construing the Contract itself and understanding the nature of the relationship between the Plaintiffs and the Bank.

30. Clauses 9(c) and (d) are at the center of this issue and provide:-

> (c) If any time the prevailing market value of Pledged Securities does not exceed by at least 70% per cent the amount of the moneys and liabilities under the Facility the Borrower hereby undertakes to pay to the Bank such sum of money as shall be required to make up the required margin or undertakes on demand and at the option of the Bank either to deposit with or transfer to the Bank or to trustees for or nominees of the Bank (as the Bank may require) additional securities approved by the Bank to make up the required margin.
>
> (d) The Borrower hereby agree and authorize the Bank to sell all or part of the Pledged Securities through Forced Sale or otherwise, at the Bank's discretion, in order to regularize the Facility upon failure, after due notice to by the Bank to the Borrower, to regularize the Facility. Such proceeds arising from such sales shall be net of all charges and commissions as specified under the existing regulatory guidelines, rules and procedures.

31. The language used in these two clauses is plain and easily discernable. Upon the breach of the Margin, the first responsibility is on the borrower to take corrective action by paying to the Bank such sum of money as shall be required to make up the required Margin. As the facility was an overdraft, Sunil would be required to make such deposits into his current account as would restore the Margin. Given the plain words of this obligation the primary obligant in maintaining the Margin was Sunil.

32. Failing to restore the Margin in that way then Sunil, on demand and at the option of the Bank, was required to provide additional Securities, (which would be subject to the Banks' approval) to achieve the restoration.

33. But under clause 9(d) the Bank could, after giving due Notice to Sunil, to regularize the account, sell all or part of the pledged securities through forced Sale or otherwise if breach continued.

34. Given the above scenario, where the responsibility is at the outset on the Borrower to right the breach, it would be against the spirit of that arrangement to hold that the Bank had an obligation or even a right to immediately sell the pledged Securities upon breach. The first step that the Bank could take was to demand amends from the Borrower.

35. Two issues then possibly arise. Can the Bank be said to be in default of its obligation if it does not make the Demand for regularization immediately there is breach, and/or if it does not proceed to immediately sell after the expiry of the period of the Demand Notice and in the face of continued breach?

36. There seems to be a tacit acknowledgement in the Article by Ope Banwo (cited by Counsel for the Plaintiffs) that the position may change depending on the actual nature of the relationship between a Bank and its Customer. Hear what he says:-

> "When a bank goes out of its way to give a loan, which by the way was never requested for or solicited by the customer like the case study in point, and then deliberately puts itself in the way of the client where the customer is forced to run the trading business based on advice and permission from them, the coloration of the transaction changes dramatically. Furthermore, in a situation where the contractual arrangement give the bank the right to decide which stock gets purchased and which not to purchase and also gives the bank the right to unilaterally sell the stock when the value drops to a certain point, the imputation of fiduciary duty of care cannot be escaped".
>
> Underscored in this opinion, and which cannot be begrudged, is that where a Lender relates with the Borrower more intimately than the everyday Lender, then the Lender risks assuming the higher duty of a Fiduciary.

37. However in a arms-length loan transaction where the Lender remains a Lender and the Borrower a Borrower and there is no semblance of some sort of Joint Venture or partnership venture, it would be safe to hold that, as a general proposition, a Mortgagee is not a trustee of the Power of Sale for the Mortgagor. The Lender would generally have an unfettered discretion to elect when to sell the pledged security. In a typical arms-length relationship the Bank does not owe its customer a fiduciary duty and the positions of the two would invariably be competing. Yet this Court is not willing to accept that this is no more than a general proposition which may not hold true at all times. It has to be remembered that even in a conventional Debtor-Creditor relationship the Creditor owes the Debtor a duty to act in good faith when enforcing its security so as to achieve the best or commercially reasonable price at the time of sale. While Lenders cannot be begrudged for delaying Sales in the hope of obtaining better bargains, they should not be excused when the delay is so reckless, fraught with mala fides and is commercially nonsensical that it leads to a foreseen or foreseeable substantial devaluation of the pledged Security.

38. Sunil does not suggest that his relationship with I & M Bank was no more than the conventional Creditor-Lender relationship. On its own this Court is unable to find evidence that the relationship had been elevated as to give rise to a fiduciary responsibility on the part of the Bank. Nonetheless in the credit facility letter of 13th December 2007 is clause 2 which stipulates:-

> "Purpose
>
> OD The overdraft facility shall be solely used for trading in Shares to be held in I & M Nominees Limited CDS Account Sunil Chadulal Shah".
>
> This Court has had to ponder the object and therefore the effect of this requirement.

39. In cross-examination DW2 testifies:-

> "*The Plaintiff pledged Shares which we had a lien over. I & M Nominees acts as custodian of Shares. When a customer wants to sell, we grant permission but on condition that proceeds come to us".*
>
> He was later to testify in re-examination,
>
> "*In respect to Shares not held under lien no authority was required for their sale*".

The reason why the Shares held under lien would have to be traded under some control of I & M Nominees is really simple enough. As the Shares had been pledged to secure some indebtedness to the Bank, the Bank had to have control of their Sale so that the proceeds would be paid through the Bank. The Bank was simply protecting its interests and this does not alter the relationship of Sunil and the Bank from the Lender and Borrower relationship as understood in the conventional sense.

40. The result I reach is that the relationship between Sunil and the Bank was that of a typical Lender and Borrower and whose relationship would have to be inferred from the terms of the Contract between them. The Bank was under no obligation to sell the pledged Shares immediately after the Margin was breached. In the circumstances, the timing by the Bank can only receive censure if it was so reckless or motivated by bad faith that it led to substantial erosion of the value of Shares in circumstances which were foreseeable or ought to have been foreseeable.

41. But first I have to address the issue of delay in the Bank making the Demand given that it was made on 9th December 2008 when a less than transient breach had commenced on 31st August 2008. Now, this Court has held that the duty to keep the Margin was on Sunil. And so when the breach began on 31st August 2007, Sunil was under an obligation to take corrective action. Admittedly, this was not done. Sunil, in this context, was no ordinary customer because he had substantial knowledge in the trade of Shares and would know or ought to have known that Breach had happened and was continuing to hold.

42. On the other hand, the Bank was under duty to demand the regularization of the Account upon Breach. The Bank had the advantage of I & M Nominees who are Trade Brokers and would be expected to have first-hand information on the value of Sunil's Shares. The Bank could draw from this information and therefore prompt knowledge when breach happened.

43. So if there was delay in the issue of beach being raised, then this Court must find both parties to blame. Is Sunil therefore justified to complain about it? The answer, in my view is to be found in his reaction to the Demand from the Bank. This is his immediate reply (letter of 10th December 2008, P Exhibit page 74):-

> Sunil Chandulal Shah
>
> P.O. Box 80952
>
> MOMBASA
>
> 10TH December 2008
>
> Your Ref: MSA/CR/673/2008
>
> Chief Manager

I & M Bank Limited

MOMBASA

Dear Madam

BREACH IN MARGIN ON PLEDGED SHARES FOR YOUR FACILITIES.

Your letter dated 9th December 2008 under above reference refers.

As you are aware, the share marked had fallen well below any expectation and selling shares would mean incurring heavy losses. However, the market is picking up a bit now and we should be able to reduce the exposure by selling the shares during the first quarter of 2009 when prices should be favourable as many companies would be releasing their final results.

Meanwhile, you must have noticed that inspite of the difficulty, I have still been making deposits as and when funds are available.

Your understanding in this matter will be highly appreciated.

Yours sincerely,

SUNIL CHANDULAL SHAH.

Sunil does not take issue with the timing of the Demand. Instead, he asks for Sale of the Shares to be held off to the first quarter of 2009 ostensibly "*when prices should be favourable as many companies would be releasing their final results*".

44. Thereafter Sunil engages the Bank as to the timing of the Sale of the Shares. In his testimony under cross-examination Sunil expressly acknowledges his role in timing as follows:-

> "*I was involved in making decisions in respect to timing of when Shares were to be sold*".

> And he was aware about the volatility of the trade. He had earlier told Court:-

> "*Trade in Shares is uncertain. Prices go up and down"*.

45. There is a litany of letters by Sunil to the Bank making requests to the Bank to either hold off the Sale of Shares or to proceed. For example on 14th January 2009 he promises to make a deposit of Khs.50 million so as to reduce the exposure and at the same time says as follows in respect to the Shares,

> "*We will at the same time continue selling Shares as the prices improve which is anticipated in February/March 2009 to further reduce our overall exposure*".

The Bank never accepted the proposal and instead makes some Counter offer which includes asking Sunil to immediately sell various Shares noting that if the Shares had been sold earlier (as the Bank had intended) the loss would have been considerably minimized. In that letter of 30th January 2009 (P Exhibit pages 77 and 78), the Bank indicates that it was no long willing to delay the Sale of Shares.

46. In a response of 8th February 2009 (P Exhibit page 80), Sunil again asks for the sale to be delayed. Things did not improve and the Bank through its Advocates Archer & Wilcock Advocates makes a Demand on 16th March 2009 (D Exhibit page 82 and 83). On 20th March 2009 (D Exhibit pages 84 and 85) Sunil seeks the indulgence of the Bank and specifically requests as follows:-

> "*it would be prudent to wait for the Share prices to improve to the level they were eight months up and sell without any greed for further price improvement*".

47. On 27th March 2009 (D Exhibit page 80), Sunil notes some price improvement in the Shares and instructs the Sale of 600,000 Kenya Commercial Bank Ltd Shares. Sunil's own Broker, Dye and Blair, sends the proceeds of the Sale to the Bank and Sunil reaffirms the arrangement in a letter of 25th June 2009 (D Exhibit 96).

48. There are various letters dated 2nd May 2009, 17th June 209, 18th June 2009, 19th June 2009, 27th June 2009 and 24th June 2009 in which I & M advise Sunil of the Sale of various Shares and advising that the proceeds will be applied to the Credit of either his overdraft account or that of Virchand Virpal and sons Ltd. Sunil does not complain about this at all.

49. Given the evidence that Sunil had on several occasions asked the Bank to hold off the sale of Shares and did not complain when they were eventually sold, the Claim that the Bank was responsible for any loss suffered because of the delay in the Sales is not viable and is without merit. I so hold.

50. If however, I had found I & M Bank liable then I would have made an award in favour of the Plaintiffs for the sum of Kshs.26,337,200.56/= because, as stated earlier, the Court had found the evidence of PW2 to be credible in respect to the value of the Shares held by the Bank and the indebtedness of Sunil on the dates material to this Dispute.

51. Otherwise the Plaintiffs’ case is dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 7th day of December, 2018.

F. TUIYOTT

JUDGE

Present;

Migiro for Plaintiff

N/a for Respondents

Nixon-Court Assistant