REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 586 OF 2009

C MEHTA & CO. LIMITED. ……………………………………………PLAINTIFF

Versus

STANDARD BANK LIMITED. …………………………………………DEFENDANT

JUDGMENT

[1] In the Amended Plaint dated 22nd September, 2009, the Plaintiff seeks for damages for breach of contract, general damages for defamation together with costs. The Court struck out the Defendant's Statement of Defence dated 20th September, 2009 in a Ruling delivered on 6th November, 2012 by Njagi J. The suit then proceeded on formal proof on 26th March, 2014.

The Plaintiff's case

[2] The Plaintiff called one witness, Mr. Ashvin Kumar Doshir (herafter PW1). PW1 is the Managing Director off the Plaintiff Company. He told the Court that the Defendant (hereafter the Bank) has been the company bank since 1989. He stated that the company lost reputation when four (4) of the company cheques drawn upon the Bank bounced. The said cheques were drawn in favour of the Plaintiff's suppliers and service providers. The cheques were referred to drawer by the Bank for reason that there were no funds in the account. PW1 was categorical that the company accounts held sufficient funds to pay the cheques. When the cheques were dishonored, the suppliers stopped the supplies and services they offered to the company. PW1 firmly stated that dishonoured cheques is not good news to the suppliers as a result, the company was affected. The company was formed in 1933 and has been in the business of pharmaceuticals since then. Over time it attracted multinational partners in the business of pharmaceuticals. These companies are contained at page 5 and 6 of the Plaintiff's list of documents. The suppliers would give the company goods on credit but those terms were rescinded when the cheques in question bounced. He said that the company operated on a Kshs. 4.2million profits per year. The company has operated for 80 years and this was the first time a cheque was returned by the Bank. Therefore, the company lost business and customers. Pw1 concluded by stating that the company should be compensated for the said injury.

[3] On cross-examination, PW1 insisted that the defence was struck out after the judge found that the accounts of the company held sufficient funds to clear three cheques and only one could have been returned. As a result of the dishonoured cheques, the company lost Kshs. 4,185,998 in 2008. In 2009 the company registered a profit after performance had improved. He confirmed, however, that the Auditors of the company did not indicate that the loss was as a result of action

by the Bank. PW1 did not have evidence of rescission of credit agreements by the international partners and suppliers. He testified that a courier even refused to deliver a parcel to the company after the said incident. The company should be compensated for the injury suffered and the loss incurred as a result.

[4] Pw1 was re-examined. He stated that the ruling by Njagi J at page 5 is clear that the Bank's conduct injured the Plaintiff's business.

The Plaintiff's Submissions

[5] The Plaintiff filed elaborate submissions in support of its case for damages for breach of contract, general damages for defamation together with costs. It laid a lot of emphasis on the Ruling by by Justice Njagi delivered on 6th November, 2012. It pointed out that the documents exhibited in the Affidavit of A C Doshi in support of the application on which the said ruling was delivered form part of the Court record and should be considered in reaching the decision herein. The account in question which the Plaintiff operated as a customer of the Defendant since 1976 is account number (particulars withheld). It is not denied that the Defendant was aware that the Plaintiff operated the account for purposes of its business. From the Plaintiff's Company profile in the Supplementary List of Documents since the its establishment in 1933, the Plaintiff has built its name as a leader in the business of importation of distribution of pharmaceuticals both locally and internationally. The basis of the claim herein is refusal by the Bank to honour 4 cheques issued on diverse dates between 31st October, 2008 and 22nd November, 2008 to the Plaintiff's suppliers and service providers for payment of goods applied and services rendered. The cheques were not paid on the ground that there were no sufficient funds to pay all the cheques. But when Njagi J held that the Plaintiff had sufficient funds to clear three (3) of the Cheques but the Defendant negligently returned all the cheques unpaid indicating on each of the four (4) cheques that there were insufficient funds to pay each of them. Of great significance is that the defendant later paid all the four (4) cheques after the Plaintiff had complained of the Defendant's conduct. As the Plaintiff was a trading company, the conduct of the Defendant in dishonoring all the cheques dented the otherwise credible reputation and creditworthy of the Plaintiff Company which it had built over a period of more than Seventy Five (75) years. The Defendant is prima facie liable in damages. See ***Paget's Law of Banking***, **13th Edition** where the learned author states: -

> ***"The Credit of a customer may be seriously injured by the wrongful dishonour of a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation.***
>
> ***As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in Wilson Vs United Counties Bank Ltd (1920) AC 102, where, after reviewing the authorities, Lord Birkenhead said:***
>
> > ***'The Ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit''.***

[6] According to the Plaintiff, it is entitled to damages on account of breach of contract. See **T. G Reeday**, ***Law Relating to Banking***, **2nd Edition** on the Obligations of the Bank when it comes to honouring of cheques. The author writes thus: -

> ***"The opening of a current account implies a contract that the bank will pay at the branch concerned cheques drawn by the customer in correct form and with funds available, whether consisting of a credit balance or an authorized overdraft limit. If a bank dishonours a cheque wrongfully i.e. where funds are available and no legal impediment to payment exists, then this is a breach of contract for which the <u>customer</u>***

<u>can sue for damages and the measure of the damages is not the amount of the cheque but such sum as is reasonable compensation for the injury to his credit…..</u> However, in the case of a tradesman, and by analogy is that of a professional man or a commercial agent, reasonable compensation can be recovered without proof of special damages."

[7] Again in ***Patel Vs National and Grindlays Bank Ltd (1959) E.A 76 THE Court held at page 11*** of the Bundle of Authorities in the following terms: -

> ***"Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured and the inference arises that pecuniary loss will necessarily ensue. In Vanbergen Vs St. Edmonds Properties Ltd., 1933 I K.B. 345, where a bankruptcy notice was wrongly served on a trader, Macnaughteen J. , said at page 348;***
>
> ***"With regard to damages, I do not think that the cases with regard to contracts for sale of goods have any bearing on a case such as this. The Plaintiff is a trader, and the service of a bankruptcy as the jury have found in this case, is an act which would very likely affect the direct of a trader. In my view, those cases are opposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonours a cheque drawn by the customer, he is liable to substantial damages to the customer for breach of contract."'***

[8] See also the Principle as to payment of damages in cases of breach of contract as cited in the case of **V R Chande and Others v E. A Airways Corporation (1964) E. A. 78,** which was quoted with approval in **Francis Namatoi Obongita v Cocker Printers and Designers Ltd** where the court held that:-

> ***"The general rule as to the quantum of damages to be awarded for breach of contract was stated by ALDERSON, B in Hadley Baxendale (18854) 9 Ex 341 (156 E R 145 at P. 151) in the following terms: -***
>
> ***"Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as my fairly and reasonably be considered either arising naturally i.e. according to the usual course or things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it."'***

[9] The Plaintiff's witness, PW I testified on the nature of the Plaintiff's business and considering the Plaintiff's nature of business the Plaintiff respectful submitted that an amount of Kshs. 1,000,000.00 would be sufficient compensatory damages to the Plaintiff on account of breach of contract. The Plaintiff submitted it is also entitled to damages on account of the disrepute it has been brought into as a result of the wrongful dishonor of the cheques by the Defendant. On that title, and taking into consideration factors of inflation, the plaintiff proposed an amount of Kshs. 5,000,000.00 as being sufficient compensation on damages for disparaging the Plaintiff's creditworthiness and reputation. See the case of **Bank of Baroda (Kenya) Limited v Timwoods Products Limited (2008) eKLR** where the Court of Appeal considered a similar scenario where the bank wrongfully dishonoured the Respondent's Cheques. The Court held: -

> ***"Damages for wrongful dishonor of a cheque by a bank is clearly awardable – see Gibson Ombonya Shiraku Vs Commercial Bank of Africa, Civil Appeal No. 16 of 1985, (unreported), and also KPOHRAROR V WOOLWICH BUILDING SOCIETY [1964] 4 ALL E.R. 119. The Bank's complaint in ground eleven is not that the sum was not awardable. All Mr. Fraser told us was that a temperate award is the usual thing in such matters and that the Ksh.3 million awarded was excessive and unjustified. We do not***

> ***think so. Timwood was a trading company and the Bank knew that. In quick succession the Bank dishonoured a total of eighteen cheques amounting to ksh. 646,258/85; Timwood had a total of Ksh.3 million to its credit with the Bank. The reason given for the dishonor of the cheques was wholly untrue, i.e. that "Cheque stopped". That could have been interpreted to mean that it was Timwood itself which had stopped the cheques. As the trial Judge correctly pointed out other more innocent words could have been used – like cheque not counter signed etc. We think and are satisfied that the Ksh. 3 million awarded, in the circumstances of the case, was temperate, i.e. It is not so inordinately high that it calls for our intervention."***

[10] The Plaintiff prayed for costs on the sum proposed.

The Defendant's Submissions

[11] The Defendant filed submissions after cross-examining PW1. Their defence was struck out by the Court. I will consider the submissions. The Defendant submitted that where the plaintiff fails to prove its case on a formal proof, the interlocutory judgment is set aside. They referred the Court to the case of **PENINA ATIENO & ANOTHER v STANDARD CHARTERED BANK & ANOTHER KSM HCCC NO 133 OF 2002.** On the alleged defamation, the Defendant submitted in line with ***Gatley on Libel and Slander*** that the interest which is protected by the libel and slander is generally the person's reputation not the reputation that he deserves. Reputation is the esteem one is held by others, the goodwill entertained towards him by others, or the confidence reposed in him by others. They also cited the case of **YOBESH OYARO v TOM OSCAR AIWAKA T/A WEEKLY CITIZEN & OTHERS MSAA HCCC NO 612 OF 2001** to support their position that an action for defamation is essentially an action to compensate a person for the harm done to his reputation. Reputation must be established first before damages are awarded. The Court of Appeal in the case of **DANIEL N NGUNIA v KENYA GRAIN GROWERS CO-OPERATIVE UNION LIMITED CIVIL APPEAL NO 281 OF 1998,** held that in a claim for defamation, publication is necessary and cannot succeed where only the plaintiff testifies. Another person should testify on the effect of the defamatory statement.

[12] Applying the above test, the Defendant submitted that the plaintiff seeks damages for loss of reputation yet it is the only person who testified and did not call any of the persons to whom the cheques were issued to testify. No other person who said they treated the plaintiff rather differently after the cheques was dishonoured. The defendant relied on the decision by Kaburu J in **AGGREY MUDIGO v ALFAYO OTIENO & OTHERS KISII HCCC NO 131 OF 1999** where the learned judge held that the plaintiff's reputation was not affected as he was promoted immediately thereafter. The defendant applied the foregoing logic and submitted that; in spite of the fact that the MD for the Plaintiff testified that in 2008 the company incurred a loss in profits of Kshs. 4,185,998, he, however, told the Court that in 2009 the company made a profit of Kshs. 4,226,228. That was indicative that the company did not suffer any loss of reputation. The plaintiff did not also produce anything by the international partners which attributed the loss in profits to the loss of reputation of the company. In the absence of the recipients of the dishonoured cheques that they lowered the esteem of the plaintiff, the claim for defamation should fail. The defendant took issue with the fact that the funds available at the time in the account of the plaintiff were sufficient to pay only some and not all the cheques- which show the plaintiff issued cheques without sufficient funds. This is a conduct that disentitles the plaintiff from claiming for damages on defamation as well as for the breach of contract. See also thee case of **KIPTOO v A-G (2010) 1 EA. 200.** The case of Bank of Baroda relied upon by the plaintiff cannot assist them because; unlike in this case, the plaintiff in that case had sufficient funds. The conditions for grant of unliquidated damages for breach of contract have not been met. These conditions are; 1) actual loss must be proved; 2) remoteness of damages must be demonstrated for actual loss; 3) damages must have been reasonably foreseeable; and 4) pecuniary loss must be proved. See the cases of **HADLEY v BAXENDALE [1854] 9 Ex 341 quoted in FRANCIS NAMATOI v COCKER PRINTERS AND DESIGNERS; VICTORIA LAUNDRY LTD v NEWMAN INDUSTRIES LTD [1949] 2 KB 528; THE HERON II (1969); and WROTH v TYLER (1974).** In the Francis

Namatoi case, the Court awarded damages because the action of the Defendant had abruptly stopped the plaintiff's business thus affecting its income. In the case before the Court, the financial statement produced show the plaintiff recovered and made a profit the following year. The totality of all the foregoing is that the plaintiff has not proved its case and it should fail.

[13] The defendant submitted that it issued an apology before trial which should be a mitigation of quantum of damages. In a case where the doctrine of *injuria sine damno* applies or damage is shown but quantum is not sufficiently proved, nominal damages are ordinarily awarded. The plaintiff did not even take steps to mitigate its loss as by the law required. See the cases of **EAST AFRICAN STANDARD v GITAU [1970] EA 678, THE NATION NEWSPAPERS LIMITED v CHESIRE (CAK) LLR NO 48** and **HCCC NO 772 OF 2001** where awards were reduced**.** On the basis of these authorities the defendant proposed a sum of Kshs. 100,000 to be reasonable award of damages.

THE DETERMINATION

[14] The plaintiff's claim is for damages for breach of contract, general damages for defamation and costs. The court should determine whether these claims have been proved and if so, the amount of damages payable.

[15] Let me set out those facts which are not in dispute. The plaintiff was a customer of the defendant bank holding account (particulars withheld). Justice Njagi delivered a ruling on 6th November, 2012. In the said ruling, the learned judge, found and held that the funds available in the account of the plaintiff was sufficient to pay three small cheques out of the four cheques issued. He was guided by the work in ***Paget's Law of Banking,* 13th Edition** at page 472- which the learned judge correctly represents the situation in this case-that:

> ***''...when two or more cheques are presented simultaneously for payment and the balance is sufficient to satisfy one or some but not all, the bank should pay the one which the balance will cover. If there are two, each within the limit, but not sufficient money to pay both, or if there is enough money to pay two small ones but not one large one, the bank should pay the small ones, on the ground that their dishonour would have greater effect on the drawer's standing. The dilemma is the fault of the drawer, not the bank.***

[16] The bank apologized later especially on the dishonour of the three small cheques which the bank said were returned due to a technical problem. In the circumstances, the judge found the dishonour of the three small cheques was unlawful. That position does not change as no new evidence has been adduced during the hearing to negate the said finding by Njagi J. I find and hold the same. The apology may act as a mitigation factor rather than an absolution of wrongdoing by the defendant. On that basis, the defendant breached the contract it had with the plaintiff to honour cheques if there are sufficient funds to honour such cheques. And the obligation to act diligently where more than one cheque are presented simultaneously in an account where the funds available are only sufficient to clear some and not all, is part of the contractual relationship between the bank and its customer. This position is informed by the fiduciary nature of customer-bank relationship where the bank should not expose the customer to injury. The fact that the customer had issued several cheques whose total value exceeded the funds in the account does not justify the bank to take unlawful action of dishonouring all the cheques including those which would otherwise have been paid on the funds available in the account. Such practice will be most imprudent; it will remove the duty of the bank to act diligently in handling the accounts of the customer; and will be a dark day in the bank-customer relationship which is and must be based on utmost good faith.

[17] Now that I have found that the bank breached the contract with the customer when it dishonoured three of the four cheques, was the reputation of the plaintiff affected? This question is answered by looking at the facts of the case and the applicable law. The evidence before the Court

is that the plaintiff company has been in the business of importation of distribution of pharmaceuticals both locally and internationally since 1933 when it was established. It has been a customer of the Defendant since 1976 and operated account number (particulars withheld). Nothing was placed before the Court to suggest that the plaintiff was in a habit of issuing bad cheques. The evidence by PW1 was that the plaintiff had established itself as a leader in the business of importation of distribution of pharmaceuticals both locally and internationally. The accounts it produced in court reflect a profitable enterprise. It also produced a company profile with complete detail of the local institutions as well as multi-national partners with whom they have transacted. Some of the local institutions include KENYA MEDICAL SUPPLIES AGENCY (KEMSA), M.P SHAH HOSPITAL, UNIVERSITY OF NAIROBI, and INTERNATIONAL COMMITTEE OF THE RED CROSS. The international partners include F.HOFFMAN ROCHE, THORNTON & ROSS, and BROOKS PHARMACEUTICALS.Without doubt, the plaintiff company had a reputation in the business of importation of distribution of pharmaceuticals both locally and internationally. But was the reputation affected by the unlawful dishonour of the three cheques by the bank? A dishonour of a cheque by a bank ordinarily affects the commercial credit of the drawer and an inference arises that pecuniary loss will ensue. See what ***Paget's Law of Banking*** that…***The credit of a customer may be seriously injured by the wrongful dishonour of a cheque''.*** And I should state that the publication of the said dishonour is done to the persons in whose favour the cheques had been drawn as well as the various banks for the said drawee. In such a case of unlawful dishonour of a cheque, it is sufficient publication when the bank has returned the cheques with remarks for dishonouring the cheques. In this case'' for insufficient funds''- which was not true in respect of the three cheques. The drawee and their respective banks are third parties to whom publication is made in case of a dishonoured cheque. More often than not, the estimation of the person issuing the cheques is affected in the eyes of the drawee as well as their respective bank. Matters are worse today with the establishment of the repository centers on creditworthy of bank customers where information such as on bounced cheques is relayed immediately and may be shared amongst the banks within the framework. I am not, therefore, able to accede to the argument by the defendant that there was no publication or evidence of publication of the defamatory material or act. However, I am acutely alive to the fact that the wider the publication of the defamatory material the more likely the effect on the reputation of the person injured will be huge. But that will only have a bearing on the quantum of damages. The defendant also argued that the reputation of the plaintiff company did not suffer since it made a profit the following year. Improved income after a loss in profits in the year immediately following the unlawful dishonour of cheques is not proof that the reputation of the company was not affected. Such improvement can only be used when assessing the extent of the loss and is not proof that the reputation was not affected at all. The reputation and credit worth of the plaintiff company was affected in the eyes of the drawee and supplier. The plaintiff testified that even one of the couriers refused to deliver parcels on behalf of the plaintiff. No wonder one of the cheques No 303787 was issued to ONE WORLD COURIER LIMITED. Thus, I reject the argument by the defendant to the contrary on that aspect. As Njagi J found I too find that the evidence herein supports that;

> ***''The Defendant's conduct exposed the Plaintiff's credit to serious injury by wrongfully dishonouring some of its cheques. The dishonour gave the impression that the Plaintiff had no sufficient funds in its account to meet its financial obligations which was not correct. It also depicted the Plaintiff as un-creditworthy and this could easily lead to the Plaintiff being shunned by business colleagues''.***

[18] Having found that the defendant breached the agreement with the plaintiff, and that the reputation of the plaintiff was affected, what is the reasonable compensation for those wrongs? I wish to found a footing on this by citing the following judicial authorities and the eminent literally works which were availed to the Court:

1) ***Paget's Law of Banking***, **13th Edition** where the learned author states: -

> ***"The Credit of a customer may be seriously injured by the wrongful dishonour of***

a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation.

As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in Wilson Vs United Counties Bank Ltd (1920) AC 102, where, after reviewing the authorities, Lord Birkenhead said:

'The Ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit''.

2) **T. G Reeday**, *Law Relating to Banking*, **2nd Edition** on the Obligations of the Bank in honouring cheques. The author writes thus: -

"The opening of a current account implies a contract that the bank will pay at the branch concerned cheques drawn by the customer in correct form and with funds available, whether consisting of a credit balance or an authorized overdraft limit. If a bank dishonours a cheque wrongfully i.e. where funds are available and no legal impediment to payment exists, then this is a breach of contract for which the customer can sue for damages and the measure of the damages is not the amount of the cheque but such sum as is reasonable compensation for the injury to his credit….. However, in the case of a tradesman, and by analogy is that of a professional man or a commercial agent, reasonable compensation can be recovered without proof of special damages."

[3] And **Patel v National and Grindlays Bank Ltd (1959) E.A. 76 the Court held**: -

"Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured and the inference arises that pecuniary loss will necessarily ensue. In Vanbergen Vs St. Edmonds Properties Ltd., 1933 I K.B. 345, where a bankruptcy notice was wrongly served on a trader, Macnaughteen J. , said at page 348;

"With regard to damages, I do not think that the cases with regard to contracts for sale of goods have any bearing on a case such as this. The Plaintiff is a trader, and the service of a bankruptcy as the jury have found in this case, is an act which would very likely affect the direct of a trader. In my view, those cases are opposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonours a cheque drawn by the customer, he is liable to substantial damages to the customer for breach of contract."'

[18] The plaintiff proposed an award of Kshs. 1,000,000 and Kshs. 5,000,000 for breach of contract and for defamation, respectively. The defendant, on the other hand, proposed a figure of Kshs. 100,000 as nominal damages. This is not a case for nominal damages and the sum of Kshs. 100,000 proposed by the Defendant is unreasonable. I reject it. I will proceed on that basis. The cases of the East Africa Standard and the Nation Newspapers are old-1970 and 1982- but the figures of Kshs. 24,000 and Kshs. 15,000, respectively at the time were not small amounts. Those figures have not been tempered by and do not reflect current inflation. The case of **Bank of Baroda (Kenya) Limited v Timwoods Products Limited (2008) eKLR** is closer to the point in time and quantum, thus, it will offer real guidance here. The plaintiff testified that it lost profits in the year 2008 in the sum of Kshs. 4,185,998. The accounts for the company reflect that fact except it is possible other factors together with the disparaging of reputation caused by the unlawful dishonour of the cheques may have contributed to the loss in profit. But the evidence assists the court in determining the extent of the effect on the reputation and credit of the plaintiff in

business, as well the reasonable quantum of damages. In the circumstances of this case, and in the estimation of the Court, a global sum of Kshs. 3,000,000 is a reasonable compensation for breach of contract and disrepute to credit and reputation of the plaintiff. I, therefore, award the plaintiff a global sum of Kshs. 3,000,000 for breach of contract and disrepute to its credit and reputation. I am aware damages which a party ought to receive for breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course or things from such a breach of contract itself. The said award of damages will attract interest at court rate from today-the date of assessment of damages- until payment in full. I also award costs on damages awarded.

Dated, signed and delivered in court at Nairobi this 14th day of October, 2014

F. GIKONYO

JUDGE

Present:

Anzala for Plaintiff

Odundo for Odera for Defendant

Alex – Court clerk