IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)

CIVIL APPEAL NO. 248 OF 2015

BETWEEN

FIDELITY COMMERCIAL BANK LIMITED.....APPELLANT

AND

ITALIAN MARKET KENYA LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Ogola, J.) dated 19th December 2014

in

HCCC NO. 444 OF 2012)

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JUDGMENT OF THE COURT

Stephano Sala, his wife Monica Garibaldi and John Nguli were all directors of Italian Market Kenya Limited (the respondent).

The respondent opened and maintained a Current Account, No. [particulars withheld] with Fidelity Commercial Bank Limited, the appellant, (the Bank) whose signatories were Stephano Garibaldi and John Nguli. The signing mandate was that either director could sign. The said account was supposed to be operated for purposes of conducting and facilitating the business of the company.

In the course of their business, the respondent applied for and was advanced credit facilities by the Bank. These included an overdraft facility which was to be utilised solely for purposes of working capital, and bills discounting facility which was to be utilized for discounting bills drawn on Nakumatt Holdings Ltd and Dhanjee Bros Ltd.

The business relationship appears to have progressed well and the appellant invited Mr. Stephano Sala to apply for a Visa Gold Card, in his personal capacity. Mr. Sala accepted the invitation and also extended the same to his wife. They were consequently issued two Visa Gold Credit Cards in their personal names.

Stefano and Monica then signed an auto credit authorization form; authorizing the Bank to link the said Visa cards to the company account we have mentioned earlier. This meant that all monies expended

through the said cards would automatically be offset from the company funds, and became a liability on the company.

John Nguli, the other director of the respondent was apparently not privy to this arrangement. The Bank continued to debit the respondents account with the amounts utilised through the use of the said credit cards form July 2007 to January 2010, which amounted to Kshs. 2,889,764/= plus interest at bank rates.

On 1st January, 2010 and 16th resigned from the directorship of the June 2010, Monica and Stefano respectively respondent. John Nguli was joined by Linda Muthoka who became the respondent's managing director. That was the beginning of the problems between the respondent and the company, leading to the appointment of Phillip Muoka as the official receiver to take over the affairs of the respondent, in the Bank's bid to recover its money. This action is what prompted the respondent to move to the High Court by way of plaint filed on 11th July, 2012, which suit was against the Bank (appellant) and Philip Muoka, claiming the following reliefs:-

A) That the Honourable Court be pleased to issue an interlocutory mandatory injunction compelling the removal of the 1st and 2nd defendants and/or employees and/or agents and/or anybody interfering with the plaintiff's business operations, offices, equipment and movables until the determination of the application and this suit.

B) An injunction restraining the defendants their servants and/or agents from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the plaintiff's assets or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the defendants in respect of the plaintiff's accounts pending the hearing and final determination of this matter.

C) The Honourable Court be pleased to issue an interlocutory mandatory injunction to compel the 1st defendant's directors and officials and the 2nd defendant and/or his employees and/or agents and/or assigns and/or anybody to return possession of the plaintiff's business until the determination of this application and suit or further order of this honourable court.

D) That this Court be pleased to grant orders to eject and remove the 2nd defendant as Receivers and Managers from the plaintiff's premises and/or offices and the plaintiff's possession of its premises and/or offices be reinstated.

E) That the plaintiff be at liberty to apply for and the Honourable Court be pleased to grant any further orders and directions as may be just and expeditious disposal of the application and suit herein.

F) An order directing the 1st and 2nd defendants, respectively to render true and full accounts to the plaintiff.

The respondent contemporaneously field a notice of motion dated 11th July, 2012, seeking several orders of injunction meant to protect and preserve its properties from disposal by the appellant as the outcome of the case was awaited.

According to the respondent, the Bank owed it a duty of care to act diligently, prudently and in good faith in ensuring that the respondent's accounts were legally operated within the confines of the law. In view of this, argued the respondent, the appellant had allowed the loading of irregular personal debits in the respondent's accounts without a resolution from the directors of the company, and also failed to communicate the said decision to the company, and in the process occasioned loss to the company.

According to the respondent, this negligence or lack of prudence had exposed the respondent to loss, in terms of loss of business reputation and goodwill and also in terms of financial loss. The suit was heard by Ogola, J. who found that the visa card debits amounting to Kshs 2,889,764/- was irregularly debited in

the respondent's account without authorisation from the company; that the appellant and two other directors had conspired to defraud the company; that the appellant owed the respondent a duty of care which unfortunately had been breached; and in the result entered judgment in favour of the respondent and granted it orders as follows:-

> **(a) An order directing the 1st and 2nd defendants, respectively to render true and full accounts to the plaintiff.**
>
> **(b) An order directing the 1st and 2nd defendants to reverse the illegal debits loaded on the plaintiff's account. This reversal to take into account the interests payable to the plaintiff on the amounts reversed at court rates from the date the amounts were debited to the date of reversal.**
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> **(c) Costs of the suit with interest thereon a court rates.**

Those are the orders the appellant has challenged by way of this appeal in which it has proferred nine grounds of appeal as hereunder:-

> **1. The learned Judge erred in fact and in law by finding that the respondent complained to the appellant immediately upon realizing that its account had been subjected to the illegal debits.**
>
> **2. The learned Judge failed to make a finding on the fact that respondent waited until the 2 directors had resigned to make any complaint to the appellant.**
>
> **3. The learned Judge misdirected himself in ignoring the signing mandate given to the appellant and making a finding that the said signing mandate did not cover the Auto Credit for corporate application.**
>
> **4. The learned Judge erred in fact and in law in finding that the respondent's failure to raise any query and/or complaint in respect of the entries in the Bank statement within 21 days or reasonable time was prejudicial to the appellant.**
>
> **5. The learned Judge erred in fact and in law in holding that the execution of the Auto Credit Application Form required mandatory authorization from the respondent and that a Board resolution was required to authorize the signing of the respondent's directors.**
>
> **6. The learned Judge erred in finding that the signing of the Auto Credit application by 2 directors of the company was not sufficient to commit the respondent.**
>
> **7. The learned Judge erred in fact and in law in holding that there existed Visa Cards in the personal names of the directors that were later linked to account of the respondent. This was done without any evidence in support and was against the evidence on record.**
>
> **8. The learned Judge erred in fact and in law in holding that the appellant was negligent and in breach of duty of care to the respondent without sufficient proof being placed before the Judge.**
>
> **9. The learned Judge gave judgment to the respondent against the weight of the evidence adduced.**

When parties appeared for case management, it was agreed that the appeal proceeds by way of written submissions with brief oral highlighting. In compliance with these directions, the appellant filed its submissions on 15th December, 2016 while the respondent filed its on 19th January, 2017.

The introduction of the appellant's submissions, which is 3 1/3 pages is a remonstration or censure

against the learned Judge of the High Court for what learned counsel seems to say was the "copy and pasting" of the plaintiff's submissions to form the main body of the judgment. To sample but one of the statements by learned counsel in relation to the impugned judgment, he says:-

> **"… Further the purported conclusion by the Judge and almost all the statements in the judgment have simply been achieved by copying word for word the submissions by the plaintiff. A reading of the judgment and the plaintiff's submissions one would be at pains to tell whether there was any judgment delivered in this matter…"**

We hold the view that this remonstration was totally uncalled for. Written submissions are filed for ease of reference by the learned Judge, and if a judge considers one set of the submissions in greater detail, than the other set, which is not actually what learned counsel is saying, the reason could be that he/she finds more content in those submissions. We do not want to descend to that arena, but it would be remiss of us to ignore that issue in totality. All we can say however is that the statement, and sentiments expressed through them is unfortunate and totally uncalled for.

Before we go to the rest of the submissions, we would like to assure learned counsel for the appellant that as a first appellate court, we shall reconsider the entire evidence adduced before the trial court and arrive at our independent decision, irrespective of the findings of the learned Judge.

On grounds 1 and 9, the appellant faults the learned Judge for finding that the respondent had complained to the appellant immediately after discovering that the credit cards in question had been linked to the company account.

Counsel submitted that although Mr. Nguli said he learnt about the linking of the visa cards to the company account in 2007, it was not until 2011 that he complained to the bank. In his view therefore, the respondent was not being truthful, and that it waited until the other two directors, who were the culprits in the matter, to resign from the company for him to raise the issue with the bank. This conduct of Mr. Nguli, was according to the appellant deceitful, and a plot to defraud the appellant of its money by refusing to settle the credit card debts.

Ground 4, is in our view the same as to ground 1 and 9, as the appellant questions why the respondent did not query the entries in its bank statements upon receipt – or within the 21 days as required by the banks.

The assumption here is that Mr. Nguli used to see the statements in question once sent to the company from the bank. We shall re-examine the explanations given by the respondent later on these issues before we make our conclusions on the matter. We think however, that it is necessary to ponder whether the 21 days window given in the bank statements precludes a dissatisfied customer from raising any queries arising from his/her accounts thereafter.

On grounds 3, 5 and 6 which were argued together, the learned Judge is faulted for failing to find that the signing mandate by the two directors covered the credit card accounts as well. The appellant further contends that the learned Judge was wrong in his finding that the authority to link the credit cards to the company account needed a company resolution.

On ground 7, the appellant submitted that there was no evidence that the credit cards in question were in existence before they were linked to the company account. We note, however, that the overdraft facility was applied for in 2005, and the history we have of Account No. [particulars withheld] appears to be from that date.

On the other hand, there is evidence that the letter inviting Stefano & Monica to apply for the visa gold cards which are at the center of this appeal, was dated 27th April, 2006. The existence of the account therefore pre-dates the Visa Gold Cards. There is also no dispute that the Auto Credit application form was signed on 26th June, 2007. So if there was any linkage of the cards to the company accounts, it was done subsequent to the issuance of the credit cards. Clearly these cards were in existence before the signing of the auto credit forms, and there must have been another mode of payment for the debts

incurred through the said cards.

Ground 8 covers the issue of purported negligence on the part of the Bank. According to the appellant, there was insufficient proof to show that the appellant was negligent in handling the respondent's accounts. The appellant's contention is that the particulars of negligence given in the plaint were two, namely failing to act diligently to ensure that proper authorisation was sought before linking the credit cards to the company account; and failing to communicate the bank's decision to link the visa cards to the company account in good time thereby exposing the respondent to debt. However, the learned Judge's finding on negligence according to the appellant was based on the Bank's failure to distinguish between the legal/juridical personality of the company vis-à-vis that of the directors, which had not been pleaded in the particulars of negligence in the plaint.

Learned counsel urged the Court to allow this appeal, and set aside the impugned judgment.

In response to the appellant's submissions, the respondent maintained that the judgment appealed from was arrived at after the learned Judge considered all the evidence on record, and that the same cannot be faulted.

According to counsel, the learned Judge was right in making a finding that the respondent had acted immediately after realising that the company account No. [particulars withheld] had been debited with amounts that had not been expended by the company. This finding was borne by the evidence of John Nguli on oath, which according to counsel for the appellant was not controverted.

According to counsel, the respondent had been alerted about the debits by the Bank and he went to the bank immediately to find out what was happening. He was given a verbal assurance by senior officers at the Bank that the matter would be attended to. He was further informed that the issue of the Visa Cards was a personal matter and that the Bank would sort it out with Stephano.

On the issue as to whether the learned Judge could be faulted for his finding on the signing mandate, counsel submitted that the learned Judge was correct in his finding that the mandate could not have been meant to include signing for the visa cards as his mandate would only have been included in the part designed for "special instructions if any" which in this case was left blank.

Counsel maintained that the appellant's act of linking the Visa Cards to the company accounts was unilateral and could not have been sanctioned without a Board of Directors' resolution from the company.

On the issue of negligence on the part of the appellant, counsel submitted that the appellant owed the respondent a duty of care, and it had failed to discharge that duty when it linked the personal cards to the company account without proper instructions from the respondent and without seeking any clarification as to whether the said linking was duly authorised by the company.

For this proposition, the respondent called in aid the decisions in **Karak Rubber Co. Ltd vs Burden [1972] 1 All ER 1210; Supreme Court of Uganda Case of Stanbic Bank of Uganda vs Uganda Cross Ltd**, **Civic Appeal No. 4 of 2004** where the respective courts held that in a banker and customer relationship, a bank had an obligation to exercise reasonable skill and care while interpreting, ascertaining and acting in accordance with the instructions of the customer.

Learned counsel summed up his submissions by maintaining that the learned Judge relied on the evidence adduced before him and the same was sufficient to prove the respondent's case to the standard required by law. He urged us to dismiss the appeal.

When the matter came up for plenary hearing, both counsel adopted the written submissions and opted not to make any oral highlights. This being a first appeal, we are enjoined by **Rule 29(1) a** of the **Court of Appeal Rules** to re-appraise and reconsider the evidence adduced before the trial court and to arrive at our own independent decision. While doing so, we should always bear in mind that unlike the trial court, we never saw the witnesses testify and did not therefore have the benefit of assessing their demeanor, and

must give some allowance for that.

We have given a broad overview of the case above, and will now consider in detail the viva voce evidence adduced before the learned Judge, the submissions made before the trial court, the law, and then draw our own conclusion as to whether the learned Judge erred in his judgment, the subject of this appeal.

Although the plaint before the High Court was filed by "**Italian Market Kenya Limited"**, the verifying affidavit was sworn by **John Kisalu Nguli** in his capacity as a director of the respondent. He was also the sole witness called by the respondent at the hearing of the case. The appellant also called one witness, namely **Stella Mbui**, the Legal Manager of the appellant.

In his testimony before the High Court, Mr. Nguli told the court that he had been a director of the respondent since year 2005 together with Stephano Sala and Monica Garibaldi, the couple that were the beneficiary of the Visa Cards that are the genesis of this suit. He confirmed to the court that the respondent operated Current Business Bank Account No. [particulars withheld] with the appellant and further that the signature mandate was for either himself or Stephano to sign. The witness does not seem to have been aware of the respondent's financial transactions until one year later when they received a call from the bank enquiring about the overdrawn business account. The witness went to the bank to seek clarification on the debt that he said he was not aware of. He requested to be supplied with the statement for the account in question. On going through it, he discovered that there were large amounts of money which had been drawn from the account using Visa Cards. The Visa Cards were in the names of the other directors. He learnt from the bank that the said visa cards had been linked to the company account after authorisation from Stephano the co-director of the respondent. He was shown a document signed by Stephano Sala and Monica which was an Auto Credit Application Form authorising the appellant to link the cards to the business account.

According to the witness, the cards were for personal use by Stephano and his wife, who was not a signatory to the account. It was Mr. Nguli's evidence that he requested the bank to furnish him with the details of the disputed debits, but the Bank's senior staff rebuffed him saying that such details could not be divulged as they were personal to the card holders.

The amounts in dispute were debited into the said account from 3rd July, 2007 to 11th January 2010. It is instructive to note that Monica Garibaldi resigned from the directorship of the company on 1st January, 2010 followed by Stephano six months later on 16th June, 2010. According to the witness however, he noticed the debits on 31st May, 2008 but it was after Stephano and Monica had left the country – even after they left the country the debits on the cards continued until 15th June, 2011 when the respondent formally wrote to the Bank cancelling the instructions.

It was the respondent's view that the bank was negligent in not confirming the instructions from the company, and for that, it is guilty of breaching the duty of care it owed the respondent and it should be held liable for the loss suffered by the respondent in terms of the unauthorised debits accrued from the use of the Visa Cards.

The appellant's witness, Stella Mbuli, confirmed that the respondent held a business account at the bank; and that the respondent secured some overdraft and bill discounting facilities in March 2005, which facility was secured by a debenture over some company assets.

According to Stella, the impugned visa cards were issued to Stephano and Monica in their capacity as directors of the respondent. She contended that the signature mandate which stated that either director could sign included either director signing the auto credit in respect of the visa cards. It was the Bank's stand therefore that Stephano was legally allowed to sign the auto credit form, and so any debts incurred by the Bank from the use of the said cards was a debt owed by the company to the Bank. Stella further stated that John Nguli was part of the directorship of the company when the disputed payments were made, yet he never raised a finger untilStephano and Monica resigned from the respondent. She read collusion on the part of the director to avoid payment of a debt properly owed. She insisted that the visa

card application form was a corporate application and not personal and that is why the cards were linked to the company account. The cards were issued to Stephano and Monica as directors of the company and not in their personal capacity. She conceded that the cards had been allowed to operate for a full year before they were linked to the company account, but did not say on what account they were operated. This is what Stella said while on cross-examination by Mr. Kiima, at page 411 of the Record of Appeal:-

> ***"I am aware that Sala Stefano and Monica Garibaldi (sic) were husband and wife. The cards given to them were allowed to operate for over one full year before they were linked to the company accounts….."***

We have found it necessary to quote Stella verbatim because the appellants have emphatically denied existence of the said cards prior to the linkage and in fact ground 7 of the memorandum of appeal is specifically on that point. We hold the view that it is not necessary to drag this point further and we can determine it at this point. We make a finding that from the appellant's witness' testimony before the High Court, there indeed existed the visa cards which were ran for a whole year before they were linked to the respondent's business account. That evidence was tendered on oath, and cannot be negated through learned counsel's submissions. The learned Judge did not therefore fall into error when he found that the said visa cards existed before they were linked to the account thus ground 7 of the memorandum of appeal has no basis whatsoever and the same must fail.

Back to Stella's evidence, she stated that the account had become non-performing by 1st February, 2010 and the interests had been suspended (as at page 441 RoA).

We must say we find that statement rather confusing because from the bank statements on record the said account was active with debit and credit entries, including credit entries in respect of the visa cards in question as at 11th January, 2011. That is nonetheless only an observation, and is neither here nor there. As we said earlier, we have no benefit of having seen the witnesses testify as we would have sought to clarify such apparent contradiction. We have no option now but to take the record as it is, and do the best we can in the circumstances.

Having considered the entire evidence before him, the learned Judge rendered the impugned judgment on 19th December, 2014. The learned Judge found that the respondent had proved its case against the appellant on a balance of probability and entered judgment in its favour granting the following orders:-

> **(a) An order directing the 1st and 2nd defendants respectively to render true and full accounts to the plaintiff.**
>
> **(b) An order directing the 1st and 2nd defendants to reverse the illegal debits loaded on the plaintiffs account. This reversal to take into account the interests payable to the plaintiff on the amounts reversed at court rates from the date the amounts were debited to the date of reversal.**
>
> **(c) Costs of the suit with interest thereon at court rates.**

The prayer for general damages for negligence was declined. These were the orders that are challenged before us.

We have considered the evidence adduced before the trial court, submissions of counsel, cited legal authorities, the grounds of appeal and indeed the entire record of appeal. There are several issues which in our view are not disputed. For instance the fact that Stephano, Monica and John Nguli were the directors of the respondent; that they operated a business account with the appellant bank; signature mandate; that they were offered an overdraft facility with a debenture over a company property; that the visa cards issued to Stephano & Monica were linked to the said business account; the account was mostly operated by Stephano who was the face of the company; a large part of the debt in question was incurred through use of the Visa Cards; John Nguli only came into the picture after the two other directors had resigned

and raised the complaint almost one year later; and that there was default in payment of the facility and hence the appointment of the official receiver.

On the other hand, there are several disputed issues which principally revolve around the visa cards in question, and the appellant's conduct in the entire matter. There was the question as to whether the said cards were in existence before the signing of the auto credit form. We have however, already dealt with that issue and confirmed that the cards were in existence before the linking to the company account. The other disputed issues included questions as to whether the visa cards were corporate or personal; whether the signature mandate that either director could sign also applied to debits for the visa cards; why debts on the cards continued to be debited to the account even after Stephano had retired.

The other major issue which in our view is the elephant in the room is whether the Bank was negligent in its conduct in the matter. Did it breach its duty of care owed to the respondent?

Let us start with the genesis of the problem. Were the visa cards in question personal or corporate? According to the appellant (through Stella), they were corporate. Stella even referred the court to the name on the top of the card, to demonstrate that the cards were corporate. We note however that the name on the card which Stella referred to was "Hawal Market Ltd" and not Italian Markets. This information in our view just compounded matters, because Hawal Market Ltd, from the evidence on record was not the holder of Ac No. [particulars withheld] to which the cards were linked.

The court was also not told what the link or connection was between the respondent and Hawal Market Ltd. If the cards were issued on the corporate account of Hawal Market Ltd, then why were the payments linked to the respondent's account? This in our view demonstrates that the said visa cards were not issued to Stephano and Monica in their capacity as directors of the respondent but in their personal capacities, or as directors of Hawal Market Ltd, which is alien to these proceedings. In that case therefore Stephano had no authority in his capacity of the co-signatory in the signature mandate which was in respect of the respondent, to authorise the linkage of the cards to the respondent's account. From this narrative therefore, it is clear that the signature mandate could not be extended to cover the cards. We also wonder why Monica who was not one of the authorised directors in the signature mandate was allowed to sign the credit card authorization.

If the cards bearing the names of the two directors and the corporate name of Hawal Market Ltd were to be charged on the respondent's account, then it behoved the Bank to seek a resolution from the directors of the company, or at least enquire from the 3rd director (namely John Nguli) as to whether Stephano was authorised by the company to link the cards to the company account.

Although Stella said it was not a legal requirement for the bank to ask for directors' resolution, it is evident that in these circumstances, it was necessary for the Bank to be more diligent to ensure that personal or other corporate debts were not loaded to the wrong account, which is what happened here. We find it curious that the appellant acted on Stephano's instructions in absence of a directors' resolution, or company seal, in view of the discrepancies even on the face of the said cards.

It is clear also that the 3rd director was never notified of that issue by the bank. Indeed, when he went to enquire about the debt after the resignation of the other two directors, he was rebuffed by the bank officials and told that the credit card transactions were personal to the card holders and they could not therefore be released to him. This clearly shows that it was clear even to the officers of the appellant that the visa card debts were personal to Stephano and his wife and were not company debts. Without belabouring this point therefore, we come to the conclusion that the debt in question was personal to Stephano and Monica and should not have been loaded to the company account.

We are persuaded that the Bank owed a duty of care to the respondent and the cavalier, of flippant manner in which they handled the card issue was unfortunate, and an abdication of their duty of care which subsumes the responsibility to safeguard and protect the respondent's money.

We endorse the pronouncement of **Brightman J** in **Karak Brother Company Ltd vs Burden [1972] 1**

All ER 1210, which has been cited with approval in several of our local cases (e.g **Simba Commodities Limited vs Citibank N.A, Civil Case No. 236 of 2003**) where the learned Judge stated:-

> **"As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories…"**
>
> **"… while carrying out the customer's instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."**

The court further observed as follows:-

> **"In exercising its duty of care the paying bank was bound to make such enquiries as might, in given circumstances, be appropriate and practical, where it had, or a reasonable banker would have, grounds of believing that the authorised signatories were misusing their authority for purposes of defrauding their principal or otherwise defeating his true intentions."**

This authority is of persuasive value but it is spot on and good law.

We would want to believe that the appellant as a responsible banker, should have made enquiries from the respondent, insisted on a directors' resolution, or at least accepted instructions only on the company letterhead, or instructions under the company's seal. That was the only way the respondent could have been bound by the decision of any of its directors.

Our finding on this issue is that the appellant was negligent, imprudent and incautious in the manner it handled this case.

The appellant, through learned counsel's submissions has attempted to lay the blame at the feet of John Nguli, saying he ought to have discovered these withdrawals and informed the bank. According to the appellant, Mr. Nguli should have raised any queries within 21 days upon receipt of the bank statements. On this issue, Stella admitted that Stephano was the face of the company and the bank had been dealing with Stephano, not Nguli. According to Mr. Nguli, these debits never came to his attention until the departure of Stephano. Does this exculpate the Bank from its duty of care?

In the case of **Patel and Others vs Standard Chartered Bank [2001] All ER 66**, faced with an almost similar situation, Toulson J of the Queen's Bench Division, Commercial Court, England held that the argument that a customer owed to a bank an implied contractual duty to report fraud of which the customer did not know, but which a putative reasonable person possessing the same information as the customer, would have discovered, was sound in principle. This in our view though of persuasive value is a reasonable proposition. Mr. Nguli had no reason to suspect that all was not well with the company account until Stephano resigned and got access to the respondent's accounts, yet the appellant was privy to these on goings all this time. The appellant cannot therefore, be allowed to turn round and blame Mr. Nguli. In any event, even when he tried to enquire about the said cards, the appellant declined to give him the details saying that they were personal to the card holders. The Bank should therefore have pursued Stephano and Monica for those payments and not the respondent.

According to the appellant, the signature mandate did not specify that the transactions carried out through use of the credit cards could not be authorised by Stephano as "either director". Again as stated in the **Patel case** (supra), where a mandate is held to be ambiguous, it is the duty of the bank to seek clarification from its customers to ensure that unauthorised transactions do not slip through its fingers. If a bank allows dubious, unauthorized transactions to slip through, then it takes the risk of being held

accountable to the customer and in the process losing its money.

A bank's duty of care to its customers includes protecting the customer from exposure to fraud by agents such as directors, business partners and others. In this case the appellant's customer was the respondent because the account in question was in the company's name. It was the responsibility of the Bank to protect the company from 3rd parties and also from its own directors if it became evident that the said directors were acting in a questionable manner.

When Stephano applied to link his visa card and that of his wife to the company account, the bank should have clarified the signature mandate with Nguli, who was not a beneficiary to that arrangement, yet he was a co-director and co-signatory to the account. Had this been done, the respondent would not have found itself in the unenviable situation it now finds itself in.

We find that the appellant failed to discharge its duty of care to the respondent in the manner it maintained the respondent's account. It cannot run away from this responsibility. When a customer opens an account with the bank, the bank is expected to apply its skill, expertise and all manner of safeguards to ensure that the customers' money is safe from 3rd parties and other unauthorised persons. The customer is not obligated to be checking its accounts every other day to confirm that the account is safe. As long as a customer keeps his/her/its end of the bargain by ensuring that he/she/it refrains from doing acts that may facilitate fraud or forgery, like not drawing cheques as per the generally accepted instructions given by the bank acting in good faith, and alerting the bank of any inconsistencies in the bank accounts as soon as possible, then the bank is expected to keep the customer's account safe. This did not happen in this case as the Bank failed to protect the respondent from its own wayward directors. Stephano and Monica could not have had access to the company facility to use for their personal use if the bank had been more careful in seeking clarification from the 3rd director, before allowing Stephano to link personal cards to the company account.

We think we have said enough to show that the appellant is culpable and was responsible for the loss incurred by the company.

We do note that Mr. Nguli himself is not blameless in all this. We say so because, he ought to have shown more interest in the manner the company was being run. Further that he failed to inform the bank about the resignation of Stephano and Monica from directorship of the bank contrary to the terms of the debenture. Had he done so, then the problem would have been detected, and corrected much earlier. He should not therefore benefit in any way from the misdeeds of the Bank.

Having made our findings as above, we come to the following conclusion. That the learned Judge did not err in entering judgment in favour of the respondent as against the appellant. This appeal is therefore dismissed, save for the specific orders granted after entry of the judgment. We set aside the said orders, and substitute thereof the following orders:-

1. That the appellant is hereby ordered to reverse the debits loaded on the respondent's account in respect of the two Visa Gold Cards issued in the names of Stephano Sala and Monica Garibaldi;

2. That the issue of interest payable to the respondent does not arise, but the interest accruing on those debits should also be reversed;

3. That as we have found the respondent's director John Nguli blameworthy for failing to report the resignation of the two directors of the respondent to the bank, and failing to stop the debits sooner, he does not deserve an award for costs. We therefore order that each party bears its own costs both here and before the High Court;

4. As the court is unaware of the terms of the consent referred to in the respondent's submissions, we are unable to make any orders pertaining to the same, save that the terms of the consent be complied with. We so order.

Dated and delivered at Nairobi this 28th day of July, 2017.

ALNASHIR VISRAM

……..…….....

JUDGE OF APPEAL

W. KARANJA

……....

JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR