In dealing with the appeal, I invited input from the state attorney as *amicus curiae*. Accordingly Mrs Neema Joseph, learned state attorney appeared and filed a written submission. In her view, the evidence at the trial established the case against the respondents beyond reasonable doubt. She has specifically submitted that there was enough evidence of identification of the dogs by the appellant on the night in question. With respect, I do not agree with her as I shall try to demonstrate hereunder.

I propose to deal with the appeal generally as follows: admittedly, a decision of the case depended on identification, specifically whether the appellant identified the dogs that night to be those of the respondents. According to the appellant he identified the dogs. With respect I do not agree. It was quite possible that he knew the dogs to belong to the respondents. But this was not the crucial point in the case. The point was whether he put in sufficient evidence to prove conclusively that the dogs he saw on that material night belonged to the respondents. His evidence on the point simply ran as follows:

> ... nikiwa na tochi nikamulika, na mbwa wawili wakakimbia, mmoja wa kiume wa mshtakiwa 1 na mmoja wa mshtakiwa 2...

With respect, this evidence was not sufficient to establish conclusively that the dogs which the appellant saw that night belonged to the respondents. Since it was dark, one would have expected to see more positive evidence of identification by the appellant especially whether the conditions that night allowed for proper identification. For instance, the appellant was expected to say whether or not the torch light was bright enough to allow for correct identification, whether the dogs had any special marks, whether he was familiar with them as not to mistake them at any one time etc. In other words, it was not enough for him to say the dogs belonged to the respondents without more. It also appears that the appellant believed the dogs belonged to the respondents, because after he had seen them that night they ran towards the respondents' homes. In my view, that was not sufficient proof that these were the respondents' dogs for it was still possible that

the dogs he saw belonged to some other people and not necessarily the respondents notwithstanding that they ran towards the said respondents' homes. For the above reason, the appeal is dismissed.

NBC HOLDING COPRORATION *v.* HAMSON ERASTO MRECHA

COURT OF APPEAL OF TANZANIA AT DODOMA

(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 35 OF 1995

(Appeal from the order of the High Court of Tanzania at Dodoma, Mwalusanya, J., dated 12 December 1994, in Civil Case No. 10 of 1994)

Contract – Exeption clauses – Contract contains an exemption clause – Whether exemption clause in a contract is ambiguous – Construction of an exemption clause.

Banking – Banker exempts himself from requirement of giving notice – Exemption does not extend to cover liability for injury to customer – Requirement of notice in banking practice.

Damages – Special damages – Party claiming special damages without proof of damage suffered – Whether reasonableness can be basis for awarding special damages.

Damages – Special damages – Party claiming special damages without proof of damage suffered in businesses that have no connection with the purpose of the overdraft facility – Whether such claim may be entertained.

The respondent was granted an overdraft facility of TZS. 5 000 000 by the then National Bank of Commerce. According to the agreement the facility was to commence

on 7 Janary 1994 and expire on 10 December 1994. The agreement carried various conditions one of which, clause (2), stated that although the overdraft was sanctioned to expire on 10 December 1994 "the bank retains the right of varying it at any time without notice." On 31 January 1994 the bank, without giving prior notice, required the respondent to sign a new agreement granting a reduced overdraft facility of TZS. 2 000 000 and informed him that that amount was the approved facility which had previously been erroneously indicated as TZS. 5 000 000. Upon protests by the respondent the facility of TZS. 5 000 000 was restored on 22 February 2004. The respondent sued the bank in the High Court of Tanzania alleging breach of contract and that he had suffered damage when the variation was in operation between 1 February 1994 and 22 February 1994. The trial judge held that there was breach of contract and awarded the respondent TZS. 3 669 500 although the respondent had claimed TZS. 19 577 510 as general damages. The basis for the trial judge's decision that there was breach of contract was that clause (2) was an exemption clause that did not empower the bank to vary the overdraft amount but its expiration date only. The judge was of the view that clause (2) was ambiguous, that it had to be construed restrictively against the bank because it appeared on a standard form and that in accordance with the *ejusdem generis* rule, the words "the bank retains the right of varying it at any time" were to be read as limited to the expiry date and not the amount of the overdraft facility. The learned judge awarded part of the special damages on the basis that the claim was reasonable.

The bank, whose liabilities subsequently vested in the NBC Holding Corporation, appealed to the Court of Appeal of Tanzania against the decision. Counsel for the bank argued that the learned judge erred in his construction of the clause and that variation had reference to the overdraft. He also attacked the damages awarded to the respondent on the ground that what he claimed were special damages and that there was no proof of the damages. The Court of Appeal of Tanzania considered whether or not the High Court judge correctly construed clause (2) and whether the damages awarded could be sustained.

Held: (i) There was no breach of contract on account of variation of the overdraft;

(ii) Clause (2) constituted an exemption clause in the context of notice in as far as it exempted the bank from the necessity of giving prior notice when exercising the right to vary the overdraft;

(iii) *Obiter:* The exemption did not extend to liability for injury to the customer;

(iv) *Obiter:* The bank exposed itself to damages for exercising its right to vary the overdraft without notice in the absence of an exemption from liability;

Appeal allowed

Case referred to:

1) *Allison (F. Gordon) Ltd v. Wallsend Shipway and Engineering Company Ltd* [1927] 43 T.L.R. 323

Mr *Richard Rweyongeza,* for the Appellant

Mr *George Mbezi,* for the Respondent

JUDGMENT

(Date 27 June 2000)

Lugakingira, J.A.: By an agreement dated 7 January 1994 the respondent obtained an overdraft facility of TZS. 5 000 000 from the then National Bank of Commerce expressed to expire on 10 December 1994 and subject to various conditions. Clause (2) of these conditions stated:

> Although the overdraft is sanctioned to expire on 10 December 1994 the Bank retains the right of varying it at any time without prior notice.

Indeed on 31 January1994 the respondent was required to sign a new agreement granting a reduced overdraft of TZS. 2 000 000 and on 1 February 94 he was informed that sum represented the approved overdraft which had previously been erroneously indicated as TZS. 5 000 000. The respondent protested to the bank's branch manager at Singinda and at the bank's headquarters in Dar es Salaam and this resulted in the TZS. 5 000 000 overdraft being restored on 22 February 1994. However, the respondent then commenced proceedings in the High Court at Dodoma alleging that the variation constituted a breach of contract and that he had suffered damage between 1 and 22 February when the variation was in operation. He claimed what he termed

general damages amounting to TZS. 19 577 510 interest at the Bank rate and costs. The trial judge held that there was a breach but awarded the respondent TZS. 3 669 500 in special and general damages, plus costs and interest. The Bank, whose liabilities have since vested in the NBC Holding Corporation, appealed against the decision through learned counsel Mr Richard Rweyongeza. The respondent was represented by Mr George Mbezi.

In deciding that the bank had breached the contract, the trial judge held that Clause (2) cited above, which he termed an exemption clause, did not empower the Bank to vary the overdraft amount but its expiration date. He said:

> It is my view that the amount of the overdraft was the essence of the contract in this case, and the reduction of the same deprived the agreement of all the contractual force. I take it that the exemption clause entitled the defendant bank to vary only the date of expiry, the interest rate, etc., but not the amount of the overdraft facility which was the core of the contract.

In arriving at that view he held that Clause (2) was ambiguous, that it had to be construed restrictively against the Bank because it appeared on a standard form, and that, in accordance with the *ejusdem generis* rule, the words "the Bank retains the right of varying it at any time" were to be read as limited to the expiry date rather than the overdraft facility. The third ground of appeal which Mr Rweyongeza first argued was that the learned judge erred in his construction of the Clause and that variation had reference to the overdraft. Mr Mbezi supported the judge's interpretation.

We think, with respect, there is no ambiguity in Clause (2). In our appreciation of it, the pronoun "it" refers to "overdraft" and the phrase "at any time" refers to the date of expiry, thereby meaning that the overdraft could be varied at any time before 10 December 1994. The trial judge found as a fact that the agreement was explained to the respondent and held that the respondent understood the document. The respondent therefore understood the variation to refer to the

overdraft and that is why his counsel at the trial did not argue that Clause (2) was ambiguous but merely that it was "very unconscionable", meaning, oppressive. We do not think the argument of conscionability could avail the respondent, either, because parties to an executory contract are at liberty to vary its terms at any time, either partially or wholly, if the necessity for doing so arises. Besides, variation of overdraft terms is a recognized banking practice. We only need refer to a passage brought to our attention by Mr Rweyongeza in **Sheldon's Practice and Law of Banking** (13 ed) page 310, which states:

> When a banker agrees to allow the customer on advance, the document of charge usually consists a provision making the loan repayable on demand. He also takes power as a rule to cancel the specified limit, if and when he deems it advisable to do so.

In this case, too, it is apparent that the respondent's basic complaint was not against the variation as such but, according to paragraph 6 of the plaint, was on the fact that the variation was done" without giving sufficient notice" and that this was "to the detriment and loss in business on the part of the plaintiff". It is, indeed, apparent that notice is necessary in banking practice, for **Sheldon's book** further states (*ibid.*):

> But he (the banker) must give reasonable notice to his customer before acting upon his decision to cancel the limit, and must pay all cheques within the limit originally agreed upon, drawn and put into circulation before the customer has received notice. How much notice is required will depend upon circumstances.

In the light of the foregoing, and now with reference to the first, second and fourth grounds of appeal, we are satisfied that there was no breach of contract on account of the variation as such. Moreover, it is not easy to see in what sense Clause (2) became an exemption clause in relation to variation as such; it was in that context merely an enabling clause to vary the limit of the overdraft. However, the Clause constituted an exemption in another context – the context of notice: it exempted the bank from the necessity of giving prior

notice when exercising the right to vary the overdraft. It is noteworthy, though, that it did not say that the bank was exempt from liability for damages arising from the absence of notice. If such an exemption was intended, it had to be expressed in clear words: *Allison (F Gordon) Ltd v. Wallsend Shipway and Engineering Company Ltd* (1) at page 324. As the clause stands, there is no mention of exemption from liability for varying the overdraft without giving notice. We think that is precisely why in the letter addressed to the respondent on 1 February 1994, the bank hastened to apologize for the inconvenience arising from its act: *"Tunakuomba msamaa (sic) kwa usumbufu utakaokupata haikuwa nia yetu kukupa matumaini ya aina hiyo"*. Since notice is necessary in banking practice, a banker who seeks to exempt himself from it does so at his own risk if, as in this case, the exemption does not extend to liability for injury to the customer. Therefore, while holding that the variation of the overdraft in this case was not a breach of contract, we believe the bank exposed itself to damages for exercising its right to vary the overdraft without notice in the absence of an exemption from liability.

The various heads of damages awarded by the trial judge are challenged in the fifth, sixth and seventh grounds of appeal. The fifth ground, relates to the award of TZS. 1 610 000 for cotton cake which went bad on account of the delay in dispatching it from Shinyanga to Arusha. The trial judge held that if the overdraft had not been reduced, the respondent would have dispatched the cake earlier, but he was from 31 January to 21 February busy trying to establish why the overdraft was reduced. We have held that variation of the overdraft as such did not amount to a breach, but even if the matter were looked at from the absence of notice, we think the claim was remote and untenable. In the evidence of the respondent, the overdraft was extended for the business of supplying beer to Shinyanga and Singida. There is no connection between this activity and the supply of cotton cake and the latter was therefore not contemplated in the contract. We sustain the fifth ground and set aside the award of TZS.1 610 000.

In the sixth ground it is contended that the trial judge erred in awarding TZS. 59 510 as travel, board and lodging expenses incurred by the respondent when he traveled to Dar es Salaam to press for the restoration of the original overdraft, and TZS. 1 million as lost profits when the variation was in operation. The judge made the first award merely for being "reasonable" in the light of the 10 days the respondent spent at Dar es Salaam. We think reasonableness cannot be the basis for awarding what amounted to special damages, but strict proof thereof.

The respondent tendered no receipts to establish the claim but conceded that he had none. On the award of TZS. 1 million the judge himself said:

> I agree with the defendant's counsel that this claim being of special damages ought to be strictly proved. The plaintiff did not bring any documentary evidence to establish how much profit he had been making in the past. What we have is mere speculation an conjecture...

PW1 testified that he did not know these two men he only knew the two who had arrived by car, being a manager of Samcu and his driver. He swore that he managed to observe them because there were two electricity bulbs which were lit in the area surrounding the bar entrance. Apart from carrying a gun, the man in front also wore a hat he described as a "*puma*" hat with a large brim which covered his face up to the nose. The armed men were about six metres away from him, he said. As a result of his observation, PW1 alleged that he managed

The respondent had claimed a total of TZS. 14 630 000 as lost profits, but the judge observed that the respondent could not have made that much profit in 21 days were TZS. 3 million not removed from the overdraft. However, he observed that if the appellant had bought beer of TZS. 3 million he would have realized some profit. He therefore assessed loss of profits at TZS. 1 million. Once again, we have held that there was no breach, so that amount was not available even as nominal damages. Further, there was no evidence of any loss, so the sum cannot be awarded even for the absence of notice. Moreover,

as Mr Rweyongeza pointed out, it does not appear that the respondent was engaged in the business for which the overdraft was extended. He did not say for what purpose he issued the cheques Exhibits page 2, P3, P4 and P5 to Philemon Olutu of Arusha, Malisa of Moshi, Joel Brothers Ltd of Singinda and Star Petrol Station of Singida respectively. He could not possibly have purchased beer from a petrol station for distribution to Shinyanga and Singinda. What is more, he did not say that the cheques were presented to the bank and dishonoured. In short, the award had no basis whatsoever.

Finally, the seventh ground challenges the award of 1 million as general damages. As pointed out by Mr Rweyongeza, the respondent did not pray for general damages but special damages which he erroneously titled "General Damages". The learned trial judge realized this but made the award on the ground that "our financial institutions do not strictly abide by their working ethics" and that the breach "must have caused a lot of anxiety and inconvenience to the plaintiff as a businessman". Since we have held that there was no breach we can see no basis for punishing the appellant Bank for the so-called breach of ethics; and since the respondent appears to have been engaged in businesses other than the business for which the overdraft was extended, he cannot be compensated for anxiety and inconvenience even for the absence of notice.

We have in sum come to the view that this appeal ought to succeed and it is allowed in its entirety, the judgment and decree of the High Court being set aside. The appellant will have its costs here and below.

SAMSON MZAMANI v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT DODOMA

(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 160 OF 1994

(Appeal from the Judgment of the High Court of Tanzania at Dodoma, Msoffe, J., dated 13 July 1994, in Criminal Appeal No. 37 of 1994)

Criminal Practice and Procedure – Charges – Conviction to a charge – Whether a conviction for armed robbery may be entered on a charge of robbery sections 285 and 286 Penal Code and Act 10 of 1989.

Evidence – Identification Parade – Irregularities in an identification parade – Whether any irregularity in conducting parade vitiates the whole identification evidence.

Criminal Law – Theft – Recent possession – Watch found with accused two days after an armed robbery during which it was stolen – Whether doctrine of recent possession was rightly applied to incriminate appellant.

The appellant was convicted of armed robbery in a District Court and his appeal to the High Court against the conviction was dismissed. It was alleged that the appellant together with other raided a house, firing a shot in the air in order to scare the occupants and ransacked property comprising various items and a rado lady's wrist watch. The appellant was found in possession of the watch two days after the complaint's house was raided.

In his appeal, the appellant argued that he should not have been convicted of armed robbery since he was charged with ordinary robbery. He also argued that the identification parade had some flaws, and that the doctrine of recent possession was wrongly applied against him.

Held: (i) Though there is no express and specific definition of what constitutes "armed robbery" it is clear that if a dangerous and offensive weapon or instrument is used in