IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: WELBOURNE, J.A (PRESIDING)

MENSAH, J.A.

BARTELS-KODWO J.A.

SUIT NO: H1/229/2020

9TH March, 2023

JUSTICE Y. ABDULAI _____ PLAINTIFF/APPELLANT

VRS

ECOBANK GHANA LIMITED _____ DEFENDANT/RESPONDENT

JUDGMENT

BARTELS-KODWO (JA):-

INTRODUCTION:

This is an appeal from the decision of the High Court, Adentan, Accra dated 12th November, 2021 which decision dismissed the Plaintiff/Appellant's (hereinafter called "the Appellant") action brought against the Defendant/Respondent.

At this point, it is trite knowledge that among the most important conditions in the contract between a banker and a customer who conducts a current account is the obligation of the banker to honour the customer's cheques to the extent of the customer's credit, see the cases of ***Joachimson v Swiss Bank Corporation*** **[1921] 3 KB 110 at 127; and** ***Aktas v Westpac Banking Corp Ltd*** **[2007] NSWSC 1261 at page 1261.** If for any reason, this is not stated expressly in a contract between a bank and a customer, it is as a matter of necessity, implied by law.

At the same time, the ability of a bank to efficiently and effectively process cheques submitted by customers is a matter of general convenience and welfare of society ***Macintosh v Dun*** **(1908) 6 CLR 303 at 305; [1908] AC 390 at 399.**

These two interests can sometimes clash when a customer's cheque is dishonoured in error as is the case in the instant dispute.

BACKGROUND:

The Appellant, a legal practitioner and head of the Crown Legal Bureau law firm based in Accra, operates an Investment Deposit Account with the Respondent at its Legon branch. On 12th of November 2019, the Appellant issued a cheque numbered 000076 in the name of one Trade & Save Limited with a face value of GH¢ 6,300.00. The Appellant claimed that when an attempt was made to pay the cheque into the accounts of the said Trade & Save Limited, the cheque was dishonoured.

The Appellant avers this constitutes defamation and brought the instant action before the High Court, Adentan.

By a writ of summons and accompanying statement of claim filed on the 10th of March 2020, the Appellant instituted this action seeking the following reliefs reproduced *verbatim*:

a. *An Order for punitive damages of GH¢ 500,000.00 for wrongfully dishonoring Cheque No. 000076 dated 12th November 2019 for no justifiable cause;*
b. *Damages for breach of contract of the banker/customer relationship;*
c. *Costs on full indemnity basis including legal fees;*
d. *Any other relief(s) as this Honourable Court may deem appropriate.*

In his statement of claim, the Appellant contended that the Respondent, by dishonouring his cheque, breached the contract between the parties and by doing so, they defamed his reputation and character.

The Appellant averred that the Respondent never called him or communicated with him in any way to inform him that they had dishonoured the cheque. The Appellant also claimed that this was not the first time that the Respondent had failed to honour a cheque when the Appellant had sufficient funds for the transaction. The Appellant avers that the Respondent Bank once failed to honour a cheque for an amount of GH¢ 174,000.00 being a judgement debt belonging and being paid out to a client after the money had been paid into his firm, Crown Legal Bureau's accounts.

The Appellant alleged that in both cases, the people for which payment was intended became angry with and spoke to him in a manner that was insulting and threatened to report him to the police and the General Legal Council. The Appellant added that

in this case, the dishonouring of the cheque damaged his reputation because the said "*Trade & Save Limited thought he had swindled the company.*"

The Respondent on their part, denied all operative allegations of fact of the statement of claim. The Respondent contended that the United Bank of Africa (UBA), the payee's bank, entered the wrong Magnetic Ink Character Recognition (MICR) details, leading to the cheque failing to clear. The Respondent argued that the act of dishonouring the cheque did not lower the reputation of the Appellant in the estimation of the right thinking members of society in any way since the payee, Trade & Save Limited continued to view the Appellant as credit worthy. In addition, the Respondent alleged that its officer called the Appellant to confirm the issuance of the cheque in dispute, but that the Appellant did not respond to the call in line with their standard operating policy.

Following trial, the High Court held in favour of the Respondent and refused all reliefs sought by the Appellant. The Appellant, dissatisfied with the judgement of the High Court, has caused the notice of appeal instituting the instant appeal to be filed at the Registry of this Honourable Court.

GROUNDS FOR APPEAL:

In the Notice of Appeal filed on behalf of the Appellant on the 2nd day of February 2022, the Appellant set forth the following grounds for the instant appeal:

a. The judgement is against the weight of evidence;

b. *The Honourable Court erred in law and on the face of the admissions when it held that the dishonouring of the Plaintiff's cheque no. 000076 did not constitute defamation;*

c. *The Honourable Court erred in law when it held that the Defendant did not breach its contract with the Plaintiff and for that matter the banker-customer relationship when it dishonoured cheque no. 000076;*

d. *The Honourable Court erred in law when it disregarded the law and the evidence and placed a blame [sic] or responsibility on United Bank for Africa (UBA), when the said bank was not a party to the suit to answer for itself.*

ARGUMENTS OF THE APPELLANT:

The Appellant in arguing the first ground of appeal stated that the learned trial court judge applied a generic definition of the word defamation, and failed to apply the technical legal sense of the word in coming to her decision on this matter. This, the Appellant says, led to her coming to an 'erroneous' conclusion in the matter. The Appellant contended that, "*hard,* [sic] *the learned judge, applied the meaning of defamation applicable in banking law to the facts of the case before her, she would have arrived at a different conclusion*."

Citing **E.P. Ellinger et. al**'s opus entitled **Ellinger's Modern Banking Law,** the Appellant impresses on this Honourable Court that actions in defamation arise out of situations of wrongfully dishonoured cheques due to supposed inadequacy of funds standing to the credit of the customer's account. In such situations, the Appellant argues, the reputation of the customer may be harmed. The Appellant says that this is exactly what he alleged happened to him following the dishonouring of cheque no 000076 by the Respondent.

The Appellant referred to cross-examination conducted by counsel for the Appellant on DW1 and states that the Respondent, in cross-examination admitted that the reason given for the rejection of the cheque which was returned to the said Trade & Save Limited, was that there were inadequate funds. The Appellant also points out that counsel for the Appellant managed to get DW1 to admit that the Appellant had sufficient funds in his account for the transaction at the time that the cheque was disallowed. This, the Appellant contends, amounts to defamation "under the law of banking".

The Appellant cites the cases of **Baker v. Australia and New Zealand Bank Ltd. [1958] NZLR 907 @ 911, Pyke v. Hibernian Bank Ltd [1950] IR 195** and **Jayson v. Midland Bank Ltd. [1968] 1 Lloyd's Rep. 409** as precedents for the principle that a wrongfully dishonoured cheque may lead to defamation of the issuer of the cheque. Additionally, the Appellant argues that his cheque was a valid bill of exchange and that the Respondent's reliance on the Cheque Codeline Clearing (CCC) Guideline (DW1 Exhibit 2) as a basis to dishonour the payment instruction of the Appellant was improper and immaterial. The Appellant adds that the words "*wrong MICR (magnetic ink character recognition) details entered"* are defamatory on his character.

The Appellant also argued that "*there is a presumption of fact that every customer suffers injury to its credit and reputation when its cheque is wrongfully dishonoured"* and cites the case of **Kpohraror v. Woolwich Building Society [1996] CLC 510 (CA)** in support of this position. The Appellant then goes on to contend that when banks dishonour cheques, the regular common law rules governing defamation do not apply. The Appellant stated that the Australian High Court in the case of **Aktas v. Westpac Banking Corporation Limited [2010] HCA 25,** established that a notice of dishonour of a cheque sent in error is defamatory and not protected by the common law defence of qualified privilege.

On the second ground of Appeal, the Appellant contended that the Court of first instance in this case committed an error when it found that the Respondent was not in breach of contract by dishonouring a valid cheque. In support of this assertion, the Appellant first cites the definitions of a cheque and of a bill of exchange under **Sections 1 and 72 of the Bills of Exchange Act, 1961 (Act 55)** and states that the cheque at the centre of the instant dispute met the definition of both a valid cheque and a valid bill of exchange. The Appellant concludes this part of his argument by saying that by failing to honour his cheque, the Respondent acted unlawfully because it violated the above mentioned sections of Act 55 and that the Respondent's reliance on the reason of '*wrong MICR details entered'* is in violation of Act 55.

The Appellant also argued that the United Bank of Africa (UBA), who the Respondent seems to blame for getting the MICR details wrong regarding the cheque in dispute, was an agent of the Respondent in this transaction, and thus the Respondent should be held vicariously liable for any wrongful act of the UBA which led to the cheque being wrongfully dishonoured. The Appellant is of the view that the Respondent ought to have joined UBA to the action by way of counterclaim because the Respondent, having no contractual relationship with UBA had no cause of action against the UBA and could not join it as a party to this suit.

The Appellant asserts that the trial judge "*spent grave effort"* discussing the issue of the previously disallowed cheque, which the Appellant describes as irrelevant, and states that all the reliefs in this action were with regard to cheque no. 000076 and not the previous cheque.

The Appellant cites **Ellinger's Modern Banking Law at page 453** and says that wrongful dishonour of a cheque constitutes a breach of the contract that arises

between the bank and the customer at the opening of the account. Consequently, the Appellant concludes, the failure to honour cheque 000076 amounts to breach of contract by the Respondent.

On the third ground of appeal, the Appellant contends that the trial Court judge wrongly laid the blame for the dishonouring of the cheque at the feet of the UBA who was not a party, nor called as a witness in the action. The Appellant contends that between himself and the Respondent, issues arose which the Court could have determined between them as parties without placing the blame on UBA.

ARGUMENTS OF THE RESPONDENT:

The Respondent on its part argued all grounds of the appeal together. On the first ground of appeal, the Respondent contends that upon a rehearing of the matter, as is required of appellate courts, the evidence will lead to a conclusion, similar to that reached by the trial court, that Respondent's case is more likely than that of the Appellant.

First, the Respondent clarifies that the cheque for GH¢174,000.00 was issued later in time than the cheque at the center of this dispute. The Respondent also claims that at the time the cheque for GH¢ 174,000.00 was issued, the Appellant did in fact not have enough funds in his account for that cheque to be honoured. The Respondent says that this assertion went undisputed or unchallenged during the trial at the High Court.

The Respondent then states that the story of the Appellant is unsupported by the evidence on the record. The argument is also made that there exists a perfectly legal basis for the dishonouring of the cheque, contrary to the claims of the Appellant. The

Respondent states that "*inasmuch as 'a cheque is a bill of exchange… payable on demand', the cheque must in addition pass the MICR test.*"

The Respondent states that it was for purposes of efficiency, reliability and timeliness in clearing of cheques that the Bank of Ghana introduced MICR technology. Respondent points to the Cheque Codeline Clearing (CCC) guidelines and operational procedures, Exhibit 7, and says that the Bank of Ghana introduced these rules to apply to cheques and other paper instruments, and that the rules run with, not contrary to, the provisions of Act 55. According to the Respondent, these rules state that when the MICR details on a paper instrument are entered wrongly, the standard operating procedure is to withdraw the payment at the drawee bank, essentially leading to the cheque being dishonoured. Counsel for the Respondent therefore argues that the Appellant is wrong when he says that the CCC guidelines are irrelevant when it comes to the processing of cheques.

The Respondent states that banks are required by the rules to ensure that all cheques presented to it meet all the requirements under the law and operating guidelines. Respondent argues that when a bank performs this duty, they ought to be protected from "*every alleged wrong or inconvenience*". The Respondent contends that it has a responsibility to protect itself by dishonouring any cheque that falls foul of regulatory requirements.

On the issue of defamation, the Respondent states that, as long as it was acting within the rules and guidelines of its regulator, issues of defamation and breach of banker-customer relationship do not arise. The Respondent cited the case of **Owusu-Domena v. Amoah [2015-2016] 1 SCGLR 790**, and added that the Supreme Court in that case decided that for a party to successfully bring an action in defamation, the party must plead and lead evidence to support the elements of; publication by the

Defendant, such publication must be about the Plaintiff, the publication must have been capable of being defamatory in the ordinary sense or are defamatory given the surrounding circumstances, and malice, if the Defendant pleads qualified privilege or fair comment as a defence.

The Respondent continued by arguing that apart from the fact that it was entitled to refuse to honour the cheque once UBA had entered the wrong MICR details, it has also pled qualified privilege as a defence. The Respondent argues that in light of this defence asserted by the Respondent, the Appellant is under an obligation to assert and prove malice on the part of the Respondent. According to the Respondent, even if the words were defamatory or had the potential to be perceived as such, given surrounding circumstances, which it maintains they were not, without malicious intent proved on the part of the Respondent, it cannot be held liable in a defamation action. The Respondent asserts that in this case, it had lawful excuse not to honour the cheque in dispute in this suit, it has qualified privilege and that it acted without malice.

In expounding on qualified privilege, the Respondent cites the case of **Too Good v. Spyring 149 E.R. 1044** and says that statements made during the course of carrying out a moral or legal duty, where one's interest or the interest of others are concerned are qualified. The Respondent says that in ensuring that the cheque met CCC guidelines put out by the Bank of Ghana, it was performing a legal duty, and statements made during the cause of such duty that are not actuated by malice are protected by qualified privilege.

The Respondent argues that the Appellant has at no time been able to establish any loss of reputation, or material loss or damage caused by the statement. The Appellant points to testimony given by one Bridget Baah-Tuahene, representative of Trade &

Save Limited, on whose behalf the cheque was issued, where she states that her company and the Appellant maintain a cordial relationship. The Respondent uses this to establish the assertion that the Appellant suffered no reputational harm from the alleged defamatory statement and urges this Court to dismiss the Appeal *in toto*.

LAW AND ANALYSIS:

The Supreme Court in the case of the case of **Owusu-Domena v. Amoah [2015-2016] 1 SCGLR 790**, held that for a party to be successful in an action for defamation, the claimant must plead and lead evidence to support the following elements;

a. *That there was a publication made by the Defendant;*
b. *That the publication was made about the Plaintiff;*
c. *That the publication must have been capable of being defamatory in the ordinary sense or is defamatory given the surrounding circumstances;*
d. *That the publication was made with intent to damage the reputation of the Plaintiff or with malice, if the Defendant pleads qualified privilege or fair comment as a defence, and;*
e. *That there was actual damage to the reputation of the Plaintiff.*

In the instant case, the first three elements are not in dispute and this judgement will not spill too much ink going into the details of those elements.
However, while the Respondent states that they intended no malice and were just doing their duty, as imposed by their regulator, the Appellant cites the case of **Aktas v. Westpac Banking Corporation Limited [2010] HCA 25,** and states that the defence qualified privilege does not apply to wrongfully dishonoured cheques.

It is true that the High Court of Australia, its highest appellate court found in the **Aktas case (supra)** that the defence of qualified privilege did not apply in that case, but that was due to certain statutory rules that apply in that jurisdiction and not in this one. Additionally, the decisions of the High Court of Australia are not binding on any court in this jurisdiction.

On the other hand, the Supreme Court of Ghana decided in the **Owusu-Domena case (supra)**, that if malice is not made out, the defence of qualified privilege (if applicable) would operate as a defence to the tort of libel. Once the defence is raised, if the Plaintiff is able to show that the statements were made, not as part of the duty of the defendant, but out of spite, ill will, anger or other malicious motives, the defence would be defeated.

Speaking on behalf of the unanimous bench, Benin JSC stated as follows;

> *"For his part the defendant could raise in his defence privilege, whether absolute or qualified, and/or fair comment. But these defences of qualified privilege and fair comment will be defeated if actual malice is established. Malice in such matters will be said to exist if there is spite or ill will on the part of the defendant or if the court finds indirect and improper motive against the defendant in publishing the words complained of."*

> *Thus in Angel v. HH Bushell & Co. Ltd. (1968) 1 Q.B. 813; (1967) 1 All ER 1018 a defamatory letter was found to have been motivated by anger, not by duty or any interest, so a defence of qualified privilege failed."*

In the case of **TooGood v. Spyring (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050]** His Lordship Baron Parke elaborated on the issue of qualified privilege as follows,

> *"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice.* ***If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society;*** *and the law has not restricted the right to make them within any narrow limits."* (emphasis added)

This Court is of the view that the Respondent has been able to establish clearly that the publication was honestly made (albeit in error) in line with its duty as a deposit-taking institution as regulated by the Bank of Ghana. There has been no evidence led to the effect that the publication was made out of malice or ill-will by the Respondent towards the Appellant. The Appellant has incidentally been unable to establish that he suffered any pecuniary or reputational damage from the erroneous failure of the bank to honour his cheque.

As a result, this Court will uphold the High Court's finding on the issue of libel and dismiss the reliefs centering on that.

However, on the issue of breach of contract, as stated at the beginning of this judgement, there is a fundamental obligation in contract for a bank to honour a cheque issued by a customer to the limit of the customer's credit. This is implied by law.

By failing to honour the cheque, while there were funds standing to the credit of the Appellant, the Respondent breached this fundamental condition of the contract between the parties. Consequently, the Appeal is upheld on that ground. The Appeal thus succeeds in part and nominal damages for the breach of the contract is awarded in the amount of GH¢20,000.00 to the Appellant.

(Sgd.)

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

(Sgd.)

Welbourne, (J. A.) I agree **MARGARET WELBOURNE (MRS.)**

(JUSTICE OF APPEAL)

(Sgd.)

Mensah, (J. A.) I also agree **P. BRIGHT MENSAH**

(JUSTICE OF APPEAL)

COUNSEL:

- **Daniel Osei for Plaintiff /Appellants**
- **Francis Kwame Offin for Defendant/Respondent**