**NBC Holding Corporation v Mrecha**

**Division:** Court of Appeal of Tanzania at Dodoma

**Date of judgment:** 27 June 2000

**Case Number:** 35/95

**Before:** Ramadhani, Lubuva and Lugakangira JJA

**Sourced by:** L J S Mwandambo

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**Summarised by:** H K Mutai

*[1] Contract – Overdraft – Conditions of overdraft – Construction of terms – Variation of terms –*

*Whether clause exempting bank from giving notice of variation was valid.*

*[2] Damages – Award of special damages – Strict proof – Whether reasonableness could be a basis for awarding special damages – Whether sufficient evidence had been adduced to prove special damages.*

**Editor’s Summary**

On 7 January 1994 the Respondent entered into a contract with the Appellant bank whereby the bank was

to extend to him an overdraft facility of TShs 5 million for the purposes of a beer supply business. Clause 2 of the agreement provided that though the overdraft was to expire on 10 December 1994, the bank retained the right to vary it at any time without prior notice. On 31 January 1994 the Respondent was required to sign a new agreement reducing the overdraft to TShs 2 million. The following day, he was informed that the sum of TShs 2 million represented the approved overdraft and that the previously indicated figure of TShs 5 million was incorrect. The Respondent protested to the bank and managed to get the overdraft restored to TShs 5 million on 22 February 1994. He then commenced proceedings against the bank claiming that there had been a breach of contract and that as a result he had suffered damages between 1 and 22 February 1994 amounting to TShs 19 577 510 made up, in part, of a claim for the value of a quantity of cotton cake, the shipment of which had been delayed, allegedly owing to the variation of the amount of the overdraft. In those proceedings the trial court held that clause 2 of the contract was ambiguous and had to be interpreted restrictively and, on that basis, found that the right of the bank to vary the overdraft related only to the expiry date thereof and not to the sum of the facility itself. However, the Judge only awarded the Respondent TShs 3 669 500. The bank appealed against this award on the grounds that (i) the Judge had erred in his construction of clause 2, and (ii) that his finding that the contract had been breached was wrong.

**Held** – Clause 2 of the agreement was not ambiguous and its terms clearly permitted the overdraft to be varied at any time before 10 December 1994. Moreover, the document had been clearly explained to the Respondent, which was why at his trial, his counsel had not argued that it was ambiguous but rather that it was unconscionable. Recognised banking practice permitted a bank to vary the terms of an overdraft subject to the giving of notice to the customer. However, where clear words were not present exempting the bank from liability for damages arising from the absence of notice, a bank that exercised its right to vary an overdraft without giving notice thereof to its client exposed itself to a claim for damages; *Allison (F Gordon) Ltd v Wallsend Shipway and Engineering Co Ltd* [1927] 43 TR 323 considered. This was the case on the fats of the present matter; however, no damages flowing from the lack of notice had been shown. The claim for damages relating to the supply of cotton cake was set aside as it could not be claimed pursuant to breach of contract as no breach had been established, and it was too remote and untenable even if viewed in the context of absence of notice, as the contract relating to the overdraft concerned the Respondent’s beer supply business and not the supply of cotton cake. The remaining sums of damages awarded were also set aside as they amounted to special damages and as such had to be strictly proved, which they had not been. It was not enough for the Judge to hold that the expenses for travel, board and lodging claimed as damages by the Respondent were “reasonable” since these amounted to special damages and had to be proved; nor was there any evidence to substantiate the claim for lost profits. The appeal therefore allowed in its entirety.

**Case referred to in judgment** (“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed and “**LLR**” means LawAfrica Law Reports; “**O**” means overruled