

COURT OF APPEAL LAGOS DIVISION
FRIDAY 7TH FEBRUARY 2014. CA/L/556/2008
CORAM:- A. A. AUGIE, R. N. PEMU, S. C. OSEJI, JJCA

CITIBANK NIGERIA LIMITED APPELLANT
(Formerly known as Nigeria
International Bank Ltd)
AND
MR. MARTINS IKEDIASHI RESPONDENT

BANKING - Customer - Relationship - Is that of principal and agent
- Thus cheque drawn on banker by customer constitutes the order
of principal to agent - To pay out his money in custody of the agent
(H1)

BANKING - Cheque - Payment of - Denial of customer's cheque -
When he has to his credit an amount endorsed therein - Is a breach
of contract for which banker is liable in damages (H2)

BANKING - Account - Notice of closure - Notice was not justifiably
given to respondent - As he can only be deemed to have received
notice via registered post - Upon the signing or collection from post
office (H3)

BANKING - Account - Notice of closure - Time limit - Notice given to
respondent 2 weeks after closure of his account - Is a breach of clause
7 of Exhibit C - That provides for at least 7 days prior notice (H4)

PARTIES - Contract - Binding nature - Parties to written contract are
mutually bound by terms therein - And court has duty to enforce
same - Provided that they are not illegal or contrary to public policy
(H5)

BANKING - Cheque - Libelous endorsement - Reliefs - Where such
exists in addition to dishonour of cheque - Customer can in the same
action - Claim for damages for breach of contract and for libel (H6)

ACTIONS - Contract - Breach - Damages - In action for breach hinged

on dishonoured cheque - Claimant is entitled to award of nominal damages - Unless he pleads specific damages suffered (H7)

CONTRACTS - Breach - Libel - Damages - Award - Although it is elegant to separate the amount awarded for damages for breach and for libel - But no miscarriage of justice resulted from the non separation (H8)

DAMAGES - General damages - Award - It is at discretion of trial court - And appellate court will not interfere - Unless inter alia trial court acted under mistake of law - And in disregard of principles (H9)

COSTS - Award - Principles - Successful party is entitled to cost unless circumstances deprive him of same - But costs are not awarded as punitive measure against the losing party (H10)

COURTS - Discretion - Cost - Award - Discretion is that of trial court - Which must exercise same judiciously and judicially - And appellate court should be wary to interfere (H11)

DEFAMATION - Defence - Qualified privilege - It is occasioned when the person who makes the writing has moral duty to make same - And the person who receives it has an interest in hearing it (H12)

BANKING - Defamation - Qualified privilege - Defence - Due notice not given to respondent prior to closure of his account - It follows that the publication - Which constitutes libel cannot justify the defence (H13)

FACTS

Before the High Court of Lagos State, plaintiff/respondent filed this action against defendant/appellant via a writ of summons, claiming N10 million damages for breach of contract, damages for libel, apology from appellant and interest on the judgment sum at 10% rate per annum till final payment. The case for respondent was that as a customer of appellant with sufficient credit in his account, he issued a cheque in favour of a third party. Appellant dishonoured the

cheque with the words “ACCOUNT CLOSED” endorsed on it.

In view of this, respondent contended that the said endorsement is not only a breach of contract but also libelous having been published to a third party and the staff of UBA Plc when in fact he was not given notice of any such closure of his account with appellant. On the contrary, appellant argued that the said endorsement was based on the ground that respondent’s account had been closed. Appellant further stated that notice of the closure was given to respondent via a letter sent through a registered post. The parties adduced evidence and tendered a number of exhibits at the trial. At the end of hearing, the learned trial Judge in his judgment, found in favour of respondent. Dissatisfied with the judgment, appellant has appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether having regard to the circumstance of this case, the lower court was sufficiently guided by the fundamental principles governing the award of damages in contract and libel?

2. Whether having regard to the circumstance of this case, the lower court was right to have awarded costs in this case?

3. Whether the lower court was right to have found that the appellant could not avail itself of the defence of “qualified privilege” in the claim for libel?

HELD (Unanimously allowing the appeal in part per

OSEJI JCA)

BANKING - Customer - Relationship

1. It is trite from a long list of authorities that the relationship between a bank and its customer is that of principal and agent. Consequently, where a cheque is drawn on the banker by the customer, it represents the order of the principal to the agent to pay out of the principal money in its custody, the amount stated on the cheque to the payee endorsed on the cheque. The relationship between a bank and its customer is that of principal and agent, consequently, a cheque drawn on the banker by the customer constitutes the order of the principal to the agent to pay out of the principal’s money in the custody

of the agent. It is also viewed under the law as that of a debtor and a creditor. This is because when a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum. On the other hand when a bank debits the account of its customer with a certain sum the customer becomes a debtor to the bank the tune of the sum debited. (pp. 287 G/295 H)

BANKING - Cheque - Payment of

2. It follows therefore that a cause of action will accrue where the bank refuses to pay a customer's cheque when in fact he has to his credit at least an amount equivalent to that endorsed on the cheque he has issued on his account with the bank. Such act by the bank in dishonouring the cheque or refusal to pay constitutes a breach of contract for which the banker is liable in damages.

A bank is under obligation to honour a cheque issued by its customer if such customer has enough funds in his account to satisfy the amount payable on the cheque. Failure or refusal by the bank to honour the cheque amounts to a breach of contract and would render the bank liable in damages.

The law is that where a banker dishonours a customer's cheque without justification, it is liable to the customer in damages for injury to his reputation. (pp. 287 H/296 B/297 E)

BANKING - Account - Notice of closure

3. Learned counsel for the appellant had relied heavily on the provisions of Section 64 (3) of the Nigerian Postal Service Act CAP N127 Laws of the Federation of Nigeria 2004 to contend that it creates a situation of constructive notice on the Respondent, in which case he is deemed to have had notice of the closure of his account on the 15-10-2003 when it was dispatched by registered post to him.

I however agree with the learned counsel for the Respondent, that the said provision is not applicable to this case, moreso that it made reference to the delivery of a postal article at the house or office, private mail bag or private letter box of the addressee or to the addressee, servant or agent.

Going by the pleadings and evidence of the appellant, what was delivered to the private letter box of the Respondent was a slip informing him that he has a parcel in the custody of the post office. In this regard it is my strong view that it cannot be justified to say that there was delivery of a postal article to his private letter box as contemplated by the provisions of Section 64(3) of the NIPOST Act 2004. Thus by virtue of clause 8 of (Exhibit C) 'Account Opening form', the respondent can only be deemed to have received any notice or letter through registered post upon the signing or collection from the post office after presentation of his collection slip. (p. 289 C)

BANKING - Account - Notice of closure - Time limit

4. I am indeed inclined to agree with the findings of the lower court. Though the Respondent denied ever receiving any notice of closure either personally or through Stanley U.K. whom he has never met. But the appellant adduced documentary evidence to show that the letter notifying the Respondent about the plan to close his account was collected from the post office by one Stanley U.K. on the 28-11-2003. It is also the evidence of the appellant that the respondent's account was closed on 14-11-2003. It follows therefore that even if it is taken that the notice of closure of account was received by the Respondent through one Stanley U.K. on 28-11-2003 as contended by the appellant. There is however a glaring evidence also from the appellant that the said notice was handed to and received by the said Stanley U.K. two weeks after the Respondent's account was closed on 14-11-2003. Consequently the appellant is in breach of clause 7 of the agreement (Exhibit C) which provides for the giving of at least 7 days notice to the Respondent before his account can be closed. (p. 292 A)

Contract - Binding nature

5. Parties to a written contract are mutually bound by the terms contained in the agreement and the court has the duty to enforce the terms when called upon to do so, provided that the said terms are not illegal or contrary to public policy.

BANKING - Cheque - Libelous endorsement - Reliefs

6. It is also established that where in addition to the act of dishonoring a customer's cheque, a banker as in the instant case makes an endorsement on the cheque, which endorsement is libelous, the customer can in addition to a claim for damages for breach of contract claim in the same action for damages for libel.

From the authorities earlier cited, it is not in doubt that a party can make a claim for damages for breach of contract and libel in the same action. The Respondent towed this line of action by claiming damages for breach of contract in the sum of N10 Million and another N10 Million as damages for libel.

(pp. 297 F/298 D)

Contract - Breach - Damages

7. It is the law that in an action for breach of contract hinged on a dishonored cheque, except in the case of a person in trade, the claimant shall be entitled to the award of nominal damages unless he pleads and proves specifically any damage suffered. (p. 298 E)

CONTRACTS - Breach - Libel - Damages - Award

8. Though, it would have been more elegant to separate the amount awarded for the two claims of damages for breach of contract and libel given the fact that they were separate claims in the writ of summons. I do not however see any miscarriage of justice, confusion for fundamental vice emanating therefrom. The learned trial judge made it clear that the said sum was for nominal damages for the breach of contract and for damages for libel. (p. 299 B)

DAMAGES - General damages - Award

9. The award of general damages is a matter which is entirely at the discretion of the trial court and the appellate court will not interfere with such award unless:-

(a) The trial court acted under mistake of law

(b) The trial court has acted in disregard of principles

(c) The trial court has acted under misapprehension of facts

(d) The trial court has taken into account irrelevant matters or failed to take into account relevant matters.

(e) Where the amount awarded is either ridiculously low or ridiculously high.

(f) Where injustice will result.

The Respondent's claim in the lower court was N10 Million each as damages for breach contract and for libel. The learned trial judge after a review of the circumstances of the case found that the Respondent is entitled for nominal damages for breach of contract having not proved any specific loss or injury and also damages for libel. I have considered the sum awarded vis-à-vis the guidelines earlier stated and I do find justification to interfere with it on the basis that it is on the high side given the fact that damages for breach of contract was only nominal. I am also inclined to separate the damages awarded for the two claims as follows:-

(1) N500,000 damages for breach of contract

(2) N1 Million damages for libel (p. 299 D)

COSTS - Award - Principles

10. On the issue of the sum of N200,000 awarded as costs by the lower court. It is trite that cost follow event which means that a successful party is entitled to costs unless there is any disenabling circumstance to deprive him of that entitlement. And costs are not to be awarded as punitive measure against the losing party but for the purpose of meeting the legitimate expenses of the successful party either wholly or partially as the court may see fit.

It is also worthy of note that costs are not imposed as a punishment on the party who pays them, neither are they awarded as bonus on the benefiting party. The party entitled should only be indemnified for his out of pocket expenses and be compensated for the true and fair expenses for the litigation.

(p. 300 B/G)

COURTS - Discretion - Cost - Award

11. It is also of note that the award of cost is always at the discretion of the court which discretion must be exercised both judiciously and judicially in which case the appellate court
 B **will be quite wary to interfere with such exercise of discretion by the trial court as to the amount of costs.**

In the instant case I see the award of N200,000 cost as more of a bonus to the benefiting party as no reason or justification
 C **was given for the award of the said sum which to my mind is extremely high and calls for the interference of this court. Accordingly the sum of N200,000 awarded as cost by the lower court is hereby reduced to N50,000. (p. 300 C/H)**

D *DEFAMATION - Defence - Qualified privilege*

12. Qualified privilege is occasioned when the person who makes the writing has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both conditions must exist in order that
 E **the occasion may be privileged. (p. 301 H)**

BANKING - Defamation - Qualified privilege - Defence

13. In the instant case having found that due notice was not
 F **given to the Respondent before the closure of his account by the appellant, and that the consequent endorsement on the cheque with words "Account closed" was in breach of clause 7 of (Exhibit) C) the agreement between the two parties; it follows that the publication of the words in the said cheque to**
 G **Dr. T. A. Balogun and the staff of the United Bank for Africa Plc. which constitute libel cannot justify a defence of qualified Privilege as raised by the appellant. It would have been otherwise if the act of dishonoring the cheque with the aforesaid endorsement were justified by a proper notice being given to**
 H **the Respondent.**

Herein, from available evidence, given by both parties, there were funds in the account of the respondent at the time the cheque was presented and he was yet to be notified about the intended closure of his account. To my mind therefore, the

endorsement is defamatory as the imputation therein was to the discredit of the Respondent which cannot be justified with the defence of qualified privilege.

The issue is accordingly resolved against the appellant.
(p. 302 A)

B

CASES REFERRED TO

- UBN Ltd. v. Fajebe Foods Ltd. (1998) 6 NWLR (pt. 554) 380
Balogun v. N.B.N. Ltd. (1978) 11 NSCC 135
Afribank Nig. Plc. v. A. I. Invest. Ltd. (2012) 1 BFLR 39 C
Buko v. Nigerian Pool Co. (1968) NMLR 195
Ali v. Hassan (2004) FWLR (pt. 194) 494
Isiyaku v. Zwingina (2001) FWLR (pt. 72) 2096
ABC Plc v. Haston Nig. Ltd. (1997) 8 NWLR (pt. 515) 110
Emeagwara v. Guardian Newspaper Ltd (1998) 1 NWLR (pt. 535) D
610
Ekpeyong v. Nyong (1975) 2 SC 1
Adefulu v. Okulaja (1990) 9 NWLR (pt. 475) 668
Ladoke v. Olubayo (1992) 8 NWLR (pt. 261) 605
Onyekwulunne v. Ndulue (1997) 7 NWLR (pt. 512) 250 E
Pavex v. Afribank (2000) 7 NWLR (pt. 663) 105
Awojugbagbe Light Ind. Ltd. v. Chinukwe (1993) 1 NWLR (pt. 270)
485
Okoya v. Santili (1990) 2 NWLR (pt. 131) 172 F

STATUTE & RULES REFERRED TO

- NIPOST Act Cap. N127 LFN 2004, s. 64(3)
High Court of Lagos State (Civil Procedure) Rules 2004, O. 49 r. 12

G

REPRESENTATION

- Folabi Kuti with T. Orekunrin (Miss), for the Appellant
O. Giwa-Osagie with D. Ezika and O. Oyesanya, for the Respondent

LEAD JUDGMENT BY OSEJI JCA

H

This appeal is against the judgment of the High Court of Lagos State delivered by Hon. Justice F. A. Atilade on the 16th day of February 2007 in suit No.LD/1847/2004.

The appellant herein was the defendant in the trial court while

the Respondent was the claimant who by a writ of summons and statement of claim dated 20-10-2004 claimed against the defendant (now appellant as follows:-

“(a) Damages for breach of contract in the sum of N10 million.

(b) Damages for libel in the sum of N10 million as the defendants published defamation vide the cheque dated 14th November, 2003 on which the word “account closed” was written.

(c) A full apology from the defendant to the claimant.

(d) Interest on the judgment sum at the rate of 10% per annum till final payment thereof”.

The appellant (as defendant) responded by filing a statement of defence dated 31-3-2005 but was subsequently amended pursuant to an order of the trial court granted on 6-11-2006. The said amended statement of defence is also dated 6-11-2006.

Briefly put, the Respondents case in the trial court was that he operated a current account with the appellant and on 14-11-2003 while the account was still in credit he issued a cheque in the sum of N30,000 in favour of one DR. T. A. Bashorun. The said cheque was subsequently presented for payment by DR. T.A. Bashorun to his bank UBA Plc for payment but it was dishonoured with the words “ACCOUNT CLOSED” endorsed on it.

The Respondent contended that the said endorsement is not only a breach of contract but also libelous having been published to DR. T. A. Bashorun and the staff of UBA Plc when in fact he was not given notice of any such closure of his account with the Appellant.

The appellant on the other hand was of the stance that the endorsement on the cheque was premised on the fact that the Respondent’s account with it had earlier been closed and notice of the said closure given to the Respondent via a letter sent through a Registered post.

At the trial of the case which commenced on 2-5-2006 the Respondent (as claimant) testified and called one other witness, four exhibits were also tendered in evidence as Exhibit (A - D).

The appellant in its defence called three witnesses as DW1 - DW3 and tendered in evidence Exhibits (E - K).

At the conclusion of hearing, written addresses were ordered, filed and exchanged and parties duly adopted same on the 18-12-2006. In a judgment delivered on 16-2-2007 the learned trial judge

in finding in favour of the claimant (now Respondent) held as follows:-

“It is in the light of the foregoing that I hereby enter judgment for the claimant against the defendant for damages in the sum of N2 million comprising both nominal damages and damages in respect of the defendants liability for the libelous statement against the claim- B ant.

It is further ordered that the defendant pay to the claimant the sum of N200,000 as costs of litigating this suit and N2000 costs of the Defendants Application dated the 18th October 2006 respectively”. C

Being aggrieved with the said judgment, the appellant filed a Notice of Appeal dated 27-2-2007. It contains five grounds of appeal which shorn of their particulars reads thus:-

GROUND 1

The learned trial judge misdirected herself in law when she D held at page 6 of the judgment as follows:

“It is in this light that the court is left with no other logical conclusion but to reason from the evidence before it and hold that there was indeed a failure on the defendant’s part to notify the claimant before effecting the closure of his account” E

GROUND 2

The Learned Trial Judge erred in law awarding as damages the sum of N2,000,000.00 (Two Million Naira) being nominal damages in contract and damages in respect of the defendant’s libelous statement without taking into consideration the time-honoured principles F underlying the award of damages in contract and libel.

GROUND 3

The Learned Trial Judge erred in law when she awarded the sum of N200,000.00 (Two Hundred Thousand Naira) to the claim- G ant being the cost of litigating the suit when same was not claimed by the claimant.

GROUND 4

The Learned Trial Judge erred in law when she held at page 8 H of the judgment as follows:

“The defendant has also raised the defence of qualified privilege. Unfortunately, it is my position that this will not qualify as an instance where a defence of qualified privilege would avail the libelous party” without due regard to established principles.

GROUND 5

The judgment is against the weight of evidence.

Subsequently, pursuant to the Rules of this court, briefs of argument were filed and served by the parties.

The appellants brief of argument settled by Folabi Kuti Esq. was dated 8-8-2011 and filed on 9-5-2011 but deemed properly filed on 30-5-2013.

The Respondents brief dated and filed on 30-9-2011 but deemed properly filed on 30/5/2013 was settled by Folashade Bankole-Oki (ms). At the hearing of the appeal on the 21st day of November 2013 parties duly adopted and relied on their respective briefs of argument.

In the appellant's brief, three issues were formulated for determination as follows:-

1. Whether having regard to the circumstance of this case, the lower court was sufficiently guided by the fundamental principles governing the award of damages in contract and libel?

2. Whether having regard to the circumstance of this case, the lower court was right to have awarded costs in this case?

3. Whether the lower court was right to have found that the appellant could not avail itself of the defence of "qualified privilege" in the claim for libel?

I find substantial similarity in the issues raised in the parties' brief of argument but for purposes of the appeal, I will adopt the three issues formulated by the appellant.

ISSUE ONE

Dwelling on the issue, learned counsel for the appellant referred to the portion of the judgment of the trial court to contend that the learned trial judge erred in construing the notice required to be given to the Respondent before the closure of his account to be actual notice and not constructive notice pursuant to clause 8 of the "Account Opening Form".

He submitted that parties are bound by agreement freely entered into or a contract which they duly subscribe to and no party will be permitted to go outside it for remedy rely on UBN LTD VS FAJEBE FOODS LTD (1998) 6 NWLR (PT 554) 380 and OSUN STATE GOVERNMENT Vs DALAMI (NIG) LTD (2007) 9 NWLR (PT.1038) 66 at 86.

Learned counsel added that the signature of the Respondent on the contract paper signified his full agreement with its content and is deemed to have consented to every clause in the document including clause 8 and which document was tendered and admitted in evidence as Exhibit C.

Learned counsel further contended that the Respondent did not in his pleadings deny categorically that he did not receive notice of closure of his account in accordance with relevant terms of the contract and as such the appellant's averment on the issue should be regarded as uncontroverted and deemed admitted by the respondent. B
C

He also submitted that the appellant's pleadings and evidence at the trial are the same to support the fact that the defendant issued and caused to be dispatched by registered post, a notice dated 23-9-2003 and dispatched on the 15-10-2003 informing the Respondent of its intention to effect a closure of his account. D

On the position of the law with regard to Registered post learned counsel referred to Section 64(3) of the NIPOST ACT CAP N127 Laws of the Federation of Nigeria 2004 to contend that it makes room for constructive notice which is a sufficient substitute for actual notice. Further reference was made to the evidence of DW1 to DW2 at the trial to the effect that the Notice of Closure of the Respondents account was issued and dispatched to the NIPOST on the 15-10-2003 and it was collected by one Stanley U.K. Learned counsel then submitted that in view of the Respondents contractual agreement to accept delivery by Registered post, the burden of proof was discharged by the appellant when it proved that the letter was delivered through NIPOST and thus complied with its contractual obligation to notify the Respondent ahead of the closure of his account. E
F
G

Responding on this issue, learned counsel for the Respondent submitted strongly that there is indeed no dispute as to whether or not there was a binding contract between the parties, which fact the Respondent agreed to in his pleadings and evidence wherein he admitted that he signed the requisite "account opening form" (Exhibit c). He added that learned counsel for the appellant needlessly went into a long legal discourse on the bindingness of a contract between parties when the simple issue in contention is the breach of contract. H

Learned counsel further submitted that the Respondents stance

is that the appellant failed to give required notice in compliance with clause 7 of the “Account Opening Form” (Exhibit C) before the closure of his account and such failure occasioned a breach of contract and the provisions of clause 8 therein cannot provide a cover to the appellant having pleaded, relied on and tendered the acknowledgment slip in evidence and added to that is the fact that one Stanley U. K. signed for and collected the registered letter on behalf of the Respondent which fact the latter denied as he does not know any Stanley U. K. Besides, he added, even if the appellant issued the notice as per clause 8 of the agreement, there was uncontroverted evidence that the said notice was delivered two weeks after the account was closed which means that the Respondent was not given notice as required by clause 7 of the agreement. On the appellant’s contention that the Respondent did not plead non receipt of the Notice of closure, learned counsel referred to paragraph 14 of the amended statement of claim to submit that the import of the averment therein is that the Respondent never received any notice.

On the issue of constructive notice as argued by the appellant, learned counsel submitted that it cannot absolve the appellant of the requirement to show that the Respondent was given notice of closure of his account and as such it cannot rely on section 64(3) of the NIPOST ACT. Moreso that the appellant lead evidence to show that one Stanley U.K. received the letter on 28-11-2003 and DW1 and DW3 admitted under cross-examination that the date of dispatch to the Respondent and the date of receipt was 28-11-2003, two clear weeks after the closure of the said account.

From my perusal of the record of appeal as well as the parties’ brief of argument with particular reference to the issue under consideration, the following facts are not in dispute.

(a) That the Respondent entered into a contract with the appellant by virtue of the “Account opening form” (Exhibit C) which the appellant gave to the Respondent and he duly signed it upon opening an account with the appellant.

(b) That clause 7 of the said Exhibit C provided that the Bank may at any time with at least 7 days notice to the Respondent, close his account whether it be in debt or in credit.

(c) That clause 8 provided that any notice or letter addressed to the appellant and sent through post shall be considered as deliv-

ered to and received by the appellant at the time it would be delivered in the ordinary cause of post.

(d) That the Respondents account was in credit at the time the cheque issued to DR. T. A. Bashorun by the Respondent was dishonoured by the appellant.

(e) That the cheque issued by the Respondent was endorsed "Account closed" by the appellant when it was presented to it for clearance/payment.

Consequently, the core issue in contention is whether the Respondent was given the requisite notice as per clause 7 of Exhibit C before his account was closed by the appellant.

In this regard, I cannot but agree with the submission of learned counsel for the Respondent that it was absolutely unnecessary for the appellant's counsel to have delved into an exhaustive but fruitless discourse on the bindingness of contract between the parties given the fact that none of the parties contested or challenged the existence of a contractual relationship between them.

Now back to the issue in dispute. For the appellant, it was argued that due notice was given to the Respondent by a letter dated 23-9-2003 and dispatched on 15-10-2003 by registered post which letter was claimed in the post office by one Stanley U.K. on the authority of the Respondent, while the account was formally closed on 24-11-2003.

The Respondent on the other hand contends that he did not receive any notice from the appellant before his account was closed on the 14-11-2003 and he did not authorize and in fact has nobody called Stanley U.K. and the act of the appellant in endorsing "ACCOUNT CLOSED" on the cheque in question is a breach of contract and also libelous.

It is trite from a long list of authorities that the relationship between a bank and its customer is that of principal and agent. Consequently, where a cheque is drawn on the banker by the customer, it represents the order of the principal to the agent to pay out of the principal money in its custody, the amount stated on the cheque to the payee endorsed on the cheque.

It follows therefore that a cause of action will accrue where the bank refuses to pay a customer's cheque when in

fact he has to his credit at least an amount equivalent to that endorsed on the cheque he has issued on his account with the bank. Such act by the bank in dishonouring the cheque or refusal to pay constitutes a breach of contract for which the banker is liable in damages. See BALOGUN VS N.B.N. LTD (1978)

B 11 NSCC 135 or (2012) 1 BFLR 193; AFRIBANK (NIG) PLC vs A. I. INVESTMENT LTD (2012) 1 BFLR 39; F.B.N. Plc v NAGARFI vs A.C.B. Plc (2002) 12 NWLR (PT 782) 623.

C It will be germane at this stage to look at the relevant clauses in the “account opening form” which formed the basis of the dispute between the parties on whether or not notice of closure of account was given to the Respondent. Clause 7 and 8 calls for consideration and they read:-

D *Clause 7: “That the bank may at any time with at least 7 days notice to me close my account whether it be in debt or in credit”.*

Clause 8: “Any notice or letter addressed to me and sent through post at the address supplied by me shall be considered as delivered to and received by me at the time it would be delivered in the ordinary course of post.”

E The above reproduced clauses in the agreement (Exhibits C) are quite clear and unambiguous in my own assessment and have no need for any other meaning being read into them. See NIICA FISHING CO. LTD vs LAVINA CORPORATTON (2008) 6-7 SC (PT.11) 200.

F Clause 7 confers on the appellant the right to close the Respondent’s account whether it is in debit or credit provided the appellant gives the Respondent at least seven days notice before such closure.

G Clause 8 which is more of a general provision provides for any notice or letter addressed to the respondent by the appellant and sent through the post to any address supplied by the Respondent shall be considered as delivered to and received by him at the time it would be delivered in the ordinary course of post.

H This to my mind means that, any notice or letter sent through the post to the Respondent shall be deemed to have been delivered to him, in the case of ordinary postage upon being handed to him but where he has a mail box, upon it being delivered therein. But where the means is by registered post, then upon such letter being

signed for and collected from the postal officials in whose custody such letter or notice remains until it is so collected after identification. This is given the fact that such registered letter or items cannot be taken to have been delivered to, or received by the addressee until it is retrieved or collected from the custody of the postal officials who according to DW3 have such unclaimed letters or items destroyed after a given period in the absence of a recipient. In the circumstance an addressee of a letter or notice cannot be taken to have received such letter or notice sent by Registered post unless and until he signs for and collects it from the officials of the post office. This is in contrast to an unregistered letter which is directly delivered to his Private Mail bag or a private letter box.

Learned counsel for the appellant had relied heavily on the provisions of Section 64 (3) of the Nigerian Postal Service Act CAP N127 Laws of the Federation of Nigeria 2004 to contend that it creates a situation of constructive notice on the Respondent, in which case he is deemed to have had notice of the closure of his account on the 15-10-2003 when it was dispatched by registered post to him.

I however agree with the learned counsel for the Respondent, that the said provision is not applicable to this case, moreso that it made reference to the delivery of a postal article at the house or office, private mail bag or private letter box of the addressee or to the addressee, servant or agent. Going by the pleadings and evidence of the appellant, what was delivered to the private letter box of the Respondent was a slip informing him that he has a parcel in the custody of the post office. In this regard it is my strong view that it cannot be justified to say that there was delivery of a postal article to his private letter box as contemplated by the provisions of Section 64(3) of the NIPOST Act 2004. Thus by virtue of clause 8 of (Exhibit C) 'Account Opening form', the respondent can only be deemed to have received any notice or letter through registered post upon the signing or collection from the post office after presentation of his collection slip.

Now the Respondent both in his pleadings and evidence in the lower court strongly denied being given or receiving any letter notifying him of the intention to close his account with the appellant. The

appellant on the other hand contended that due notice was given to the Respondent through a letter dated 22-9-2003 but dispatched by registered post to him on 15-10-2003. It also adduced oral and documentary evidence to show that the said registered letter was signed for and collected on behalf of the Respondent by one Mr. Stanley U.K. on the 28-11-2003.

In paragraph 8 of its amended statement of claim, it was averred as follows:-

8. In their natural and ordinary meaning the said words are true in substance and fact.

(a) By virtue of a written agreement dated 16th September, 1999 the defendant had the power to unilaterally close the claimant's account.

(b) Pursuant to paragraph (a) above by a letter dated 22nd September 2003 the defendant issued and caused to be dispatched on 15th October 2003 by registered post to the claimant a notice of closure which was received by one Stanley U.K.

(d) On 14th November 2003 a month after the notice was sent; the claimant's account was closed.

DW2 in her deposition on oath stated in paragraphs 7 and 8 as follows:-

7. (7) *"That registered letter No Lgs/1164/359 addressed to Martins Ikediashi of Box 5088 Ikoyi was registered in G.P.O. Marina and dispatched to Ikoyi post office for delivery on 10th October 2003. A slip deposited in the post office box.*

(8) *The addressee sent an authority through Mr. Stanley No 10B Ayodogba avenue, Park view Estate Ikoyi on 28-11-2003 to collect the Registered letter."*

Under cross-examination DW3 also testified thus:-

"This Exhibit K is an acknowledgment that NIPOST sent the letter to the claimant but not that the claimant received it. The date on the receipt is 28-11-03. That is the date of dispatch to the claimant".

Added to that is the evidence of DW1 who also during cross-examination answered that:-

"I do not know when Exhibit E (notice of closure of account) was dispatched from the bank. I do not know if it was received by one Stanley U.K. I do not know anything about Exhibit F except that

it is proof of delivery. The date written on it as date Stanley received it is 28-11-2003. Account was closed on 14-11-2003”.

From the above reproduced evidence from the appellant’s witnesses, it is glaring that the notice of closure of account sent to the Respondent was not delivered to his assumed agent/servant until the 28-11-2003. It is also clear and undisputed that the Respondent’s account with the appellant was closed by the latter on 14-11-2003, that is two clear weeks before the Respondent would be deemed to have received the notice of the closure. B

At this point, I deem it expedient to reproduce the portion of the judgment of the lower court on the issue, particularly at page 113 of the record. It reads:- C

“The claimant has indeed been unequivocal to the effect that he never received any notice from the Defendant informing him of the said account closure. Thus, it is in my view of little relevance that the Claimant did not file a Reply and thus dispensed with the opportunity to specifically address the issues raised by the Defendant per Paragraphs 8 and 16 of its Defence.

The Defendant had by their processes and in the course of the testimonies of DW1 & 2, tendered evidence to the effect that they had issued and dispatched the requisite notice on time and that it had in fact been received on the Claimant’s behalf by one Stanley U.K. E

However, due cognizance must be had to the fact that while the Claimant’s account was closed on the 14th November 2003, the purported Notice of Account Closure was according to Exhibit “J” (the Acknowledgment Slip), received on the claimant’s behalf by Stanley U.K. on the 28th November 2003, a clear period of two (2) weeks after the Defendant had effected the account closure in exercise of its discretion pursuant to the provisions of Paragraph 7 of Exhibit “C” [the Account Opening Form.]. F G

It is also pertinent to observe here that in the course of cross-examination, the Claimant as PW1, had averred that he had never heard of any Stanley U.K. and could not have authorized this fictitious paragon to collect any documents on his behalf. H

Unfortunately, no evidence was led to establish a contrary position. Facts uncontroverted and/or un-refuted by evidence must be deemed admitted.

It is in this light that the court is left with no other logical conclusion but to reason from the evidence before it and hold that there was indeed a failure on the Defendant's part to notify the claimant before effecting the closure of his account."

I am indeed inclined to agree with the findings of the lower court. Though the Respondent denied ever receiving any notice of closure either personally or through Stanley U.K. whom he has never met. But the appellant adduced documentary evidence to show that the letter notifying the Respondent about the plan to close his account was collected from the post office by one Stanley U.K. on the 28-11-2003. It is also the evidence of the appellant that the respondent's account was closed on 14-11-2003. It follows therefore that even if it is taken that the notice of closure of account was received by the Respondent through one Stanley U.K. on 28-11-2003 as contended by the appellant. There is however a glaring evidence also from the appellant that the said notice was handed to and received by the said Stanley U.K. two weeks after the Respondent's account was closed on 14-11-2003. Consequently the appellant is in breach of clause 7 of the agreement (Exhibit C) which provides for the giving of at least 7 days notice to the Respondent before his account can be closed.

Parties to a written contract are mutually bound by the terms contained in the agreement and the court has the duty to enforce the terms when called upon to do so, provided that the said terms are not illegal or contrary to public policy. See BUKO vs NIGERIAN POOL COMPANY (1968) NMLR 195; ALI vs HASSAN (2004) FWLR (PT.194) 494 and MARYAM ISYAKU VS ZWINGINA (2001) FWLR (PT.72) 2096. On the whole, issue one is resolved against the appellant.

ISSUE TWO

Dwelling on this issue, learned counsel for the appellant submitted that the measure of damages for breach of contract to which the Respondent will be entitled to, is as laid down in the case of HADLEY VS BAXENDALE (1854) 156 ER 145 and restated by the Supreme Court in UNIVERSAL VULCANIZING (NIG) LTD VS IUTTC (1992) 9 NWLR (PT.266) 588 at 12.

Learned counsel added that, in view of the finding of the lower

court that the Respondent did not prove any actual loss sustained as a result of the alleged breach of contract he shall only be entitled to general or nominal damages, but the same lower court went ahead to grant the Respondent damages in the lump sum of N2 million comprising both nominal damages for the breach of contract and damages for libel. B

This according to learned counsel has been frowned at by this court in the case of ABC PLC VS. HASTON (NIG) LTD (1997) 8 NWLR (PT.515) 110 at 136 - 137. Therefore, he added, the lower court erred in law by awarding the sum of N2 million comprising both nominal damages for breach of contract and damages for libel C and this ought to be set aside or varied by this court.

Specifically on the issue of damages for libel, learned counsel submitted that, given the facts and circumstances of this case, the learned trial judge wrongly exercised her discretion when she awarded D the sum of N2 Million in favour of the Respondent which amount is manifestly too high.

He cited the case of EMEAGWARA VS. GUARDIAN NEWS-PAPER LTD (1998) 1 NWLR (PT.535) 610 at 629 to list the factors to be considered in the assessment of damages for libel as follows:- E

(1) The conduct of the defendant before the action.
(2) The conduct of the defendant after the institution of the action.

(3) The conduct of the defendant in court during the trial. F

(4) The nature of the libel

(5) Mode and extent of the publication.

(6) Absence of retraction or apology.

(7) Other matters of the same kind.

Learned counsel argued further that given the holding of the G learned trial judge that the Respondent failed to established any special reputation or that he is a person in trade, the sum awarded to him as damages was unfounded.

On the award of the sum of N200,000 as costs, learned counsel submitted that a court must not grant a relief not claimed or sought H by a party. He cited the following authorities: EKPEYONG VS. NYONG (1975) 2 SC 1; ADEFULU vs. OKULAJA (1990) 9 NWLR (PT.475) 668; LADOKE vs. OLUBAYO (1992) 8 NWLR (PT.261) 605 and ONYEKWULUNNE VS. NDULUE (1997) 7 NWLR (PT 512)

Learned counsel added inter alia, that a claimant intending to recover the costs of his action will specifically include it in his writ of summons because the court is not a Father Christmas or a social welfare institution and does not go about awarding reliefs to parties even they are not claimed against the adverse party. He added that since the Respondent did not include a prayer as to the cost in his writ of summons, the learned trial judge erred in law by granting a relief not claimed. He cited the following authorities:- PAVEX VS. AFRIBANK (2000) 7 NWLR (PT.663) 105 at 130; AWOJUGBAGBE LIGHT IND. LTD. vs. CHINUKWE (1993) 1 NWLR (PT.270) 485 and OKOYA VS. SANTILI (1990) 2 NWLR (PT.131) 172 at 226.

In the alternative, learned counsel submitted that the amount awarded by the lower court was manifestly too high given the circumstances of the case, that the Respondent did not call any expert witness or incur much expense and the appellant was not guilty of undue delay or omission during the trial in which case Order 49 Rule 12 of the High Court of Lagos State (Civil Procedure) Rules 2004 does not apply.

Replying on this issue in the Respondent's issue three, learned counsel for the Respondent submitted that damages are purely at the discretion of the trial judge and the appellant courts will not interfere with such award unless it is satisfied that the judge applied a wrong principle of law or that the amount awarded is either ridiculously low or high that it must have been wholly erroneous estimate of damage. He cited the case of UWA PRINTERS (NIG) LTD VS. INVESTMENT TRUST CO. LTD (988) 12 S.C. (PT.11) 31.

Learned Counsel further referred to UNION BANK OF NIGERIA PLC VS. PASTOR OKORO (2002) FWLR (PT.122) 24 where it was held that:-

"The amount of N15,000.00 (Fifteen thousand naira) awarded for a dishonored cheque was too low and thereupon increased the amount to N30,000 (Thirty thousand naira) which is double the amount awarded by the lower court."

On damages for libel, learned counsel submitted that the court is not bound by any established legal rules in the award of damages but rather deprives on the peculiar circumstances of each case and the court will consider among other things the totality of the conduct

of the defendant, which includes any apologetic or remorseful desire to make amends and possibly to settle out of court, or a retraction or apology: see COMPLETE COMMUNICATIONS LTD VS. BIANCA ONOH (1998) 5 NWLR (PT.549) 197.

Learned counsel also referred to the conduct of the appellant both before the action and up to the Judgment where it did not show any remorse or desire to settle out of court but merely offered the Respondent N500,000 as settlement while maintaining that it did no wrong.

On the nature of the libel and made and extent of publication, learned counsel submitted that the words "Account closed" as endorsed on the cheque were published not only to the respondent's witness but also to the officials of the UBA PLC and the PW2 did in fact testify as to how infuriated he was when the cheque was returned to him and this made him to give the respondent a piece of his mind.

This according to the learned counsel justifies the award of the sum of N2 million for damages for breach of contract and damages for libel.

On the issue of cost, learned counsel submitted that the award of cost is entirely discretionary and a court can suo motu award same. The case of MOBIL PRODUCING UNLTD VS. MONAKPO (NO 2) (2001) FWLR (PT.78) 1210 was referred to.

Justifying the award of N200,000 cost by the lower court against the appellant, learned counsel referred to Order 49 Rule 10 and Rule 6 of the Lagos State High Court (Civil Procedure) Rules 2004 to submit that the quantum of cost awarded by the court was within his discretionary powers, more so that costs follow events and the appellate court does not normally interfere with such exercise of discretion except where it is shown that such discretion was not exercised judicially or judiciously. He cited in support the case of OYEDEJI VS. AKINYELE (2001) 29 WRN 95 and CCB (NIG) PC VS. OKPALA (1997) 8 NWLR (PT 518) 633.

The relationship between a bank and its customer is that of principal and agent, consequently, a cheque drawn on the banker by the customer constitutes the order of the principal to the agent to pay out of the principal's money in the custody of the agent. It is also viewed under the law as that of a debtor

and a creditor. This is because when a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum. On the other hand when a bank debits the account of its customer with a certain sum the customer becomes a debtor to the bank the
 B **tune of the sum debited.** See YESUFU VS. A.C.B LTD (1981) 1 SC 74; BALOGUN VS. NATIONAL BANK OF NIGERIA (1978) 3 S.C 155 (2012) 1 BFLR 194 and UBA VS. UNION BANK OF NIGERIA PLC (1995) 7 NWLR (PT.405) 72.

C **A bank is under obligation to honour a cheque issued by its customer if such customer has enough funds in his account to satisfy the amount payable on the cheque. Failure or refusal by the bank to honour the cheque amounts to a breach of contract and would render the bank liable in damages.** See
 D UBA VS. UNION BANK OF NIGERIA PLC. Supra; DIKE VS. AFRICAN CONTINENTAL BANK LTD (2000) 5 NWLR (PT 657) 441. In BALOGUN VS. NATIONAL BANK OF NIGERIA LTD (2012) 1 BFLR 194 at 203, the Supreme Court per Idigbe JSC (of blessed memory) gave a wholesome reasoning and conclusion as follows:

E *“The role or predominating business of banker is the business of banking which consists in the main in the receipt of monies on current or deposit accounts and the payment of cheques drawn by as well as the collection of cheques paid in by a customer -see Also*
 F *ATKIN LJ, in JOACHIMSON VS. SWISS BANK CORPORATION (1921) 3 KB 110 at 127. Therefore, the receipt of journey from or on account of his customer by a banker constitutes the latter the debtor of the farmer (Forley Vs. Hill) 2 HL case 28; and the banker undertakes to pay any part of the money this due from it to the*
 G *customer against the written orders of the customer (Joachimson Vs. Swiss Bank Corporation (supra). Accordingly, the relation so constituted is that of principal and agent and therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay out of the principals money in his hands, the amount*
 H *stated on the cheque to the payee endorsed on the cheque. Therefore, it has long been established that refusal by a banker to pay a customer cheque when he holds in hand an amount, equivalent to that endorsed on the cheque, belonging to the customer amounts to a breach of contract for which the banker is liable in damages.”*

In the instant case there is no dispute or controversy on the fact that as at the time the Respondent issued a cheque for the sum N30,000 to DR. T. A. Bashorun, his account with the appellant was in credit. Unfortunately the said cheque was dishonoured with the endorsement. "Account closed" by the appellant who acted on the premise that the account was closed on the 14/11/2003. The said DR. T. A. Bashorun testified as PW2 and in paragraph 5, 6 and 9 of his deposition he stated thus:-

"5. That I was infuriated that the said Mr. Ikediashi issued me a cheque on an account which had been closed thus sending me on a wild goose chase.

6. That I stormed into his house to express my anger and displeasure and demand that he makes good the payment due to me.

9. That when I left him in his house he was feeling agitated and apologetic on the matter."

Under cross examination PW2 added as follows:-

"I was infuriated. I did a job, was given a cheque only to be told that the account was closed. It was written on the cheque. I went to see him and gave him a piece of my mind."

The law is that where a banker dishonours a customer's cheque without justification, it is liable to the customer in damages for injury to his reputation. See BALOGUN VS. NATIONAL BANK OF NIGERIA LTD Supra and UMOETUK VS. UNION BANK OF NIGERIA PLC (2002) 3 NWLR (PT 755) 647 and UNION BANK OF NIGERIA VS. CHIMAEZE (2007) ALL FWLR (PT.364) 303.

It is also established that where in addition to the act of dishonoring a customer's cheque, a banker as in the instant case makes an endorsement on the cheque, which endorsement is libelous, the customer can in addition to a claim for damages for breach of contract claim in the same action for damages for libel. See DAVIDSON VS. BARCLAYS BANK LTD (1940) 1 ALL E.R. 316 and BALOGUN VS. NATIONAL BANK OF NIGERIA LTD Supra. The Supreme Court at page 206 held that:-

"It is well known that a customer whose cheque is wrongfully dishonoured can always bring claims for defamation and breach of contract together in one single action.

And when, of course, in addition to an act of dishonor of a cheque, the banker, as in the case of hand, makes a libelous en-

dorsement thereon, the customer may in addition to a claim of damages for breach of contract bring also in the same action a claim for damages for libel. Sometimes in such cases the two claims have been dealt with without any marked differentiation; one of such instances occurred in ALLEN VS. COUNTY & WESTMINSTER BANK (1915) 31 TLR 210."

The Respondent in his writ of summons claimed as follows:-

- (a) Damages for breach of contract in the sum of N10 million
- (b) Damages for libel in the sum of N10 million as per the defendant's published defamation vide the cheque dated 14th November 2003 on which the word "account closed" was written.
- (c) A full apology from the defendant to the claimant.
- (d) Interest on the judgment sum at the rate of 10% per annum until final payment thereof.

The contention of the appellant's counsel is that it was wrong for the lower court to award the claimant damages in the lump sum of N2 Million comprising both nominal damages for the breach of contract and damages for libel.

From the authorities earlier cited, it is not in doubt that a party can make a claim for damages for breach of contract and libel in the same action. The Respondent towed this line of action by claiming damages for breach of contract in the sum of N10 Million and another N10 Million as damages for libel. It is the law that in an action for breach of contract hinged on a dishonored cheque, except in the case of a person in trade, the claimant shall be entitled to the award of nominal damages unless he pleads and proves specifically any damage suffered. See U.B.A. VS. FOLARIN (2003) 7 NWLR (PT.818) 18; GIBBONS VS. WESTMINSTER BANK LTD (1939) 2 K.B. 882 and BALOGUN VS. NBN LTD supra. In the instant case, the learned trial judge in her judgment at page 124 of the Record, having found that the Respondent as claimant could not prove the fact that he is a person in trade or that he suffered any specific loss held that he shall only be entitled to general or nominal damages for the appellant's breach of contract.

The learned trial judge having also found that the endorsement on the cheque issued by the respondent was defamatory concluded as follows at page 125 of the record:-

“It is in the light of the foregoing that I hereby enter judgment for the claimant against the defendant for damages in the sum of N2 million comprising of both nominal damages and damages in respect of the defendant’s liability for it’s libelous statement against the claimant.”

Though, it would have been more elegant to separate the amount awarded for the two claims of damages for breach of contract and libel given the fact that they were separate claims in the writ of summons. I do not however see any miscarriage of justice, confusion for fundamental vice emanating therefrom. The learned trial judge made it clear that the said sum was for nominal damages for the breach of contract and for damages for libel.

Learned counsel for the appellant had also contended that the amount of N2 Million awarded as damages was too high.

The award of general damages is a matter which is entirely at the discretion of the trial court and the appellate court will not interfere with such award unless:-

- (a) The trial court acted under mistake of law***
- (b) The trial court has acted in disregard of principles***
- (c) The trial court has acted under misapprehension of facts***
- (d) The trial court has taken into account irrelevant matters or failed to take into account relevant matters.***
- (e) Where the amount awarded is either ridiculously low or ridiculously high.***

(f) Where injustice will result. See:- UBN LTD vs. ODUSOTE (1995) 1 NWLR (Pt.421) 558; NWOBODO Vs. ACB LTD (1998) 6 NWLR (PT.464) 658; UMOETUK VS. UNION BANK PLC (2001) 9 FWLR (PT.81) 1849; WILLIAMS Vs. DAILY TIMES (1990) 1 NWLR (PT.124).

The Respondent’s claim in the lower court was N10 Million each as damages for breach contract and for libel. The learned trial judge after a review of the circumstances of the case found that the Respondent is entitled for nominal damages for breach of contract having not proved any specific loss or injury and also damages for libel. I have considered the sum awarded vis-à-vis the guidelines earlier stated and I

do find justification to interfere with it on the basis that it is on the high side given the fact that damages for breach of contract was only nominal. I am also inclined to separate the damages awarded for the two claims as follows:-

(1) N500,000 damages for breach of contract

B (2) N1 Million damages for libel

On the issue of the sum of N200,000 awarded as costs by the lower court. It is trite that cost follow event which means that a successful party is entitled to costs unless there is any

C And costs are not to be awarded as punitive measure against the losing party but for the purpose of meeting the legitimate expenses of the successful party either wholly or partially as the court may see fit. It is also of note that the award of cost is
D always at the discretion of the court which discretion must be exercised both judiciously and judicially in which case the appellate court will be quite wary to interfere with such exercise of discretion by the trial court as to the amount of costs.

See LAYINKA VS. MAKINDE (2002) 10 NWLR (PT. 775) 358;

E AGIDIGBI vs. AGIDIGBI (1996) 6 NWLR (Pt.454) 300 ACB.

In the instant case, the learned trial judge in awarding costs did not state the basis on which she arrived as the sum of N200,000 as the appropriate sum to be awarded in the circumstance. She merely stated at page 116 of the Record that:-

F “It is further ordered that the defendant pay to the claimant the sum of N200,000 as costs of litigating this suit and N2000 as costs of the defendants Application dated the 18th October, 2006 respectively.”

G It is also worthy of note that costs are not imposed as a punishment on the party who pays them, neither are they awarded as bonus on the benefiting party. The party entitled should only be indemnified for his out of pocket expenses and be compensated for the true and fair expenses for the litigation.

H See BUHARI VS. OBASANJO (2005) ALL FWLR (PT.258) 1604 and KUKOYI VS. ODUFALE (1965) 1 ALL NLR 300.

In the instant case I see the award of N200,000 cost as more of a bonus to the benefiting party as no reason or justification was given for the award of the said sum which to my

mind is extremely high and calls for the interference of this court. Accordingly the sum of N200,000 awarded as cost by the lower court is hereby reduced to N50,000.

Issue two is therefore partly resolved in favour of the appellant.

ISSUE THREE

Herein, learned counsel for the appellant analyzed the position of the law on the defence of qualified privilege and relating it to this case he contended that the appellant adequately and unequivocally pleaded to defence of qualified privilege in paragraph 9 of its amended statement of defence but the Respondent failed to challenge the said defence of qualified privilege by refusing to file a reply to the defence. He cited the case of UGO VS. OKAFOR (1996) 3 NWLR (PT.438) 542 at 556.

He also referred to the evidence of DW1 during the trial to argue that even if the words "Account closed" Was libelous, the were made on an occasion of qualified privilege where the appellant owed a duty under the banking practice to endorse those words on the cheque before returning it to the United Bank for Africa Plc who had a corresponding duty to receive it and then urged this court to hold that the lower court was correct in holding that the defence of qualified privilege does avail the appellant.

Replying on this issue in her issue four, learned counsel for the Respondent submitted that the appellant cannot avail itself of the defence of qualified privilege because the libelous words were uttered recklessly without considering it to be true or false and authorities abound that held that banks cannot hide under the cloak of qualified privilege when they have wrongfully dishonoured a cheque.

On the alleged failure by the Respondent to file a reply to the defence, learned counsel submitted that where a plaintiff does not wish to raise any fresh facts not already contained in the pleadings filed, he need not file a reply to the defence and such failure does not amount to an admission.

Qualified privilege is occasioned when the person who makes the writing has a moral duty to make it to the person to whom he does make it and the person who receives it has an interest in hearing it. Both conditions must exist in order that the occasion may be privileged. See OJEME VS. MOMODU

(1994) 1 NWLR (PT 323) 685 and ILOABUCHI VS ILOABUCHI (2005) 13 NWLR (PT.943) 695.

In the instant case having found that due notice was not given to the Respondent before the closure of his account by the appellant, and that the consequent endorsement on the cheque with words "Account closed" was in breach of clause 7 of (Exhibit) C) the agreement between the two parties; it follows that the publication of the words in the said cheque to Dr. T. A. Balogun and the staff of the United Bank for Africa Plc. which constitute libel cannot justify a defence of qualified Privilege as raised by the appellant. It would have been otherwise if the act of dishonoring the cheque with the aforesaid endorsement were justified by a proper notice being given to the Respondent.

Herein, from available evidence, given by both parties, there were funds in the account of the respondent at the time the cheque was presented and he was yet to be notified about the intended closure of his account. To my mind therefore, the endorsement is defamatory as the imputation therein was to the discredit of the Respondent which cannot be justified with the defence of qualified privilege.

The issue is accordingly resolved against the appellant.

On the whole, I hold that this appeal succeeds in part as pertains the amount awarded as damages and costs. The judgment of the lower court is hereby affirmed except as it relates to the award of damages in the sum of N2 Million and costs of N200,000 which is hereby set aside.

I award damages in the sum of N500,000 for breach of contract and N1 Million as damages for libel. Cost in favour of the claimant at the Lower Court is fixed at N50,000.

Parties to bear their costs in this appeal.

AUGIE JCA

I have read the lead Judgment just delivered by my learned brother, Oseji, JCA, and I agree with his reasoning and conclusion, He dealt extensively with all the issues canvassed in the appeal, and has covered the field, so I will only say that where a banker refuses to

pay a customer's cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer, such an act of refusal amounts to a breach of contract - see *Afribank v. Aminu Ishola Investment Ltd.* (2002) 7 NWLR (Pt.765) 40 and *Access Bank v. M.F.C.C.S.* (2005) 3 NWLR (Pt. 913) 460, where the Court held -

"The measure of damages in an action against a banker for breach of contract to honour the cheque that has been drawn by a customer against his account would depend on the status or station in life of the customer. If the customer is not a trader and is unable to prove the actual damage he has sustained as a result of the wrongful refusal by the banker to pay the cheque all he is entitled to by way of an award is nominal damages if the Plaintiff is able to prove that by reason of the said breach he has suffered considerable damage to his reputation and to his business, the Plaintiff will be entitled to special damages".

In this case, the lower Court found that the Respondent could not prove that he is a person in trade or that he suffered any specific loss, which is why it held that he should only be entitled to nominal damages for the breach of contract. It is its prerogative to make findings of facts, and we will not meddle with that, however, I do agree with my learned brother that the sum awarded as nominal damages is a little bit too high, and we will need to intervene by reducing it.

In the circumstances, I also hold that the appeal succeeds in part, and I abide by the consequential orders in the lead Judgment including that on costs.

PEMU JCA

I had the advantage of reading in draft, the lead Judgment just delivered by my brother SAMUEL CHUKWUDUMEBI OSEJI JCA.

My brother has eruditely dealt with the issues raised in this appeal. I have nothing more to add but these few words.

In awarding costs, it is pertinent that the Court states the basis upon which the award of costs is predicated. This was not done. The Appellate Court has the power to set aside the award of costs, and indeed pursuant to Section 16 of the Court of Appeal Act, decidedly the Court of Appeal is empowered to make an order which the Court

below could have made - NCC v. MTN (NIG) COMMUNICATION LTD (2008) 7 NWLR (PT.1086) 229 - 270 PARAGRAPHS A - C.

The appeal succeeds in part as enunciated in the lead Judgment. I abide by the consequential order made as to costs.

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