

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT No. 0402 OF 2022**

5    **ABRAHAM YOHANNES** .....    **PLAINTIFF**

**VERSUS**

**ABSA BANK** .....    **DEFENDANT**

10   **Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

      a. The plaintiffs' claim;

      The plaintiff is a customer of the defendant Bank and queried debits of US \$ 245,000 and US \$  
15    22,500 made on his bank account No. 6005103183 on the 11<sup>th</sup> March 2022. At the hearing of the  
      suit, the defendant agreed to reverse those debits and to pay interest at the rate of 6% per annum  
      on those sums from the debit date to the reimbursement date. The defendant further conceded the  
      plaintiff's claim of special damages of US \$ 210 being the cost of an air ticket as claimed in  
      paragraph 26 (ii) of the plaint, general damages in the sum of shs. 10,000,000/= and the costs of  
20    the suit.

      The Plaint includes claims for special damages listed in paragraphs 26 (v) to (xxxiii) of the plaint  
      comprising hotel, meals and motor vehicle hire expenses for a period of 5 (five) months and 1  
      (one) week between the 23<sup>rd</sup> March, 2022 and the 31<sup>st</sup> August, 2022. At the hearing of the suit, the  
25    plaintiff conceded that the part of those claims relating to the period after the 30<sup>th</sup> May, 2022 when  
      the suit was filed, comprised in items 26 (xxx) to 26 (xxxiii) of the plaint, are costs and will as  
      such be assessed at taxation pursuant to the costs order.

      The parties are however at variance as to the status of the claims for hotel, meals and motor vehicle  
30    hire expenses for the period prior to the filing of the suit that is from the 23<sup>rd</sup> March, 2022 to 30<sup>th</sup>  
      May, 2022 being part of items 26 (v) (food and drinks) and 26 (vi) (car hire), the whole of items  
      26 (vii) to (xxix), and part of item 26 (xxx) (hotel expenses). While the plaintiff contends that these

items are special damages which should be assessed as to recoverability and quantum at trial by the trial Judge, the defendant contends that these items are costs of the suit which will be assessed as to recoverability and quantum at taxation by the Registrar. Similarly, the parties are at variance as to the status of the claims for legal fees of US \$ 2,000 the plaintiff paid to M/s Mugimba and Co. Advocates and US \$ 2,000 paid to M/s Mushabe Advocates referred to in paragraph 26 (iii) and (iv) of the plaint. While the plaintiff contends that these legal fees are special damages, the defendant contends that these legal fees are clearly costs.

It is on that basis that the Court directed the parties to file an agreement of facts and issues pursuant to Order 35 rule 1 of *The Civil Procedure Rules* in order for the Court to resolve the only question that remains in controversy.

b. The issue to be decided;

From the submissions of both parties, the following emerge as the issues for determination by court, namely;

1. Whether the plaintiff's claims for hotel, meals and motor vehicle hire expenses for the period prior to the filing of the suit but related to the preparation of the claim (between the 23<sup>rd</sup> March, 2022 and the 30<sup>th</sup> May 2022 and set out in paragraphs 26 (v) to 26 (xxviii) and part of 26 (xxx) of the Plaint are special damages or costs.
2. Whether the Plaintiff's claims for legal fees being US \$ 2,000 paid to M/s Mugimba & Co. Advocates and US \$ 2,000 paid to M/s Mushabe Advocates are special damages or costs.

c. The submissions of counsel for the plaintiff;

M/s Mushabe Advocates, counsel for the plaintiffs, submitted that The Laws of England volume II at page 218 defines Special Damages as compensation for special damage which is not presumed by law to be the natural and probable or direct consequence of the act or omission complained of but which does in fact result in the circumstances of the particular case and of the injured party's claim to be compensated. Black's Law Dictionary 6<sup>th</sup> Ed, at page 392 paragraph I1, defines Special Damages as "those which are actual, but not the necessary, result of the injury complained of, and

which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.....such are damages which do not arise from wrongful act itself, but depend on circumstances peculiar to the infliction of each respective injury.” In *Uganda Commercial Bank v. Deo Kigozi* [2002] 1 EA 293 it held that special damages  
5 relate to past pecuniary loss calculated at the date of trial. To be recoverable, they must flow directly and immediately from the breach of contract, and must be reasonably foreseeable. Special damages must be specially pleaded and proved. The expenses sought to be recovered were all incurred before the institution of the suit. Strict proof does not mean that proof must always be documentary evidence.

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The defendant insisted that since there were criminal investigations vide CPS GEF 02212022 at Criminal Investigations Directorate (CID) Headquarters at Kibuli, he had to wait until the investigations were concluded, and could only recover his money after the bank recovered the money from the fraudsters. The bank insisted that his co-operation with the police was a  
15 prerequisite condition precedent to recovering his money. The police too, required him to keep around to co-operate with the investigators. These conditions required the plaintiff to stay in Uganda until when he could recover his money. The plaintiff returned to Uganda from South Sudan on 23<sup>rd</sup> March, 2022 with a view to just get his refund and return to his businesses in South Sudan without recourse to courts of law, but all in vein. The negotiations were characterised by many  
20 physical meetings and various correspondences.

It is on record that the plaintiff is a business man whose is domiciled is UK. He had to buy an air ticket to return to Uganda to address the negligence and/or fraud by the bank. From 23<sup>rd</sup> March, 2022 to 30<sup>th</sup> May, 2022, the bank evasively gave him a run-around. The plaintiff neither owns a  
25 home or a vehicle in Uganda which circumstances required him to secure accommodation and hire vehicles to travel between the defendant’s offices, CID Headquarters and his hotel. Considering the fact that a bank officer called the plaintiff on 18<sup>th</sup> March, 2022 while he was in South Sudan, the bank very well new that the plaintiff lives outside Uganda. To that extent, it was expected that the plaintiff would incur such expenses, and the same were reasonably foreseeable that he would  
30 live in a hotel, rent cars, have meals and retain lawyers. Had the Bank resolved the issue in a timely manner, the expense would have been unnecessary. However, these expenses were actual and a

result of the unlawful withdrawal of his money (the injury complained of). These expenditures, in fact, were as a natural and proximate consequence considering the fact that the bank had either defrauded him or negligently paid out his money to third parties.

5       d. The submissions of counsel for the defendant.

M/s MMAKS Advocates, counsel for the defendant, submitted that those expenses were incurred by the plaintiff in the course of pursuing this claim against the defendant and that is true of both the pre-suit expenses as well as for the post-suit expenses. The claims are identical all being hotel, meals and motor vehicle hire expenses and the basis of their computation in terms of their daily rates for meals, hotel and transport expenses are also the same. What is recoverable as costs may not be made the subject of a damages claim in proceedings against the same party, even if the legal expenses concerned otherwise might be thought to follow from that party's wrong. There is ample authority for saying that a successful plaintiff cannot obtain, in the guise of damages, any costs which are disallowed by the taxing master. In *Ross v. Caunters* [1979] 3 All ER 580, it was held that the taxing master had power to decide whether costs that had been incurred before the action was brought were necessary or proper for the attainment of justice and, if they were, to allow them and that if the costs are in respect of materials ultimately proving of use and service in the action, the master has a discretion to allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action. A similar holding may be found in *Societe Anonyme Pecheries Ostendaises v. Merchants' Marine Insurance Company* [1928] 1 KB 750,

The above authorities make the point that pre-suit expenses, incurred with regard to and in preparation for the intended suit are assessed as costs and not as damages and the position remains the same with respect to post-suit expenses. Costs and damages are mutually exclusive and if an item falls under costs incurred in preparation for an intended suit or in the course of a pending suit, then if that item is not allowable as costs either on the basis that it was not reasonably incurred or sufficiently proved, it cannot be sought to be recovered as special damages and matters that constitute costs are incapable of being as special damages. The impugned expenses were both incurred with regard to and in preparation for the intended suit and accordingly are only

recoverable as costs and not as special damages. In any event, these expenses are unreasonable in terms of duration as it is clearly unnecessary for a party to reside in a hotel for two months and one week merely to instruct Counsel a matter which can be done in a period not exceeding 3 working days. Further, in this era of modern communication including email, virtual meetings, telephone calls and the like it is untenable that a period of more than a couple of days is necessary for instructing of Counsel. The impugned expenses are costs and will be assessed at taxation and are not special damages to be assessed and proved at trial.

e. The decision:

Damages must either arise naturally from the breach or as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Special damages cover any loss incurred by the breach of contract because of exceptional occurrences or situations that are not ordinarily predictable. The defendant must have had knowledge of the actual circumstances likely to give rise to the particular and enhanced loss suffered by the plaintiff. If the defendant had knowledge of these special circumstances at the time of the contract, the defendant will by implication be presumed to have agreed to bear any special loss arising from a breach in those circumstances, unless it can demonstrate otherwise. To be recoverable in the form of damages for breach of contract, the loss caused by the breach must, at the time of contracting, either have been foreseen by the parties or have been foreseeable by a reasonable person. If the loss had not been foreseen in this way, then damages are unlikely to be awarded.

The plaintiff is a British Citizen domiciled in the United Kingdom, who at the time of the breach was conducting business in The Republic of South Sudan. What is claimed as special damages are expenses incurred largely because he has no personal residence and means of transport in Uganda. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of hindsight. The reasonable foreseeability inquiry is objective (that is, into what reasonably ought to have been foreseen), and it must be undertaken from the standpoint of a reasonable person.

Litigation costs are the fees and costs that are spent while pursuing or defending a legal claim or litigation. The term “costs” signifies the sum of money which the court orders one party to pay to another party in respect of the expense of litigation incurred by the latter. Litigation involves the process that occurs before, during, and after the actual lawsuit which are so closely bound up with the proceedings as to be regarded as part thereof. This could include negotiation stages, alternative dispute resolution, the discovery process, and potential appeals after a determination is made as to the pending issue(s). Costs of or incidental to proceedings can be recovered, regardless of whether they are incurred before, during, or after the actual suit. Where parties are engaged in pre-action processes aimed at achieving a compromise or narrow the issues in dispute, the reasonable pre-action costs will be recoverable by the successful party. It is long established that recoverable costs may be incurred before the relevant proceeding has begun (see *Re Gibson’s Settlement Trusts* [1981] Ch 179, 184-88). The need to negotiate interim solutions to difficulties thrown up by contemplated or pending claims is a common feature of civil litigation. Costs incurred in the reasonable attempt to find solutions to problems arising between the parties in connection with issues to be decided in contemplated or pending litigation clearly fall within the definition of costs of the litigation.

It has for many years been part of the courts’ analysis of the question whether pre-litigation costs are costs of the proceedings to ask whether those costs related to the creation of materials “ultimately proving of use and service in the action” or as being costs the incurring of which was “proper for the attainment of justice” in the case (see *Frankenburg v. Famous Lasky Film, Service Ltd* [1931] 1 Ch 428 at 436 and *Re Gibson’s Settlement Trusts* [1981] 1 Ch 179 at 185-187). This is the basis upon which the costs of reacting to the threat to commit a breach and the attempts to dissuade the commission of the breach are considered “incidental to” proceedings, seeking relief in respect of the breach after the event (see *Gee, Re The Estate of* [2022] EWHC 1590 (Ch). The inclusion in the costs order of phrases like “costs of and occasioned by” or “costs of and incidental to” are significant. An order for costs of the suit only does not usually provide the same expansive scope for the wider recovery of costs. It would seem to follow that the costs of negotiations (before and after issue), which are normally recovered although not of use and service in the litigation itself, are recovered as costs incidental to the proceedings. A court’s order for “the costs of” court

proceedings, by virtue of section 27 (1) of *The Civil Procedure Act* extends in any case to costs “incidental to” litigation without any requirement for specific wording to that effect.

Pre-litigation costs are in principle incidental to the proceedings and, depending on the circumstances, may be justifiably claimed in a party and party bill of cost. Rule 13 of *The Advocates (Remuneration and Taxation of Costs) Rules* provides, *inter alia*, that the Taxing Officer shall, on every taxation, allow all such costs, charges and expenses as appear to have been incurred necessarily and proper for the attainment of justice. Provided the costs appear to have been properly incurred, even though not necessary, the Taxing Officer may allow such costs in a party and party bill. Having regard to the wording of Rule 13, it is therefore permissible, in a proper case, for a litigant who has been awarded costs to include in his party and party bill, costs incurred before the issue of process where such costs appear to the Taxing Officer to have been necessarily or properly incurred. A Court will not issue directions to the Taxing Officer as to whether certain pre-process costs should be allowed as between party and party, as to do so would be to trespass upon the function of the Taxing Officer and fetter his or her discretion.

Costs which have been unreasonably incurred, or which are unreasonable in amount, will not be allowed by the court. The court will only order the other party to pay costs which are proportionate. When considering whether costs are proportionate, the court will assess whether they bear a reasonable relationship to factors such as the sums in issue, the value of any non-monetary relief, the complexity of the litigation and the conduct of the judgment debtor. Therefore while proximity and foreseeability is critical for an award of special damages, the proportionality and reasonableness of any costs incurred is crucial.

Delivered electronically this 11<sup>th</sup> day of April, 2023

.....Stephen Mubiru.....  
Stephen Mubiru  
Judge,  
11<sup>th</sup> April, 2023.