CM ADVOCATES LLP



A VALUER'S NEGLIGENCE:

The Gulf African Bank Ltd v Hanif Tours & Travel Agency Limited & 4 others Case

A scenario unfolds where a borrower seeks a loan from a financial institution, offering a property as security. To assess the adequacy of the security, the financial institution hires a valuer to appraise the property. However, the valuer, through negligence, inflates the property's value. When the borrower defaults, the financial institution, exercising its statutory power of sale, conducts a new valuation and finds that the property's actual worth is less than one-fifth (1/5th) of the initial appraisal. **What recourse does the financial institution have for the losses suffered as a result of the valuer's negligence?**

BACKGROUND

The Court was recently confronted with a dispute where the valuer negligently inflated the value of a charged property. The brief facts of the dispute were that by a letter of offer dated 16th December 2016, Gulf African Bank Limited (hereinafter the 'Bank') advanced a banking facility to Travel Agency Limited (the Borrower) to finance working capital. The facility's limit was USD 300,000/= and was secured by a first ranking legal charge in favour of the Bank for USD 300,000/- over the charged property.

The Bank engaged Milligan Valuers Limited to conduct a mortgage valuation. Through a valuation report dated 21st December 2016, the proposed security was valued at KES. 180,000,000/- being the current value and KES. 135,000,000/- being the forced sale value. The Bank availed the facility to the Borrower based on the Valuer's professional advice.

Unfortunately, However, the Borrower defaulted in making scheduled repayments and the Bank sought to exercise its rights under the registered charge. .Subsequently, the Bank instructed NW Realite Valuers Ltd (NW Realite) to conduct a fresh valuation of the charged property in preparation for exercising its statutory power of sale. NW Realite prepared and submitted a report dated 11th December 2017 returning a market value of KES. 33,000,000/- and a forced sale value of KES. 24,700,000/-. Upon comparison between this report and the initial report, it was deduced that the director of Milligan Valuers Limited had deliberately and negligently exaggerated the value of the charged property in contravention of Section 24 of the Valuers Act and in breach of the contract between the contract and the Valuer. It later emerged that, based on the georeferenced position (GPS), Milligan Valuers Limited & its director had valued a different property and not the charged property. This was a fundamental failure that exposed the Bank to significant financial risk and loss.

THE BANK'S CLAIM AGAINST MILLIGAN VALUERS LIMITED AND ITS DIRECTOR

Noting the significant loss that resulted from the Valuer's negligence, the Bank sued Milligan Valuers and its Director for professional negligence.The particulars of negligence were among others, failing to exercise due care, skill, diligence or competence in identifying, inspecting and preparing the valuation report as would be expected of a prudent valuer and preparing a misleading valuation report for a different property.

The evidence on record confirmed that the Valuer's director, relied on the owner and a third person, an Assistant Chief within the area in question, to guide him to the property's location. The director confirmed during cross-examination that he did not confirm the location of the property independently as is required of a professional valuer in spite of him having access to the Registry Index Map (RIM)

THE COURT'S FINDING ON THE PROFESSIONAL NEGLIGENCE OF MILLIGAN VALUERS LIMITED AND ITS DIRECTOR.

Based on the evidence adduced in Court, the Court found that the director of Milligan Valuers Limited, was a professional valuer and that he had a duty of care to the Bank to give a professional opinion on the value of the charged property. The valuation report would then be relied on to give the Borrower a loan facility. The Court found that he breached that duty of care by failing to independently verify the correct location of the charged property. The Court further found that there is a link between the breach of duty and the loss suffered by the Bank because of the negligence.

Milligan Valuers Limited submitted that it is a corporate entity and is therefore not capable of negligence. However, under the doctrine of vicarious liability, a corporate entity may be found responsible for the negligent acts and omissions of its agents. The Court held that Milligan Valuers Limited was vicariously liable for the Director's professional negligence.

THE BROADER IMPACT: A CAUTIONARY TALE FOR LENDERS AND VALUERS AND HOW TO MITIGATE AGAINST SUCH RISKS.

This case serves as a cautionary tale for both Lenders and Valuers on losses that may emanate from professional negligence in valuing both movable and immovable properties. It underscores the importance of financial institutions instituting robust internal policies on property

valuations, including engaging multiple valuers for high-risk loans, periodic audits of valuation reports and implementing risk mitigation frameworks to detect anomalies in valuation processes.

Furthermore, it highlights the importance of Banks and Lenders ensuring that valuers have adequate professional indemnities cover have in place the appropriate anti bribery and anti- corruption policies. Regulatory bodies such as the Valuers Registration Board must also strengthen oversight mechanisms to ensure compliance with professional standards and take stern action against errant professionals.

This case sets a precedent on professional accountability, reinforcing the responsibility of valuers to maintain high ethical and professional standards.

CONCLUSION: THE HIGH COSTS OF PROFESSIONAL NEGLIGENCE

The Courts have held that to err may be human, but for a professional to err as a result of not applying professional skills and tools is negligence in any language. This case is a powerful reminder that professional negligence has far-reaching consequences, not only for the valuer but also for financial institutions, borrowers and the broader economy.

Financial institutions must conduct thorough due diligence when selecting valuers and establish safeguards to mitigate valuation risks. Similarly, professionals in the valuation industry must uphold the highest ethical and professional standards to maintain the integrity of the industry and avoid legal repercussions.

Ultimately, this case reinforces the principle that professional integrity is non-negotiable and any deviation from established standards exposes professionals and their firms to legal liability.

HOW WE CAN HELP

At **CM Advocates LLP**, we provide expert guidance to Banks and Lenders (including Digital Credit Providers and Non-Deposit Taking Credit Providers) seeking to enforce their rights in relation to security documents as well as in debt recovery, restructuring and insolvency matters. Our vibrant team of advocates is ready to assist you in formalizing contractual relationships to ensure that your interests are protected in case of breach and to prosecute any infringement in such transactions. We also understand the need to maintain high ethical standards and proper code of conduct for regulated professions. As noted in the article, improper conduct by an employee or director implicates the entire firm and can result in significant losses and penalties to the firm. Under the Regulated Professions Legal Advisory Practice Business Unit, members of regulated professions can access legal solutions ranging from corporate governance advisory services, to employment matters, tax advisory and contract support.
For any inquiries, please contact our Business Litigation Unit or **Ms. Purity Mwangi** at ***pmwangi@cmadvocates.com.***

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